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REPORTS OF CASES
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SUPREME COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXXII.

FROM JULY 17, 1879, TO FEBRUARY 19, 1880.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN,
WALLER R. STAPLES,

FRANCIS T. ANDERSON,
EDWARD C. BURKS.

Attorney General, JAMES G. FIELD.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Callaway's Ex'or v. Price's Adm'r & als.

July Term, 1879, Wytheville.

Absent, Moncure, P., and Burks, J.*

In January, 1868, L, as principal, and P, as his surety, executed to C a bond for \$925, payable in twelve months. P died before the bond became due, and L qualified as his administrator. In December, 1860, C sued L upon the bond; and at the earnest solicitation of L, C accepted from him three negotiable notes, satisfactorily endorsed, payable in three, six and nine months, for the amount of the bond; and in January, 1861, dismissed his suit. \$150 was paid on the first note, and it was twice renewed; the second was also renewed. No more was paid on them, and both principal and sureties on the notes had become insolvent before 1866, when C sued upon them. He then filed a bill to subject the estate of P to the payment of the bonds.—HELD:

2. ***1. Principal and Surety—Taking Notes—Release of Surety.**—If upon accepting the notes the agreement was to give time upon the payment of the debt, then the surety in the bond was released, and the estate of P is not liable to pay the debt.
2. **Same—Same—Same.**—Though there was no agreement to give time upon the debt, the legal effect of accepting the notes was to suspend the right of action on the bond during the period allowed for the payment of the notes; and that operated as a release of the surety in the bond.
3. **Same—Same—Same.**—Whilst the mere taking a negotiable security, payable at a future day, does not, unless so agreed, operate as a payment of an antecedent debt, it does operate to suspend the right of action on the original demand until the maturity of the bill or note. It is a conditional satisfaction with respect to the principal; and with respect to the surety it is absolute, unless it plainly appears the parties intended otherwise.

*Judge Moncure was not present during this term of the court at Wytheville. He was in bad health, and was directed to rest. He sat in the court at Staunton. Judge Burks had been counsel in the cause.

†**Sureties.**—A surety is discharged by any change, such as taking a new note, etc., in a contract for which he is bound, if made without his knowledge or consent. *Christian & Gunn v. Keen*, 80 Va. 369. See also *Burson v. Andes & Wife*, 83 Va. 448; *Stuart v. Lancaster*, 84 Va. 772; *Dey v. Martin*, 78 Va. 1; 3 Min. Inst. (2nd Ed.) 187. See also 24 Am. & Eng. Enc. Law (1st Ed.) 840.

The doctrine set out in the second headnote was affirmed in *Stuart v. Lancaster*, 84 Va. 772, citing this case.

4. **Same—Same—Agreement to Stay Action—Burden of Proof.**—If the parties agree that the right of action on the original debt shall not be stayed, the surety will not be released. But in the absence of such agreement, the effect of taking the notes or bill in the case of a pre-existing debt, is a suspension, and a consequent discharge of the surety. It is not for the surety to prove an agreement to stay the action, but for the creditor to show that by agreement the negotiable security does not entitle the debtor to forbearance.

5. **Administrators—Conflicting Interests.**—C, by his dealings with L, had produced an irreconcilable conflict between the interests of L, as an individual, and his duty as administrator of P, and it is not for C to insist that L, as administrator of P, was not prevented by the arrangement from taking the necessary steps to protect the estate of his intestate, either by giving notice to C to sue upon the bond, or by paying the debt out of the assets of P's estate, and then give a lien on his own estate to indemnify P's estate.

6. **Same—Devastavit where Creditor Responsible.**—If L had applied the assets of P's estate to the payment of his own debt, he would have been guilty of a gross breach of trust, a *devastavit* on the part of L, for which C would have been responsible. C cannot relieve himself of the effects of an improvident arrangement with his debtor by insisting that a personal representative ought to have misapplied the assets in his hands.

3. ***7. Same—Same.**—If L, as administrator of P, might have consented to the arrangement made between himself and C, it would be necessary to show that he actively concurred and consented, as administrator, to be bound by the new arrangement.

8. **Same—Breach of Duty—Collusion—Liability.**—Any one who consents with an executor or administrator, in any manner contrary to the duty of the latter, will himself be held answerable. If, therefore, C obtained the consent of L, as administrator of P, to the arrangement, the effect of which is to throw the loss upon the estate of P, the surety, he can stand on no higher ground than L himself occupies; and he is precluded from claiming any benefit from that consent, to the injury of P's estate.

This case was heard in Richmond but was decided at Wytheville. It was a creditors bill in the circuit court of the county of Franklin, brought in August, 1868, by James M. Callaway and Thomas Dudley, claiming to be creditors of Marshall P. Price, deceased, the first by a bond executed to him in January, 1858, by James M. W. Leftwich and Marshall P. Price, for \$925, pay-

able in twelve months, and the other by a bond for \$3,000 executed in August, 1858, to Dudley, by said Leftwich and several other persons, among whom was said Marshall P. Price. The only questions in this cause was in relation to the bond executed to Callaway.

The heirs of Marshall P. Price answered the bill, and insisted that said Price was the surety in said bond; and that the estate of said Price had been released from any liability on said bond by the action of said Callaway. That said Callaway had received from said Leftwich his three negotiable notes, satisfactorily endorsed, for the amount of said bond, in satisfaction thereof. These notes were given payable in three, six and nine months; and if not given in satisfaction of the bond, the said Price's estate was released by Callaway's thus giving time to the principal debtor.

4 *It appears that Price had died before the bond fell due, and Leftwich qualified as his administrator. That at the urgent request of Leftwich, Callaway, who had brought a suit upon the bond against him, consented to dismiss the suit, and accept the three negotiable notes of Leftwich, with endorers, payable in three, six and nine months, for the amount of the bond. And this arrangement was carried out, the notes were delivered and the suit dismissed. The testimony is conflicting as to whether these notes were taken in satisfaction of the bond, or as a collateral security.

In the progress of the cause a commissioner was directed to take, among others, an account of the debts of Price, and he reported as one of the debts due this debt of Callaway's; and there was an exception to the report on this account. And the cause coming on to be heard on the 18th of October, 1873, this exception, as well as others, was sustained, and the accounts were recommitted to the commissioner.

After this decree had been made, Callaway died, and his administrator applied to a judge of this court for an appeal; which was allowed. The facts as viewed by this court will be seen in the opinion of Staples, J.

J. A. Early, for the appellant.

Ould & Carrington, for the appellees.

STAPLES, J. That Leftwich was principal in the bond to Callaway, and Price merely his surety, does not, I think, admit of serious question. Leftwich proves the fact, and he is not contradicted by any other witness. It is very true that upon cross-examination he says it is his impression that Price was surety merely; but I do not understand him as intending to qualify his previous positive statement to the same effect. Leftwich

5 of course well *knew how the fact was, and his admission, so manifestly against his interest, that he alone was principal, is entitled to great weight. Besides, his testimony is corroborated by all the circumstances. Leftwich's appeal to Callaway for indulgence, his proposal to give the negotiable notes, the whole tone and temper of his letter to Callaway, show that he considered the debt as his own, and the bur-

den of discharging it as resting exclusively upon him. Callaway no where in the record appears as denying the fact, although an opportunity of doing so was afforded him when his deposition was given, and although it was manifestly the turning point in the case. Under all these circumstances we are bound to conclude that Leftwich was principal and Price his surety.

The main question in the case to be considered is, whether Price's estate is released by the dealings between Callaway and Leftwich.

It appears that Callaway instituted an action on the bond against Leftwich in December, 1860, and in January, 1861, Callaway took from Leftwich, at the earnest solicitation of the latter, three negotiable notes with responsible endorers, for three hundred and forty dollars each, being the amount then due on the bond, and thereupon the action was dismissed. These notes were payable three, six and nine months after date. At the maturity of the first note the sum of \$150 was paid upon it; and this was all that was ever paid. The first and second notes were several times renewed. The renewed notes and the nine month's note remained in the hands of Callaway's counsel until the year 1866, when suit was brought upon them. The maker, Leftwich, and the endorers had in the meantime become wholly insolvent, and nothing was realized from that source.

There is some conflict in the testimony upon the point whether these notes were taken by Callaway in discharge of the debt, or simply as collateral security. Left-

6 wich *swears positively they were accepted in satisfaction: Callaway says they were taken merely as collateral security; and his counsel agrees with him. But as the information of the latter was derived wholly from the statements of his client, it is not entitled to the weight it otherwise would have.

The matter to be noted, however, is that Callaway states he did not agree to give time to Leftwich. He says that Leftwich proposed to give the notes as collateral security; that he declined to go into the arrangement until he could consult his counsel; and the latter advised him the arrangement would not in any manner impair the obligation of the bond; and upon this advice he received the notes as collateral security. Now Callaway may have believed, and his counsel may have thought, the taking the notes would not impair the obligation of the surety, or even operate as a suspension of a right of action on the bond. The question is not what they believed, but what was the legal effect of the arrangement, in the absence of an express agreement that the acceptance of the notes should not suspend a right of action on the bond.

The proposition with respect to the notes came from Leftwich. There is no doubt his sole object was a dismissal of the suit, and an extension of time; and Callaway knew it.

Leftwich in his letter to Callaway, says: "If you prosecute this suit you will cause others to sue, and it will terminate in sacri-

ficing my property. I say sacrifice, because no property, under existing circumstances, can be sold except at a sacrifice." Further on, after an earnest appeal for indulgence, he says: "If you will dismiss this suit, I will give you three negotiable notes at ninety days each—the first third you will get in ninety, the second third you will get in six months, the third and last in nine months, the discount and interest to be added."

7 Surely, after reading this letter no one can have any *difficulty as to Leftwich's understanding of the arrangement; and that Callaway understood it in the same way is most manifest from the fact that shortly afterwards the notes were given, the action upon the bond was dismissed, and no effort is ever made to collect it until all the parties to the negotiable notes, maker and endorsers, had become utterly insolvent. It is impossible to believe upon these facts, that both parties did not perfectly understand the debtor was to have further time. To adopt any other conclusion is to suppose that Leftwich not only gave the notes without an object, but that he was willing to subject himself to a recovery on the bond while his negotiable notes were or might be current in the hands of bona fide holders.

I attach no sort of importance to the fact that Callaway did not surrender the bond. It was no doubt filed among the papers when the suit was brought, and there remained after the suit was dismissed. Besides, Callaway's retention of the bond is perfectly consistent with the arrangement to give time, which was all Leftwich desired.

But if I am mistaken in supposing there was an express agreement for further time, there can be no doubt the legal effect of accepting the notes was to suspend the right of action on the bond during the period allowed for the payment of the notes. Whilst the mere taking a negotiable security, payable at a future day, does not, unless so agreed, operate as a payment of an antecedent debt, it does operate to suspend the right of action on the original demand until the maturity of the bill or note, unless it is made to appear it was received simply as collateral security.

It is a conditional satisfaction with respect to the principal; and with respect to the surety it is absolute, unless it plainly appears the parties intended otherwise. *Rees v. Berrington*, 2 Lead. Cases in Equity, 1915; *Putnam v. Lewis*, 8 John. R. 389; *Myers v. Wells*, 5 Hill's R. 463; *Brandt on Suretyship and Guaranty*, § 316.

8 The reason is said to be that the creditor, by negotiating *the bill or note, and passing it into the hands of a bona fide holder, may expose the debtor to the payment of both claims. In some of the cases it is held that taking the negotiable security creates a conclusive presumption of law of an agreement to suspend. In other cases, it is held, and with better reason, it is simply a question of intention. If the parties agree that the right of an action on the original debt shall not be stayed, the

surety will not be released. But in the absence of such agreement, the effect of taking the notes or bill, in the case of a pre-existing debt, is a suspension, and a consequent discharge of the surety. It is not for the surety to prove an agreement to stay the action; but for the creditor to show that by agreement the negotiable security does not entitle the debtor to forbearance. See *Armistead v. Ward*, 2 Patton & Heath, 816; *Blair & Hoge v. Wilson*, 28 Gratt. 165, 171, 173. In the case before us, it is not proved, there is nothing from which it may be inferred there was an agreement that Callaway might proceed on the bond notwithstanding the negotiable notes. On the contrary, all the circumstances indicate the understanding that further time was to be given.

The learned counsel for the appellant insists, however, that Leftwich, as the personal representative of Price, was not prevented by the arrangement from taking the necessary steps to protect the estate of his intestate. If, for example, he had given Callaway notice to sue, he (Leftwich) could not by plea, or by injunction, have stayed Callaway's hands. He might, if he pleased, have paid the debt out of the assets, and then given a lien on his own estate to indemnify his intestate's estate. It is a sufficient answer to say that Callaway, by his dealings with Leftwich, had created an irreconcilable conflict with Leftwich's interest as an individual and his duty as personal representative; and it does not lie in the mouth of Callaway to say that Leftwich might or ought to have given

9 *such notice. If we can suppose so improbable an event as a notice by Leftwich, the personal representative, to Callaway to bring such suit, we must suppose that Leftwich, as an individual, would claim the benefit of the agreement for indulgence.

The idea that Leftwich might have paid the debt out of the assets of Price's estate, and then given a lien on his own property as indemnity, is still more untenable.

If we may presume he had in his hands assets available for that purpose, upon what principle, or by what right, could Leftwich, as personal representative, direct these assets to the payment of his own debts to the injury of Price's creditors and distributees? Such an act would have been a gross breach of trust, a devastavit on the part of Leftwich, for which Callaway himself would have been responsible. The proposition cannot for a moment be entertained that Callaway may relieve himself of the effects of an improvident arrangement with his debtor by insisting that a personal representative ought to have misapplied the assets in his hands.

It has been further argued that an agreement to forbear will not release the surety, if made with his knowledge and consent; and in that case Leftwich, being at the time the personal representative of the surety, must as such have consented to the arrangement with Callaway.

It is very clear, however, that Leftwich was acting for himself only. He did not profess to represent the estate of Price in

anything that was said or done. And before that estate can be held bound it ought plainly to appear that Leftwich in his character of administrator consented to the arrangement. It is not enough that he was merely passive. It would be necessary to show that he actively concurred and consented as administrator to be bound by the new agreement. Brandt, § 299. But if it be conceded that such assent was given, it was a palpable breach of official duty.

The effect of the arrangement
10 was to deprive *the representative of Price's estate of the legal right to insist upon payment of the debt by the principal, or to pay the debt himself, and to proceed at once against the principal. It will scarcely be denied that if the personal representative of the surety agrees that the creditor may give time to the principal debtor, and in the meantime the principal becomes insolvent, and the estate of the surety is required to pay the debt, the personal representative will himself be held to answer out of his own estate. 2 Lomax Exo'rs, 295; mar. 471, 476, 485, top.

It is equally clear, I take it, that any one who consents with an executor or administrator in any manner contrary to the duty of the latter, will himself be held answerable. Graff v. Castleman, 5 Rand. 195, 203. If, therefore, the creditor enters into an arrangement with the personal representative of the surety, the effect of which is to throw the loss upon the estate of the surety, he can stand on no higher ground than the personal representative himself occupies. And in this case if it be conceded that Callaway obtained the consent of Leftwich as administrator to the arrangement, he is precluded from claiming any benefit from that consent to the injury of Price's estate.

The learned counsel tells us, however, the arrangement was an advantageous one for all parties, especially the surety, inasmuch as it furnished a new and additional security for the debt. It may have so appeared at the time, but the result has proved the very reverse. It is most apparent the indulgence extended to Leftwich is the cause of all the difficulty in the case. If Callaway, instead of yielding to his solicitations for delay, had proceeded with his suit, and obtained his judgment, he would have secured his lien, and ultimately realized his debt. His conduct with respect to the negotiable notes was equally unjust to Price's estate for after receiving them he left them in the hands of his counsel, without an effort to collect or even to secure his debt by judgment until all the parties had become insolvent.

11 *But if it was conceded the arrangement was an advantageous one to the estate of Price, the concession would not help the cause of the appellant. It is well settled law that if the time of payment be extended by an agreement binding on the creditor, the surety is discharged even though the extension of credit may prove to be a benefit to him. Because the question whether the alteration be beneficial or the reverse depends on circumstances that cannot always be judicially ascertained, and the surety

can no longer require the principal to fulfil the contract in its original form. Rees v. Bowington, 2 Lead. Cases in Equity, 1908; 10 John. R. 70; 7 Hill's R. 250.

For these reasons I think there is no error in the decree of the circuit court, and that it ought to be affirmed.

CHRISTIAN and ANDERSON J's, concurred in the opinion of Staples, J.

Judge Moncure was not present when the opinion was delivered, but he had read the opinion and concurred in it.

Decree Affirmed.

12 *Gates & Clark v. Lawson & als.

July Term, 1879, Wytheville.

Absent, Moncure, P.

Tax Titles.—By deed dated the 16th of February, 1864, T sold and conveyed to R a tract of land in Patrick county; but the deed was not recorded in that county, until 1874, though R paid the taxes on the land from 1866 inclusive. This land, standing on the land-books of the county in the name of T, was returned as delinquent for the tax of 1865; and in 1873 was sold as delinquent land and purchased by G, to whom the clerk afterwards conveyed it. In ejectment by G against R to recover the land—HOLD: Under the statute, Code of 1873, ch. 88, § 26, a purchaser at a sale of land delinquent for taxes only acquires such estate as was vested in the person assessed with the taxes at the commencement of the year for which the said taxes were assessed; and as T had in 1864 sold and conveyed the land to R, T had no estate in the land in January, 1866, and G took no title to the land under his purchase and the deed to him.

This was an action of ejectment, in the circuit court of Patrick county, brought by John W. Gates and Robert M. Clark against M. T. Lawson, the tenant in possession, to recover a tract of land of twelve hundred and eighty acres, which had been sold by the treasurer of the county in 1873, for the delinquent taxes of 1865, amounting to \$16.01, and purchased by the plaintiff. This land had been returned delinquent as the land of Robert A. Terry, who, on the 16th of February, 1864, had sold and conveyed it to Wyndham Robertson and Ben. K. Buchanan at the price of \$29,000; but the deed was not recorded in Patrick county until 1847. They had, however, regularly paid the taxes of 1866 and subsequently. They entered themselves as defendants in the cause.

13 *The case was submitted to the decision of the court, and a judgment was rendered in favor of the defendants; and the plaintiffs thereupon applied to a judge of this court for a writ of error and super-seedeas; which was allowed. The ground on which this court decided the case is stated in the opinion.

A. M. Lybrook, for the appellants.

C. F. Trigg, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Patrick county. The action was ejectment brought by the plaintiffs in error to recover a tract of land containing 1,280 acres purchased by them at a sale made by the treasurer of said county, for taxes assessed and unpaid upon said land.

On the trial a jury was waived and the matter of both law and fact were submitted to the court.

There was a judgment for the defendants. To this judgment a writ of error was awarded by one of the judges of this court.

The court is of opinion, that there is no error in the judgment of the circuit court.

The fact disclosed by the record so far as they are material to be noticed, in our view of the case, are as follows; Robert A. Terry on the 16th of February, 1864, and before that time, was the fee simple owner of the tract of land in controversy. His title to the land is nowhere questioned. On that day he conveyed the same by deed (through John Staples, his attorney in fact) to Wyndham Robertson and Benjamin K. Buchannan for the consideration expressed in said deed of twenty-nine thousand dollars.

14 *On the same day the deed was acknowledged before a notary public by Robert A. Terry, the grantor, and delivered to the grantees; but, for some reason (owing probably at first to the confusion of the times consequent upon the civil war, and military government which succeeded, and afterwards through forgetfulness and inadvertence) it was not recorded in the county of Patrick until the 16th July, 1874.

On the land-books for the year 1865, this tract of land stood charged to Robert A. Terry, and assessed at the value of \$5,132; the state tax upon which assessed value was \$10.26; which sum, together with the county levies of that year, made up the sum of \$16.01, the amount of unpaid taxes for which said land was returned delinquent.

Whether the land was afterwards transferred on the land books does not distinctly appear. But it does appear in the record that the taxes on said land, from the year 1866 to year 1874 inclusive, were paid by Wyndham Robertson, one of the defendants in error, or his agent.

The unpaid tax, therefore, for which the land was delinquent was that for the year 1865, when it stood charged on the land-books to Robert A. Terry, and amounted to the sum of \$16.01.

Proceedings were taken under the statute "concerning the sale of delinquent lands," and the land in controversy was sold at public auction by the treasurer of Patrick county. The plaintiffs in error, Gates and Clark, became the purchasers at the price of \$16.01, the amount for which said land was delinquent. A deed was made by the clerk of the county court conveying the land to the purchasers.

Exceptions are taken in the record, and relied upon in argument here, as to the irregularity of these proceedings. Upon these questions the court does not deem it necessary to express any opinion. Considering that

15 in this case the proceedings were all regular, and in strict conformity with the statute, yet the question we have to determine is, did the purchaser acquire such title by his purchase, and deed from the clerk, as would prevail against the title of the defendants. The solution of this question depends upon the true construction to be given to one of the statutes providing for "the sale of delinquent lands." The 26th section of ch. 38, of Code of 1873, is as follows: "Where the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor according to the six preceding sections, and within six months from the date of such deed, shall have caused the same to be recorded in the court of the county or corporation in which such real estate shall lie, such estate shall stand vested in the grantee, in such deed, as it was vested in the party assessed with the taxes (on account whereof the sale was made), at the commencement of the year for which the said taxes were assessed, notwithstanding any irregularity in the proceedings, under which the said grantee claims title, unless such irregularity appear on the face of the proceedings."

Now it is clear that under this section, Terry being "the party assessed with the taxes (on account whereof the sale was made) at the commencement of the year (to wit: the year 1865) for which the taxes were assessed," Gates and Clark took, under their purchase at the treasurer's sale, only such title as Terry had on the 1st day of January, 1865. On that day Terry had no title. He had parted with his title nearly twelve months before; for on the 16th day of February, 1864, he had, for a valuable consideration, conveyed the land to Robertson and Buchannan.

Upon familiar and well established common law principles, a plaintiff in ejectment can only recover on the strength of his own title. If he has no title, whatever may be the defect of the title of the defendant in possession, he must go out of court. In the case before us, the plaintiffs (standing in the

16 shoes of Terry) were without title, while the defendants had a perfect title. It is plain, therefore, that a judgment for the defendants was the proper judgment to be entered by the circuit court.

It is insisted, however, by the learned counsel for the appellants, that because the deed from Terry to Robertson and Buchanan was not recorded in the county of Patrick before the tax sale and purchase by the plaintiffs in error, they acquired no title as against the commonwealth; that the state had a lien upon the land for the taxes, and had a right to enforce that lien by a sale of the land and a conveyance of the same to the purchasers; and that the title thus conveyed would override a title, though perfect, if unrecorded in the county where the delinquent land lay.

Now it is at least questionable whether the registration acts apply to the state, in a case like the present; whether in the meaning of those acts the state, having a lien on land, can be regarded as a creditor, or purchaser for value. However this may be, and of this it is not necessary to express an opinion, it is

certain that the statute above referred to fixes the right of the parties, and declares what title a purchaser shall take in lands sold for delinquent taxes.

Whatever may be said about the policy and power of the state to preserve and enforce its lien for taxes against all claimants, and to give a good title against all alienees, the only question is, how has the state exercised this power? She has declared through her legislature, in plain and unmistakable terms, admitting of but one interpretation, that the only title which she guarantees to purchasers at sales made by her agents of lands delinquent for taxes is such title "as was vested in the party assessed with the taxes at the commencement of the year for which the said taxes were assessed." If such party at that time had no title, then the purchaser at the tax sale acquires none. If such statute be inefficient, it is for the legislature to amend it, and make it more efficient. This court

17 can only declare "what the law is, not what it ought to be. All we can say is, 'Ita est scripta lex.'"

The court is therefore of opinion that there is no error in the judgment of the circuit court of Patrick county, and that the same be affirmed.

Judgment affirmed.

18 *Calhoun v. Williams.

July Term, 1879. Wytheville.

[24 Am. Rep. 750.]

Absent, Moncure, P.

1. **Homestead Exemption—Householder.**—An unmarried man, who has no children or other persons dependent on him living with him, though he keeps house, and has persons hired by him living with him, is not a householder or head of a family, within the meaning of these terms as used in the constitution and laws of Virginia, and therefore is not entitled to the homestead exemption as provided by the same.
2. **Same—Same.**—The terms "householder" and "head of family," held to have the same meaning in the provisions of the constitution and statute relating to homesteads.

This was a suit in equity in the circuit court of Smythe county brought by Rufus M. Wil-

Householder.—The construction given in this case the term "householder" was approved in *Kennerly v. Swartz & Son*, 88 Va. 705. See also 2 Min. Inst. (4th Ed.) 909 et. seq.

But see *Wilkinson v. Merrill et al.*, 87 Va. 513, where it is stated in the second headnote that the leading case is overruled.

In *Stuart v. Stuart*, 18 W. Va. 683, the court quotes the definition of the word "family" given in the principal case, and held that the term had two distinct meanings, according to the connection in which it is used. First, the collective body of persons who live in one house, and second, those who descend from one common progenitor. When used in a will the term excludes the parents and is confined to children unless a testator's meaning is shown by the context to be different. See also 12 Am. and Eng. Ency. (2ed) 806.

liams against John C. Calhoun, to subject the land of Calhoun to satisfy a judgment for \$115, with interest from the 16th of November, 1874, and costs \$7.20, which had been rendered in said court on the 3d of October, 1875. The only defence set up by Calhoun, was that he had by a deed dated the 6th of March, 1875, set apart his land, valued by him at \$1,650, and certain personal property valued at \$30, as his homestead exemption; and the only question in the case was, as to his right to a homestead exemption. The facts seem to be as follows:

John C. Calhoun was unmarried. By deed dated the 17th of February, 1858, his father, Mark S. Calhoun, conveyed to him a tract of one hundred acres of land on the consideration of the support and maintenance of

19 said *Mark S. Calhoun and Elizabeth, his wife, during their natural lives; and further that he should pay to his sister Sarah Jane, \$125 on the 6th of April, 1861, and the like sum in April, 1862, and support her during her single life; and he seems to have purchased a small tract of ten acres on which his house was built. His father and mother removed to his house and lived with him until their death. The father had been dead about ten years, the mother died in March, 1876. John C. Calhoun lived in his own house, and kept house, but he had no person living with him, except persons employed by him to work on his farm.

The cause came on to be heard on the 3d of September, 1876, when the court held that Calhoun was not entitled to a homestead, and made a decree that the land should be rented out by a commissioner named, for the payment of the judgment and costs of this suit. And thereupon Calhoun applied to a judge of this court for an appeal; which was allowed.

A. G. Pendleton, for the appellant.

Gilmore & Penn, for the appellee.

ANDERSON, J. The homestead article of the constitution of Virginia has been judicially construed, both by the federal and state courts, to confer a personal privilege upon the "householder or head of a family;" and the question, and only question, in this case is, Is the appellant, who claims the benefit of this provision of the constitution, a householder or head of a family? This provision was not made for all persons who are residents of the state, but for a particular class of persons; otherwise it would not be limited to a "householder or head of a family." Who are embraced in that description? Worcester

gives two significations to the term

20 householder: "1st. The occupier of 'a house;' 2d. 'The master of a family.'"

In which of these senses is it used in the constitution? If in the second sense, it is nearly synonymous with the terms "head of a family." And if used in that sense, then the second phrase—"head of a family"—was intended as explanatory of it. This mode of expression is not unusual in writings. When the first phrase is considered not sufficiently explicit or definite, a second is used to give the meaning with greater definiteness and clearness. And this is peculiarly appropriate

when the design is to describe one particular class of persons, and not two distinct classes. If the language of the first description is not sufficiently precise or explicit, but may have two significations given to it, one of which is not descriptive of the class of persons intended, whilst the other is, the writer, in order to make his meaning certain, will use another term which shows in which sense he has employed the first phrase or term. And I think such was evidently the intention of the draughtsman of this clause of the constitution, and that the second description of the persons who were to be entitled to the privilege, was intended to be explanatory of the first, and not to constitute two classes of persons.

But if the term "householder" was intended to be descriptive of a different class from the "head of a family," it was intended to give the privilege to two distinct classes of persons; and if so, the copulative conjunction "and" would have been used, instead of the disjunctive "or," so as to read "every householder and every head of a family shall be entitled," &c.

But we need not confine ourselves to the definition given by the lexicographers. The term was evidently employed by the framers of the constitution in the sense in which it is commonly used. The term household literally means the inmates of the house—the family—those whom the house holds. The term is frequently used in the sacred scriptures, especially in the epistles of the New

21 Testament, *which, in the English version, is probably the best standard of the meaning of our language in common use. And the term household is so used in common parlance and in friendly correspondence by letter. What is more usual than to send messages of regard or affection by the writer to the household? Such messages are universally meant for the family—the inmates of the house. And if they constitute the household, who can be meant by the "householder" but the "head of the family?" But whilst we hold that by the "householder" is meant the head of a family, we do not mean to say that every head of a family must be, necessarily, a householder.

But the whole scope of the article shows that the privilege was intended not so much for the benefit of the person to whom it is given, as for the benefit of his family; to enable the person to whom it is given to use it to save his family from suffering and want. To this end, it was necessary that the head of the family should have the power to shield a portion of his property from levy and sale under execution or distress, or other process. In *Shipe, Cloud & Co. v. Repas & als.*, 28 Gratt. 716. 733, Judge Staples remarked "that no one can look into the provision of our constitution, and the adjudicated cases of other states, and fail to see that the primary object is to provide for the family. As was said by the supreme court of Ohio in *Sears v. Hanks*, 14 Ohio R. 498, 501, the humane policy of the homestead act seeks not the protection of the debtor, but its object is to protect his family from the inhumanity which would deprive its dependent members of a home."

That such was the intention of the framers of our constitution, to this end, to confer the privilege upon a person who had a family, and not upon the mere occupier of a house, I think is further shown by the 5th section of the article, which provides that the general assembly "shall prescribe in what manner,

22 and on what conditions, the *said householder or head of a family shall thereafter set apart and hold for himself and family," &c., "and may in its discretion determine in what manner and on what conditions he may thereafter hold for the benefit of himself and family." I think this language plainly shows that the householder intended was one who had a family.

Indeed, the whole theory and policy of the homestead is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children and other persons dependent on him, towards whom he stands almost in loco parentis, which is, if not paramount, equal to his obligation to pay his debts. Whether it is sound in morals or not, is not the question. It is evidently the ground upon which the homestead was made a constitutional provision, as I think the debates in the convention which framed it will show.

The family may consist of a wife and children, or of other persons, who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation, is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution, or other process, and who would be benefitted by its exemption.

The foregoing view I think is supported by a fair and liberal construction of the homestead article of the constitution, according to the intent of its framers, as gathered from its language and its general scope, and the object sought to be attained. And it is in harmony with the adjudications on the subject. In *Bowen v. Witt*, 19 Wend. R. 475, the court said "the statute declares that the following property when owned by any 23 person being a householder *shall be exempt from execution." &c., and in determining what was meant by the word "householder" in that statute, said it "means the head, master, or person who has the charge of, and provides for a family."

The terms "householder," and master, or chief of a family, are used interchangeably, as meaning the same thing. In *Thompson on Homestead*, § 66, it is said "If a person possesses the character of a householder—that is, if he is the master or chief of a family, he does not lose it by his temporarily ceasing to keep house."

The constitution of Georgia, adopted in 1868, guarantees a homestead to each "head of a family," or guardian, or trustee of a family of minor children. And the supreme

court of the state held, that a single man, having no person dependent on him for a support, is not within the meaning of this provision "the head of a family." (Thompson on Homestead and Exemptions, citing *Lynch v. Pace*, 40 Georgia R. 173). What constitutes a family was considered with reference to the Texas constitution of 1845 and 1866, providing for the exempting from forced sale of property of "all heads of families," &c. It was held that the term family was used in its generic sense, embracing a household composed of parents and children, or other relatives, or domestics and servants; in short every collective body of persons, living together within the same curtilage, subsisting in common, directing their attention to a common object—promotion of their mutual interests and social happiness. *Id.* § 44—citing *Wilson v. Cochran*, 31 Texas R. 677.

The duty to support is also made the test. He upon whom the law imposes such a duty, growing out of status, and not out of contract, and the persons to whom he owes this duty, if dwelling together in a domestic establishment, constitute a family, of which he is the head. *Ibid.* § 45—citing *Whaler v. Cadman*, 11 Iowa R. 226; *Marsh v. Lazenby*, 41 Georgia R. 153; *Sallee v. Waters*, 17 Alabama R. 482; *Sanderlin v. Sanderlin's adm'r*, 1 Swan's R. 441. The writer says, the courts have adopted the more humane rule, that a moral duty on the managing member of the domestic association to support the others, or some of them, will be sufficient to constitute the association a family, and the manager of it the head of a family.

There are cases which say that to constitute a family within the meaning of such statutes there must be a condition of dependence, and not a mere aggregation of individuals. *Id.*, § 46.

The relation of master and servant, or, more properly speaking, of employer and employee, as it ordinarily exists in this country, does not constitute a family. And therefore a single man, who has no other persons living with him than servants and employees, is not the head of a family, within the meaning of statutes creating homestead exemptions. *Id.*, § 47, citing *Garaty v. Dubose*, 5 South Car. R. 493; *Calhoun v. McLinden*, 42 Ga. R. 405. The adjudication of seven of the states of the Union, to which I have referred, are mostly taken from the citations of Mr. Thompson's works on Homesteads and Exemptions, not having access here to the books in which the cases are reported. Although I do not mean to express a concurrence in all they say, I rely upon them so far as they are in harmony with the views I have presented in relation to the Virginia constitutional homestead provision.

It now only remains briefly to apply these doctrines to the case in hand. Was the appellant a "householder" or "head of a family" in the sense in which those terms are used in the constitution?

He had lived upon his own land for about eighteen years. He was never married. On the 17th of February, 1858, his father and

mother conveyed to him a tract of one hundred acres of land, in consideration that he would support them during their natural lives; and they soon after left their own house, and came to live with him. But both of them died, and he occupied the house alone, no one living with him except his employees. He claims the right to hold his property as a homestead, which he values at \$1,680—probably all he owns—and which is a very low valuation, if his estimate of the value of the land is proportioned to its real value in the same ratio of his estimate of his personal property to its real value. He, an unmarried man, without a family to provide for, and no one dependent on him for support, seeks to hold all this property under the homestead, to avoid the payment of an honest debt of the inconsiderable amount of \$115, and interest on it from the 16th of Nov., 1874, and \$7.20 costs. I agree with the judge of the circuit court of Smythe county, that it cannot be done—that the homestead was not designed to enable a man who had neither wife, nor children, nor others dependent on him, to withhold his property, on the faith of which he had contracted a debt, from its payment, which he was in common honesty bound to pay; and thus to take his neighbor's property, or services, under a promise to pay for them, and then force him to lose them, although fully able to pay for them. For such an act he cannot offer the plea, upon which the right of the homestead is claimed, that he has a wife, or children, or a family of poor and needy persons, who are dependent on him, and have claims on him, and for whose support a moral obligation rests on him.

He can make no such plea; and therefore the homestead provision was not designed for him. For the care of a widow who is childless and lives alone, whose husband died without having a homestead assigned to him in his lifetime, we refer to chap. 183 of the Code of 1873, § 10; not intending how to indicate any opinion as to the proper construction of said section, as no question arises upon it in this case.

In reaching our conclusions, we have not been unmindful *of § 7 of the homestead article of the constitution, which requires that the provisions of said article "shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out;" and have endeavored to give such a liberal construction to it as will give effect to the intention of its framers.

For the foregoing reasons, I am of opinion to affirm the decree of the circuit court, with costs.

The other judges concurred in the opinion of Anderson, J.

Decree affirmed.

27 *Turpin v. Saunders.

July Term, 1876. Wytheville.

Absent, Moncure, P., and Anderson, J.

In 1830 B. holding a large tract of land called the Austin Nicholas survey, conveyed twenty-five thousand acres of it to W. and three years there-

after conveyed twelve thousand acres of the same survey to S. W conveyed to G. G to C, and O to T, the defendant. A portion of the land conveyed to S was found, on examination, to have been embraced in the conveyance to W, under whose grantees T, the defendant, claims. The case being that of an interlock, and T and his grantors holding the older title, must succeed, unless S, Jr., the plaintiff, and his grantor can show a title by adversary possession, which is then attempted. No possession of any part of the land in controversy was shown by S prior to 1812. In that year one Simpkins settled on ten or twenty acres of it. Whether he claimed title, or was a mere squatter, does not appear; but he did not claim title under S. Some time after this there was a verbal agreement between Simpkins and S that Simpkins should continue in possession, and have what he could make on the land, in consideration that he would salt the cattle of S, which he was in the habit of sending to this county to range on his lands there every spring—S living in an adjoining county, and owning other lands adjoining those in controversy. This arrangement seems to have continued until S's death in 1851. About this time C, under whom, as aforesaid, T, the defendant, claims, finding Simpkins in possession, and knowing nothing of his contract with S, agreed to give him a lease of the land in his possession, which, at Simpkins' request, was reduced to writing. Simpkins remained in possession until 1860, when he either voluntarily abandoned or was driven from the possession. The land in controversy contains about three thousand five hundred acres, and with the exception of the small clearing made by Simpkins, was, at the time of these occurrences, an "unbroken forest, and in a state of

28 nature. In an action of ejectment brought by S, Jr., claiming title under S against T, claiming under C, a grantee from W, as aforesaid, and claiming title by adverse possession, on the ground that the possession of Simpkins was the possession of S; that Simpkins having accepted a lease from S, his subsequent attornment to C was null and void—**Held:**

1. **Adversary Possession.**—The ground upon which an adversary title is established is the supposed *laches* of the true owner. The possession of the adverse claimant must not only be with claim of title, but must be visible, and of such notoriety that the true owner may be presumed to know of it; and Simpkins not having taken possession in this case under claim of title either in himself or in S, and S never having exercised any notorious acts of possession over the land in controversy, either through Simpkins, as his tenant, or in any other way S, Jr., his grantee, is not entitled to recover in this action as adversary claimant.

2. **Same—Wild Lands.**—Wild and uncultivated lands cannot be the subject of adversary possession.

***Adversary Possession.**—The principal case is cited in *Isley v. Wilson*, 42 W. Va. 770, as supporting the proposition: "That if the elder patentee is in the actual possession of any part of the land in controversy at the time of the junior patentee's entry thereon, the latter, by such entry gains no adversary possession beyond the limits of his mere enclosure, cultivation, or actual use, without an actual ouster of the older patentee from the whole of the disputed territory."

sion whilst they remain completely in a state of nature. A change in their condition, to some extent, is essential; without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this may prove an adversary *claim*, but cannot establish an adversary *possession*. The only improvement on the land in controversy being the small clearing made by Simpkins, this did not constitute an adversary possession, under the circumstances of this case, in any just and legal sense of the term: the residue of the tract being in a state of nature, could not be the subject of adversary possession, and the mere fact that herds of cattle were permitted to wander over it at will did not amount to a claim of ownership of the property.

3. **Same—Landlord and Tenant—Estoppel—Interlock—Quere.**—While it is well settled that a tenant cannot dispute the title of the person by whom he was let in possession, nor be permitted to deny that the possession so received was the possession of his landlord, does this rule apply to the possession of Simpkins as to estop him from controverting the title of S, or from showing that C was the true owner?

4. **Same—Interlock—Extent of Possession—Quere.**—Even conceding that S had actual adversary possession of a part of the interlock,

29 would that possession "be co-extensive with the bounds of his deed, or be confined to his mere enclosure, the senior grantee, C, having settled on his tract, but outside of the interlock? The case of *Cline's heirs v. Catron*, 22 Gratt. 378, was not intended to decide this question, and explained on this point.

This was an action of ejectment in the circuit court of Floyd county, brought in December, 1873, by John Boothe Saunders against Walter C. Turpin, to recover a tract of land lying in that county. There were eight other actions by the same plaintiff against other parties pending in the same court at the same time, and involving substantially the same questions, and it was agreed that the same judgment should be entered in all the cases, and there should be but one appeal, and but one judgment of reversal or affirmation. Upon the trial the whole matter of law and fact was referred to the judge, who rendered a judgment in favor of the plaintiff.

Both parties claim title under the same original grantor. It appears that in the year 1830 John Belden, being then the owner of a large body of lands lying in the then county of Montgomery, known as the Austin Nicholas survey, sold and conveyed to William Wade, trustee, twenty-five thousand acres, part of said survey. In December, 1833, three years after the deed to Wade, Belden conveyed to Samuel Saunders, of Franklin county, twelve thousand acres, also a part of the Austin Nicholas survey. The plaintiff claimed under Saunders, and the defendants claimed under Wade. And though there seems to have been some question whether the lands in controversy were embraced in the Wade tract, this court was of opinion that they were; and the question upon which the case was decided was a question of adversary possession. All

the facts necessary to a proper understanding of the case will be seen in the opinion of Judge Staples. The circuit court decided in favor of Saunders, the plaintiff in that
 30 court. *On the application of Turpin, a judge of this court awarded a writ of error and supersedeas.

J. C. Taylor and A. A. Phlegar, for the appellant.

G. E. Dennis, Wm. D. Vaughan and J. L. Tompkins, for the appellee.

STAPLES, J. This is an action of ejectment brought in the circuit court of Floyd county. Other actions of a similar character were instituted by the same plaintiff against other defendants in the same court, involving substantially the same questions, and it was agreed the same judgment should be entered in all the cases. Upon the trial, the whole matter of law and fact was referred to the presiding judge, who was of opinion the plaintiff was entitled to recover, and rendered judgment accordingly.

Both parties claim title under a common grantor. It appears that in the year 1830, John Belden, being the owner, or claiming to be the owner, of a large tract known as the Austin Nicholas survey, lying in the county of Montgomery, conveyed to William Wade, trustee, twenty-five thousand acres, part of said tract. Three years afterwards, in December, 1833, Belden conveyed to Major Samuel Saunders, of Franklin county, twelve thousand acres, also a part of the Austin Nicholas survey. The plaintiff claims under this latter deed. The defendants claim under John G. Cecil, whose title is derived from Wade, trustee.

It is conceded that the Saunders' deed covers the land in controversy. It is not, however, conceded that the deeds under which the defendants claim also cover it. The operation and effect of these deeds have been discussed by counsel at great length, and they, therefore, require a somewhat extended notice in this opinion. (Here Judge Staples enters into a minute and careful consid-

31 eration *of the deed from Belden to Wade, trustee, the deed from Wade to Glenn, from Glenn's devisees to Cecil, and those claiming in common with him, and the various provisions and descriptions contained in those deeds, and the parol and documentary evidence relating to the same. From all which he was satisfied, that, notwithstanding occasional errors in the description of boundaries, and the interests of parties, the land in controversy is embraced by the deeds of conveyance under which defendants claim.) Judge Staples then proceeds: The case presented is therefore simply one of an interlock, and the defendants having the elder title must succeed, unless their right is barred by the adversary possession on which the plaintiff relies. And this is the material question in the case.

In the first place, the evidence adduced to show possession of a part of the land in controversy by Major Saunders prior to 1842, is not at all satisfactory or reliable. Indeed, it

was not seriously insisted on in the argument, and may be thrown out of the case.

It appears, however, that in the year 1842, one Simpkins settled upon a small clearing of ten or twenty acres, a part of the land in dispute. Whether he claimed title, or was a mere squatter, is not very clear. Upon this point, the testimony is conflicting. One thing is very certain, he did not claim under Major Saunders. It seems that after remaining there awhile, he went to see Major Saunders; and it was agreed between them that Simpkins was to continue in possession, to have all he could make on the land, and in consideration of this, he was to salt and attend to the cattle which Major Saunders was in the habit of sending every spring to range his lands in Floyd county. This was the extent of the arrangement between them. The agreement was not reduced to writing, nor was anything said with respect to the time it was to last, although in fact it would seem to have continued until Major Saun-

32 ders' death in 1851. *About that time (1851), Cecil finding Simpkins in possession, and knowing nothing of his contract with Saunders, agreed to give Simpkins a lease of the land, which was regularly reduced to writing at Simpkins' request. And there is no doubt that thereafter Cecil regarded Simpkins as his tenant, and Simpkins recognized Cecil as his lessor and the owner of the land. Simpkins having thus succeeded in obtaining a lease from both parties, remained in possession until the year 1860, when he either voluntarily abandoned or was driven from the possession. The land in controversy contained about three thousand and five hundred acres, and, with the exception of the small clearing alluded to, was, at the time of these occurrences, an unbroken forest.

The theory of plaintiff's counsel is, that Simpkins having accepted a lease from Saunders, his subsequent attornment to Cecil was null and void; that Simpkins, notwithstanding, continued Saunders' tenant; his possession was Saunders' possession, was adversary to Cecil, was co-extensive with the limits of the deed under which Saunders claimed, and was continued sufficiently long to ripen into a perfect title.

The general rule is certainly well settled, that a tenant cannot dispute the title of the person by whom he has been let into possession, nor can he be permitted to deny that the possession so received was the possession of his landlord. In *Emerich v. Tavener*, 9 Gratt. 220, 224. Judge Lee said, "The rule is not varied where the tenant is in actual possession of the premises at the time he accepts a lease, for he thereby as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself." It may be a question whether this proposition of Judge Lee is correct in the broad and unqualified terms in which he has expressed it. There is a strong line of authority for the doctrine that, to create the estoppel as between
 33 landlord *and tenant, the tenant must enter into and obtain possession un-

der the lease. 2 Smith Lead. Cases, 752; 1 Bing. on Real Prop. 211; Tyler on Ejectment, 822, 880; Miller v. Williams, 15 Gratt. 213, 222.

In *Alderson v. Miller*, 15 Gratt. 279, 283, Judge Allen expressed the opinion that the estoppel did not apply where the tenant in possession had been induced by fraud and imposition to accept the lease. Other decisions have gone much further, holding that where the tenant, under a mistake, is induced to accept a lease from a person having no title, or if he be threatened with a suit upon a paramount title, the threat, under the circumstances, is equivalent to an eviction, and he may thereupon submit in good faith and attorn to the party holding a valid title to avoid litigation. *Merryman v. Bourne*, 9 Wall. U. S. R. 592, 600; 1 Wash. on Real Property, 482, 492. It is not necessary, for the purposes of this case, to express any opinion upon these points, nor is it necessary to decide how far they are affected by the provisions of our statute relating to attornments to strangers. Code of 1873, p. 965, § 4.

The question here does not turn upon the nature and character of Simpkins' obligations to Saunders growing out of the lease. The real point of inquiry is, How was Cecil affected by that lease? As has been already said, he was wholly ignorant of its existence. He not only had no knowledge of it, but he had no means of acquiring such knowledge. It does not appear that Major Saunders made it known in the community. It is certain that but few persons in the neighborhood knew anything of it. Simpkins was careful to conceal the fact, for by doing so, he succeeded in obtaining the lease from Cecil.

It is but fair to presume that if Cecil had been informed that Simpkins was Saunders' tenant, he would at once have taken the necessary steps to protect his own rights.

It is hardly to be supposed he would have permitted *Simpkins to remain there long enough to acquire title by possession. No one attributes bad faith to Major Saunders in the matter, but it was through his conduct that Simpkins was enabled to obtain a lease from Cecil and to retain the possession. It would be curious, indeed, if a possession thus continued, could be relied on to defeat the title of the party under whom it was held ostensibly, and without whose consent it could not have been so held. The ground upon which the junior claimant acquires title by adversary possession, is the supposed laches of the owner. The latter sees his boundaries invaded by an adverse claimant asserting title, and if he remains passive under such circumstances a sufficient length of time, he is held to acquiesce in the adverse claim. The principle, therefore, is, that the possession must be not only with claim of title, but it must be visible and notorious, and not secret and clandestine. Angell on Limitation, § 392.

As was said by the supreme court of Massachusetts, the occupation must be of that nature and notoriety that the owner may be presumed to know the adverse posses-

sion; otherwise he may be disseized without his knowledge. Angell, § 394.

In *Dawson v. Watkins*, 2 Rob. R. 259-269, Judge Allen, delivering the opinion of the court, said: "To operate a disseisin of one having right, the entry should be made under a claim of title with the intention of taking possession, and be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. To hold otherwise, would be to establish a principle by which every proprietor of vacant lands might be disseized without his knowledge, or even the possibility of protecting himself. The same doctrine is laid down in Taylor's devisees v. Burnside, 1 Gratt. 165, 195; *Koener v. Rankin's heirs*, 11 Gratt. 420; *Kincheloe v. Tracewells*, *Ibid.* 587, 602; *Ewing's lessee v. Burnet*, 11 Peters R. 41.

35 *Tested by these principles, the plaintiff's claim of possession is lacking in one of the most essential elements to render it adversary in its character. Simpkins, although in the actual occupation of the premises, did not claim title in himself or in Saunders. On the contrary, he accepted a lease from Cecil, and claimed to hold under him.

If Saunders ever claimed Simpkins as his tenant, or that Simpkins' possession was his possession; if he exercised any such visible or notorious acts of ownership over the land as constituted adversary possession, the record does not show it. It does not matter whether Simpkins originally took possession claiming title or as a mere squatter. If in the latter character, it was in subordination to the title of Cecil, the true owner, and would never become adverse to the latter, except by an open notorious claim of title brought to the actual notice of Cecil. On the other hand, if Simpkins entered claiming title, his possession being without color, was confined to his mere enclosure; and so far as Cecil was concerned, the character of that possession could only be changed by an open adverse claim under Saunders. Simpkins having originally entered as owner, if such was the fact, Cecil had the right to suppose he continued to hold in that character until notice was brought to him of a change in his relations. A secret parol lease, such is here shown, would be wholly ineffectual for that purpose. Practically, its effects would be, not only to disseize the owner without his knowledge, but without the means of acquiring knowledge of Saunders' claim. *Sharp v. Kelly*, 5 Denio, R. 436.

This court has repeatedly held that wild and uncultivated lands cannot be the subjects of adversary possession whilst they remain completely in a state of nature. A change in their condition to some extent is essential. Without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this may prove an adversary claim, but in the nature of

36 *things cannot establish an adversary possession; nor is there any reason for relaxing the rules of law on this subject in behalf of the adversary claimant of such

property. There ought to be no presumption in his favor against the better title. As has been well said, "the inexorable operation of these statutes (of limitation), disregarding, as they do, entirely the original merits of the controversy, furnishes a sufficient reason for excluding mere presumptions of the facts which they require, and for exacting clear and decisive proofs of their existence." Judge Baldwin in *Taylor's devisees v. Burnside*, 1 Gratt. 165, 190, 198.

In the present case, the only improvement upon the land in controversy was the small clearing occupied by Simpkins. It has been already seen that this occupation did not constitute an adversary possession in any just and legal acceptance of the term. The residue of the tract being wholly in a state of nature, covered by unbroken forests, could not be the subject of adversary possession. The mere fact that herds of cattle were driven upon it, and permitted to wander over its hills without restraint, scarcely, under the circumstances, amounted to a claim of ownership. Other persons in the community owning cattle exercised the same privilege of salting and ranging without question. Major Saunders owned a large body of land adjoining the land in controversy, and a part of the same tract; and the public might conclude, as Cecil might justly conclude, that the cattle properly belonged and were intended to be "ranged" upon lands belonging to Major Saunders, and not upon that in controversy to which he had no title.

It will thus be seen that the claim of the plaintiff, bought by him at a sale in bankruptcy for a mere nominal consideration, rests not upon any title to the premises, for the person under whom he claims had none, but upon the occupation of a small clearing of ten or twenty acres by a

37 *person, the nature and character of whose tenancy as perhaps never understood until years afterwards, and who was enabled to continue his occupation by a fraud upon the real owner, perpetrated through the negligence of the adverse claimant. In this way it is sought to recover a tract or tracts of more than three thousand acres of land, some of it of considerable value, against bona fide purchasers, who have paid valuable consideration and expended money in clearing and improving the property.

Therefore, without now inquiring whether Simpkins was estopped to controvert Saunders' title or to show that Cecil was the true owner, my opinion is that Saunders and those claiming under him cannot rely upon any possession by Simpkins as adversary to Cecil. This view places the parties in their original position—precluding either from claiming any advantage on the score of possession, and leaving their rights to be adjudicated according to the merits of their respective titles. It follows that, Cecil having the better title, judgment ought to have been entered in behalf of the defendants.

This view renders it unnecessary to decide a question discussed by counsel, which, in another aspect of the case, would have been very material. And that is conceding that

Samuel Saunders had actual adversary possession of a part of the interlock, whether that possession was co-extensive with the bounds of his deed, or was confined to his mere enclosure—the senior grantee, Cecil, having settled on his tract, but outside of the interlock. The learned judge of the circuit court decided that in such case the possession of the junior grantee extends to the boundaries of his deed, for if he had not so held, he could not have decided that the plaintiff was entitled to all the land in controversy. It seems that this ruling was based upon the case of "*Cline's heirs v. Catron*," reported in 22 Gratt. 378. It must be admitted there is an expression of the learned judge, delivering the opinion in that case, giving countenance to the ruling of the circuit judge.

38 *I did not sit in the case of "*Cline's heirs v. Catron*," having been counsel in the lower court. But I am confident this question did not arise either upon the evidence or upon any of the instructions propounded on either side.

It is obvious that Judge Anderson did not intend to lay down any such doctrine as the reported opinion would seem to indicate. What I take it he intended to say was, that when the junior grantee has actual possession of a part of the interlock, and the senior grantee has actual possession of no part of his tract, then the possession of the junior grantee is not confined to his *pedis positio*, but is co-extensive with the boundaries called for in his grant. A proposition of law, sound in itself, and sustained by the authorities. It is, however, a very different matter, where, as in this case, the senior grantee was in possession of a part of the land within the limits of his grant, although outside of the interlock. The question involved in this latter proposition was discussed by Judge Baldwin in *Taylor's devisees v. Burnside*, 1 Gratt. 165, 196, 224; and again alluded to in *Overton's heirs v. Davidson*, 1 Gratt. 211, 224; but the judges being divided in opinion, it was not decided. It was also mentioned by Judge Lee in *Kincheloe v. Tracewells*, 11 Gratt. 587, 603, and again left undecided. So that it is still an open question in Virginia. As a decision of the point is not required in the case before us, it is better it shall so remain until a thorough discussion can be had before a full bench. What is now said is only said for the purpose of removing an erroneous impression, which has gone abroad with respect to what was actually decided in *Cline's heirs v. Catron*.

For the reasons already stated, the judgment of the circuit court must be reversed, and judgment entered for the defendants.

CHRISTIAN and BURKS, J's, concurred in the opinion of Staples, J.

39 *The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the several judgments in the causes aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the judgment aforesaid of the said

circuit court, entered in the first of the causes above named, is erroneous. Therefore it is considered that the said judgment, and also, by force of said agreement of parties, the judgment in each one of these causes, be reversed and annulled, and that the several plaintiffs in error recover together, of the defendant in error, their costs expended in the prosecution of the said writ of error here. And the court, proceeding now to render such judgment as said circuit court ought to have rendered in the cause first named, and consequently (in pursuance of said agreement of parties in the record appearing), ought also to have rendered in each of said causes, it is further considered in each of the above named causes that the defendants therein go thereof without day, and recover against the plaintiff the said defendant's costs by him, or her, expended in defence of such cause in said circuit court. Which is ordered to be certified, &c.

Judgment reversed.

Note.—Although Judge Anderson did not sit in this case, he was on the bench, and after the delivery of the opinion of the court, he remarked that in *Cline's heirs v. Catron*, referred to by Judge Staples in the opinion just delivered, he thought there was a verbal error in the opinion reported in 22 Gratt. in the last sentence on page 392. The sentence is, "But if he (the junior patentee) has an actual occupation and improvement of a part of the interlock, and the elder patentee has actual possession *of no part of it." (It ought to read, of his tract.)

40 He did not think it was the intention of the court to go further; and certainly the court did not intend to decide that when the elder patentee had actual possession of his tract outside of the interlock, the possession of the junior patentee of a part of the interlock would be the possession of the whole. It was not intended to indicate any opinion on that question. It did not arise upon the record, and an opinion expressed upon it would have been an obiter dictum and decisive of nothing.

His Honor remarked that he deemed it proper to make this explanation, that the profession might not be misled by a verbal inaccuracy in the opinion which he had prepared.

Judge Christian, the only surviving other judge who sat in the case, remarked that he concurred in the foregoing explanation.

41 *Huffman v. Leffell's Ex'or, &c.

July Term, 1870. Wytheville.

In July, 1870, D. deputy for H. sheriff of Craig county, had in his hands a writ of *fi. fa.* in favor of L against M. He went to the house of M to levy it when M claimed the benefit of the "homestead" exemption, and claimed his personal property "to the extent it would go." The law to carry the "homestead" exemption of the constitution of Virginia into effect, had just then passed, and neither the deputy sheriff nor the debtor, M, knew the

form in which the exemption could be claimed, although M insisted on his right to claim it. D then notified L of M's claim of homestead, and demanded of him an indemnifying bond before levying the *fi. fa.*, which L declined to give. The debt was lost by the failure to levy. On a suit by L against H. sheriff, and his sureties, to recover the debt in the execution, with interests and costs

—HELD:

Executions—Failure to Levy—Liability of Sheriff.—

The deputy was excusable for not levying and selling under the circumstances, after L had failed to give the indemnifying bond demanded of him; and therefore, L cannot recover against H and his sureties, on his official bond, the debt thus lost by the failure to levy.

In July, 1870, Jacob Leffell, as executor of John Leffell, deceased, sued out a writ of *ieri facias* against Jonah McCartney, which was placed in the hands of Robert R. Doss, deputy for Oscar E. Huffman, Sheriff of Craig county, Virginia, for collection. Doss went to McCartney's house to levy the writ, when McCartney, who was a "householder and head of a family," claimed the benefit of the homestead exemption under the constitution of Virginia, and claimed his personal

42 property to the extent *it would go. He did not file his homestead deed at the time, because the law to carry the constitutional provision into effect had only been approved two or three weeks before, and it was not known then either by the deputy sheriff or the debtor in what form the deed must be prepared and executed. Doss then notified the plaintiff that McCartney claimed the homestead exemption, and that he required of him an indemnifying bond; which the plaintiff refused to give. McCartney filed his "homestead" deed in March, 1871, and shortly thereafter went into bankruptcy. The debt due on the execution was lost, and Leffell sued Huffman and his sureties on his official bond; and under the instructions of the court below, the jury rendered a verdict against them for the amount of the debt in the execution, and the costs, for which a judgment was rendered, and to which Huffman obtained a writ of supersedeas.

The other facts are sufficiently stated in the opinion of the court.

Charles A. Ronald, for the appellant.

D. B. Strouse, J. M. Marshall and P. V. Jones, for the appellees.

BURKS, J. Upon this record, there is no doubt, that at the time the execution of the relator was placed in the hands of the deputy sheriff (Doss), the execution debtor (McCartney) was the absolute owner and in possession of personal property sufficient to satisfy the execution; nor can there be any doubt that the sheriff is liable to the relator for the full amount of the execution, unless he has been excused from making seizure and sale of the property by the failure or refusal of the plaintiff in the execution to give the in-

*Executions.—This case is distinguished in *Sage et al. v. Dickerson et al.*, 33 Gratt. 361.

demnifying bond which was required of him.

43 *Whenever an officer levies, or is required to levy, an execution on property, and a doubt shall arise whether the property is liable to the levy, he may give notice to the plaintiff, his agent or attorney at law, that an indemnifying bond is required in the case; and if such bond, as is prescribed by the statute, be not given within a reasonable time after such notice, the officer may refuse to levy on such property, or may restore it to the person from whose possession it was taken, as the case may be. Code of 1873, §§ 4, 5.

Were the circumstances in this case sufficient to authorize the officer to demand of the plaintiff an indemnifying bond under the statute before he could be required to make the levy? Did a doubt arise, a reasonable doubt, whether the property of the debtor was subject to levy under the execution? We are of opinion that such a doubt did arise.

The execution bore date on the 11th day of June, 1870; was placed in the officer's hands on the 11th day of the next month (July), and was returnable on the fourth Monday in August following. When the officer went to McCartney's house to levy it, McCartney informed him that "he was entitled to the benefit of the homestead law as provided by the constitution of Virginia; that he claimed it, and claimed his personal property to the extent it would go." It seems that he had not then set apart the property as exempt in the mode prescribed by the statute, because, as he stated, he had no form for the proceeding, and knew of none, and he inquired of the officer if he knew of any, insisting at the same time upon his claim.

This claim the officer made known to the plaintiff, and demanded of him an indemnifying bond, which the plaintiff refused to give; in consequence of which refusal there were no seizure and sale of the property.

At the time the execution was issued, although it was for the collection of a

44 *of the constitution, the debtor was entitled, under Article 11, § 1, of that instrument, if valid, to hold the property in question exempt from levy. The constitution had been adopted the previous year (1869), and the general assembly was holding its first session thereunder; and in pursuance of § 5, Article 11, had passed an act to carry into effect the homestead and exemption provisions, which act was approved June 27, 1870, sixteen days after the execution was issued in this case, and fourteen days before it was placed in the officer's hands.

There was more or less diversity of opinion among the judges of the courts and the members of the bar as to the validity of the exemptions, affecting antecedent debts and contracts, provided by the constitution, and the legislative enactment to give effect to such exemptions; and the invalidity of such exemptions was never finally and authoritatively determined until the decision of this court in the Homestead Cases, rendered on the 13th day of June, 1872, and reported in 22 Gratt. 266, et seq.

Judge Christian, in delivering the opinion of the court in that case, adverting to the unsettled state of the law on the subject, and the inconveniences attending it, observed that "it was much to be regretted that a subject of such general interest and importance should not, at an earlier day, have received the final adjudication of the supreme tribunal constituted by law to pronounce the supreme law of the state, instead of being left to the decision of inferior courts, some of which have sustained the validity of the homestead exemption, while others have pronounced against it—thus leaving the law unsettled, and the people, both debtor and creditor, in doubt as to their rights and liabilities."

In other states, also, which adopted constitutions after the termination of the late war, containing provisions for exemptions similar to those in the constitution of this state, these doubts prevailed, giving 45 rise to litigation which was *pursued through various channels into the supreme court of the United States. See *Gunn v. Barry*, 15 Wall. U. S. R. 610; *Edwards v. Kearsey*, 96 U. S. R. (6 Otto), 595.

But it is argued by the learned counsel for the defendant in error that although the right to the exemption is granted by the constitution to the householder or head of a family, yet, in order to secure the benefit of it, he must comply with the provisions of the statute enacted to give it effect; he must select and set apart the property claimed in the mode prescribed by the statute. This may be true. He may never assert his right. It is optional with him to assert it or not. He may waive the benefit of it, and thus be barred. It has been so held by this court. *Reed and others v. Union Bank of Winchester*, 29 Gratt. 719.

But it cannot be said that he intends to waive the benefit of it or not to claim it, when he expressly declares the contrary intention.

If the officer in this case had proceeded to levy the execution on the property claimed, the debtor, if entitled to the exemption, had his remedy under the statute to secure it. Code of 1873, ch. 188, §§ 16, 17. As he had declared his intention to claim it, he would, no doubt, have carried that intention into effect in the mode provided by the statute, if the levy had been made. When applied to by the sheriff with the execution, he had not made his declaration of intention by deed as required by the statute, because of his ignorance of the necessary proceeding, the statute having been approved only a short time previous; but he then made known his claim and his intention to assert it; and if a levy had been made, he would, no doubt, have consulted counsel and under advice, would have pursued the requirements of the sections of the act already cited. The fact is, he did file his deed of homestead within a short time after the return day of the execution; thus manifesting his good faith in the assertion of his claim in the first instance.

46 *At all events, under the peculiar circumstances of this case, we are of

opinion, that when the officer was required to levy the execution in his hands, there was a doubt whether the property of the debtor was subject to levy, sufficient to authorize him to require for his protection an indemnifying bond precedent to the levy. It is fair to infer, that the plaintiff himself entertained such doubt; for, it does not appear that when the indemnifying bond was demanded, he specially directed a levy, but he seems to have left the officer to be guided in his conduct by the exigency of the writ; nor did he institute his action until after the lapse of more than three years from the time the alleged cause of action arose, nor until after the decision in the "Homestead Cases," already referred to, and the report of that decision in 22 Grattan.

Under the circumstances, if he desired to have the property of his debtor levied upon, he ought to have given the indemnifying bond, and taken upon himself the risk of damage incurred by seizure and sale, and not sought to impose it upon the officer, who seems to have acted prudently and in good faith throughout.

The loss of his debt was the consequence of his own neglect or fault, and the law will not visit it upon the officer, who was free from blame.

The instructions given to the jury, at the instance of the plaintiff, are in conflict with the views expressed in this opinion, and the second instruction offered by the defendant and rejected by the court, is in harmony with those views. The latter should have been given and the former refused.

If there was any error in admitting as evidence the answer of the witness, John F. Jones, set out in the defendant's first bill of exceptions, it could not have prejudiced the defendants in the trial, because there was evidence before the jury on the part of the defendant to the same effect.

47 *The judgment of the circuit court must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial in conformity with the views expressed in this opinion.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in a written opinion filed with the record, that the said judgment is erroneous: it is therefore considered and ordered, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error, Paris V. Jones, administrator de bonis non with the will annexed of John Leffell, deceased (the relator in this action), his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here, to be levied of the goods and chattels of his testator in the hands of the said defendant in error to be administered; and it is further considered and ordered that the verdict of the jury be set aside, and this cause be remanded to the said circuit court of Craig county for a new

trial, and for further proceedings to be had therein, in order to final judgment in conformity with the views expressed in said written opinion: all of which, together with a copy of said written opinion, is ordered to be certified to the said circuit court.

Judgment reversed.

48 *Preston & Massie v. Heiskell's Trustee.

July Term, 1879. Wytcheville.

By deed in 1858 H conveyed to P all his right, title and interest, as well at law as in equity, in and to King's salt works estate, embracing the following interests in the King's salt works estate. The deed then sets out the persons from whom H derived the several interests, and the amount of each, and among them the interests derived from three C's stating the interest of each C to be one two hundredth and seventieth. By deed in 1863, between P and H, this first deed is annulled, P releases to H all claim to the interest of H in said King's salt works derived from W—being one twenty-fourth, and H conveys to P, for a certain sum, with general warranty, the interest in the King's salt works purchased by him from—naming all the persons mentioned in the first deed, except W, and setting out their interests in the same way, the interest derived from the C's being stated at the same amount. In a suit by the trustee of H against P and parties claiming under him, it appears the interests derived by H from the C's, instead of being 3.276 or 6.540, they were 11.540; and he insisted that the excess over 6.540 did not pass by the deed of H to P—HELD:

1. *Deeds—Construction.*—The two deeds of H to P are so connected that the court may look to the deed of 1858 in construing the deed of 1863.

2. *Same—Same.*—The deed of 1863 conveys the interest in the King's salt works estate derived from the C's; this is a sufficient description to pass the whole interest of H, and it being apparent that such was the intention of both H and P, the addition stating the amount of the interest derived from the C's will not restrict the operation of the deed.

3. *Same—False Description—Compensation.*—But as both H and P were under a mistake as to the amount of the interest H derived from the

49 C's—and the *contract and conveyance was made under that mistake—H's trustee is entitled to compensation for the excess over what H was supposed to possess.

4. *Pleading—Second Answer.*—The court below.

**False Description.*—In *State Savings Bank v. Stewart*, 98 Va. 451, it is said: "It is one of the maxims of the law that a false description does not render a deed or other writing inoperative, if, after rejecting so much of the description as is false, there remains a sufficient description to ascertain with legal certainty the subject matter to which the instrument applies. This rule of construction is said to be derived from the civil law." *Falsa demonstratio non nocet de corpore constat*. 2 Minor's Inst. 1063 (4th Ed.); 1 Greenleaf on Ev. sec. 301; 2 Taylor on Ev. sec. 1218, &c.; Wooten v. Redd, 12 Gratt. 190, 209; Preston & Massie v. Heiskell, 32 Gratt. 48, 59 and 60; Broom's Legal Maxims, 629, &c. (7th Ed.)

†*Second Answer.*—The rule under which P was allowed to file the second answer was followed in *Radford v. Fawkes*, 85 Va., 820, citing this case; *Bowles v. Woodson*, 6 Gratt. 78; *Bean v. Simmons*, 9 Gratt. 389. See also 4 Min. Inst. (2nd. Ed.) 1315.

upon the bill taken for confessed as to P, holds that the deed of H to P did not convey the excess of \$540, and directs an account of rents and profits. At the next term of the court P applies for leave to answer, and in his answer says if he is to make compensation for this excess, there were several incumbrances, which he sets out, on the interest he purchased from H, which H was to discharge, and did not, and he (P) had paid them; and asks that he may be allowed them. The court allows the answer to be filed as a petition for a rehearing of the decree, and then overrules it, and decrees that the trustee of H is entitled to the excess. This court reversing the decrees, sends the case back, allowing P to file his answer; but directing he shall file his cross bill to put in issue the matters between P and H and the other defendants.

This is a suit in equity in the circuit court of the county of Washington, brought in April, 1878, by Daniel Trigg, trustee of Wm. King Heiskell, against The Holston Salt and Plaster Company, George W. Palmer, Wm. A. Stuart, Thomas L. Preston and Heiskell's adm'r. The object of the suit was to recover five-elevenths of the stock of said company, which the plaintiff insisted Heiskell had not sold and conveyed to Preston in certain deeds which he sets out. It appears that Heiskell owned certain interests in King's salt works, and as a part of them, the interests of Duncan R. Claiborne, James Claiborne and John Claiborne. That by deed dated the 30th of November, 1858, Heiskell sold and conveyed to Thomas L. Preston, all his right, title and interest, as well at law as in equity, in and to the King's salt works estate, and all the appendages and appurtenances thereto belonging and used therewith, and embracing the following interest in the King's salt works estate. He then sets out each interest and from whom derived, and stating the amount

50 of each interest, including *that derived from the Claibornes, stating it to be each one two hundred and seventieth. The proportionate part of said King's estate hereby conveyed, to be paid for by the said Preston at the rate of \$400,000 for*the entire King's salt works estate; \$10,500 on delivery of the deed, the residue to be paid in five years, with interest at six per cent., payable annually, except upon those portions which are either encumbered or in litigation. When the encumbrances are removed, or the title decided in favor of Heiskell, then, stating how the payment of the \$5,000 are to be made.

Preston by deed dated July 7th, 1859, conveyed all his property, including his interest in the King's salt works estate, to Robert Gibbony, in trust for the payment of Preston's debts; and Gibbony having paid the debts of Preston without selling his interest in the King's salt works estate, by a deed bearing date the 14th of July, 1862, in which Gibbony, Preston and Heiskell united, Gibbony released to Preston said interest, and Preston and Heiskell reciting that they desire to annul the deed aforesaid by Heiskell to Preston, it was agreed that the said deed is hereby annulled, and that this deed

is the only and whole contract between them touching the sale and purchase of interest in the King's salt works. Preston then releases to Heiskell the interest which Heiskell had derived from Wm. L. Hunter, being one-twenty-fourth; and Heiskell bargains and sells, with general warranty, to said Preston in consideration of the payment of \$10,500 (besides certain sums Preston and Gibbony had previously paid him), the interest in the King's salt works purchased by him, from— naming all the persons mentioned in the deed of November, 1858, except that derived from Hunter—and describing the interests in the same manner as in said deed, the interest derived from the Claibornes being stated as one two hundred and seventieth each. In October, 1862, Preston

51 and wife conveyed to Wm. A. *Stuart and George W. Palmer, his entire interest in the King's salt works estate.

The difficulty of managing the King's salt works estate, with so many divided interests, induced the parties interested to obtain an act of incorporation under the name of the Holston Salt and Plaster Company, and estimating the value of the property at \$450,000, each owner of an interest was to have stock in the company in proportion to the amount of his interest upon that valuation. And by deed of the 18th of August, 1875, Trigg, as trustee of Heiskell, in consideration of \$18,750 of the stock of the company, conveyed to the company all the interest he had in the King's salt works. And the deed provided that the amount of stock to be received in payment, should be increased or diminished as the interest might be found greater or smaller. The plaintiff claimed in this suit that the interests of the Claibornes in the property which they had sold to Heiskell, instead of being only one two hundred seventieths each, or six five hundred and fortieths in the whole, was in the whole eleven five hundred and fortieths; that Heiskell had sold to Preston but six five hundred and fortieths, and the other five five hundred and fortieths was retained by Heiskell, and passed under his deed to the plaintiff, and under the plaintiff's deed to the company. And the prayer of the bill was that the company should be required to issue to the plaintiff stock for this additional interest, and for an account of rents and profits.

The cause came on to be heard on the 24th of May, 1878, upon the bill taken for confessed as to all the defendants, (except Stuart and Palmer, who appeared, and leave was granted them to file their answer by July rules,) and the court held that by their deeds the Claibornes conveyed to Heiskell all their interests in the King's salt works, being eleven five hundred fortieths of the whole estate; and that Heiskell, by his deeds

52 of 1858 and 1862, *only conveyed to Preston six five hundred and fortieths of said King's estate, part only of said Claibornes' interest; and that the balance thereof being five hundred fortieths or 1.108, did not pass by said deeds; but that Heiskell conveyed the same to the plaintiff by his trust deed of 1869. And without deciding whether the ti-

tle to said interest of 1.108, is still in the plaintiff, or passed by his deed to the Holston Salt and Plaster Company, the court referred it to a commissioner to report the annual rental value of said 1.108 interest in the said King's estate, with its interest from the end of each rental year since the sale by Heiskell to Preston; who is responsible for the rents; and how many shares of stock in the said Company should be issued for said 1.108 interests, if the court should be of opinion that stock should be issued therefor; and any other matter, &c.

In December, 1878, the commissioner returned his report, to which Stuart and Palmer filed several exceptions; but as this court did not consider the report it is not necessary to state them.

At the January term, 1879, Stuart and Palmer answered the bill. They insisted that the whole interest of Heiskell derived from the Claibornes passed by his deed to Preston, and by Preston's deed to the defendants. They insist that the plaintiff has no relief against any one on the facts of the case; but if he has any relief at all it is against Preston for compensation.

At the same term the court gave leave to Preston to file his answer in the cause, and to N. H. Massie to file his petition to be made a party defendant, and the plaintiff objected to the filing of both answers and also to the petition.

Preston, in his answer, insisted that Heiskell had sold and conveyed to him whatever he purchased from the Claibornes. He admits that the interest of Heiskell in the said

King's estate was, as plaintiff claims, 53 11.540; but *he denies that in his contract with Heiskell he had in view, when he purchased, any specific or defined fractional interest, and purchased only that interest. He purchased of Heiskell the entire interest which he had purchased from the Claibornes, and not any particular portion of it. And he claims that plaintiff cannot have any claim against Stuart and Palmer by reason of anything set forth in his bill. The only demand he could have is against the defendant; and the liability of Stuart and Palmer is to him.

He further says that if he should be held to account to the plaintiff for any unpaid purchase money on these Claiborne interests by reason of the same being greater than was supposed, then Heiskell's trustee must account to him for encumbrances paid by him on the interests in the King estate sold and conveyed by Heiskell to him. And he sets out several encumbrances which he alleges he had paid, and which, by their contract, Heiskell was bound to pay. And he concludes by saying he had assigned to N. H. Massie, for valuable consideration, his entire claim against Stuart and Palmer by reason of his deed to them of October 1st, 1862.

Massie's petition alleges that Preston, in March, 1878, assigned to him, for value, his claim against Stuart and Palmer, and he insists that what is due from Stuart and Palmer is due to him, and not to the plaintiff.

At the same term of the court the cause was, by consent, brought on to be heard upon the petitions to file the said answers and petition, and also on the merits, when the court allowed Stuart and Palmer to file their answer; and refused to allow Preston to file his as an answer, but gave him leave to file it as a petition to rehear the former decree. And then upon the merits held that, by the deed of 30th November, 1858, Heiskell sold and Preston bought only 3.270, of the Claiborne interests; and by the terms of the deed or by this proportionate part of King's salt works was conveyed and con-

54 tracted to be paid for; and by the *deed between Gibbony, Preston and Heiskell, the same 3.270 was conveyed to Preston, and by him conveyed to Stuart and Palmer; that the additional 1.108 of the Claiborne interests purchased by Heiskell was his property, and passed to his trustee, Trigg, as tenant in common with the other shareholders in said King's salt works; and this interest not having been sold to Stuart and Palmer, is a subject in which neither Preston nor his assignee, Massie, has any interest; and that being the sole subject of litigation here, the prayer of the petition of Massie is denied, and the motion of Preston to open and reverse a former decree in the cause is overruled. And it was decreed that the Holston Salt and Plaster company should issue a certificate of Stock to Trigg, trustee of Heiskell, for 1.108 of the \$450,000, at which King's salt works was valued by said corporation. And the commissioner was directed to report, forthwith, the amount of the dividends on the said 1.108 interest received in five years before the institution of this suit by Stuart and Palmer, who, it was admitted, had received the same. And the commissioner having reported the amount of said dividend and interest thereon, the court, on the 18th of January, 1879, decreed that the plaintiff should recover from Stuart and Palmer the sum of \$1,424.90, with interest on \$1,176.90 from January 1st, 1879; and that the plaintiff was entitled to receive all dividends which may be declared upon said interest of 1.108 from and after the 1st of January, 1878. And Preston and Massie thereupon applied to a judge of this court for an appeal; which was allowed.

The case was argued by Gilmore and Penn, for Preston and Massie; by White and Buchanan, for Trigg, trustee, and by J. W. Johnston and D. Trigg, for Stuart and Palmer.

ANDERSON, J., delivered the opinion of the court.

55 *The court is of opinion, that William King Heiskell sold and conveyed to Thomas L. Preston, by the deed of July 14th, 1862, the interest in the King's salt works which he purchased from John, James and Duncan R. Claiborne. The terms of the grant are, "the said Heiskell bargains and sells, with general warranty, to said Preston, * * * his interest purchased from John Claiborne, James Claiborne and Duncan R. Claiborne." And as further description, he adds the words, "one two-hundred and seventieth each." We do not think these words

were intended to be restrictive of the quantity; or to imply that if the Claiborne interests were greater, he only sold so much of them. The whole record shows, that he had no thought that those interests which he sold to Preston, could be more than he supposed them to be. He sold to Preston the interest which he purchased from the Claibornes, and why would he have used these words as qualifying and restricting the thing he sold, when he had no conception that it was greater in quantity than he and Preston mutually believed it to be. This clause was evidently added merely as further descriptive of what was before amply descriptive of the thing sold—what he had purchased from the Claibornes.

He had before, by deed of 30th of November, 1858, granted to Preston "all his right, title and interest, as well at law as in equity," in said salt works. First, the interests conveyed to the said Heiskell by Joseph E. C. Trigg, and Rachel, his wife, and Walter S. Branch—one two hundred and eighty-eighth each. Second, the interest conveyed to him by James King, consisting of one seventy-second, one five hundred and fortieth, and one nine hundredth. Third, the interests conveyed to said Heiskell by John Claiborne, James Claiborne and Duncan R. Claiborne—one two hundred and seventieth (the word each probably omitted in copying). This last is the same interest that was recited in the deed of 1862. Fourth, the

56 *interest conveyed to said Heiskell by William L. Hunter—one twenty-fourth. Each of the foregoing interests sold are described in the same way, as interests purchased by Heiskell from such a person, or persons, and then the quantity of each is added, as further descriptive.

Subsequently Preston and wife, by deed dated July 7th, 1859, conveyed to Robert Gibbony the Preston salt works estate, and all their right, title, claim and interest, at law and in equity, in the King's salt works estate, which includes his aforesaid purchase from William King Heiskell, in trust to secure his just creditors, and to indemnify his sureties.

On the 14th July, 1862, the deed of that date, herein before referred to, was executed by William King Heiskell, Thomas L. Preston and Robert Gibbony, trustee for Thomas L. Preston, by which Gibbony releases to Preston all and any rights vested in him by the deed of 7th of July, 1859, to the interests which were conveyed to the said Preston by William King Heiskell, by the deed of 30th November, 1858. And the said Heiskell and Preston abrogate and annul said deed, and declare this deed to be the only and whole contract between them, touching the sale and purchase of interest in the King's salt works; and Preston releases the interest in the said salt works, purchased by Heiskell from William L. Hunter, being one twenty-fourth. And the said Heiskell bargains and sells to said Preston all the other interests which he had conveyed to him by the aforesaid deed of November 30th, 1858, which includes the interest which he purchased from the Claibornes.

The only reason assigned in the deed, for the releasing by Gibbony to Preston, all the interests which he had purchased from Heiskell, in the King's salt works, by the deed of November 30th, 1858, and which Preston had conveyed to him, by the deed of July 7th, 1859, is, that the said Gibbony had "assets sufficient for the payment
57 *of the debts, without touching said interest." And this explains why it was, that Heiskell and Preston agreed to annul the entire conveyance of the former to the latter, by said deed of the 30th of November, 1858, and then by the same instrument, reconveyed to him all those interests, except the interest which Heiskell purchased from William L. Hunter. It was because said interests were unnecessary to pay Preston's debts, and he wished to hold them unincumbered by the deed of trust; and as Preston had acquired said interests, prior to making his said deed of trust, and they had been embraced in it, they felt that it would be safest to annul that deed, and that Preston should hold them by a conveyance made to him, subsequently to the execution by him of the deed of trust. This seems to be the only way in which it can be explained. And the identical interests which had been conveyed to him, by the deed of 1858, except the Hunter interest, being reconveyed to him by the deed of 1862, in construing the latter deed, we may look to the former, though abrogated, to aid in ascertaining what was the intention of the parties, as to what property was conveyed by the latter. As it was evidently the intention of Heiskell to sell and convey by the deed of 1862, the same interest which he had conveyed by the deed of 1858, except the Hunter interest, we may look to the former as showing what property he intended to convey by the latter deed, there being nothing in the latter indicating any change of purpose as to the property he intended to convey, except as to the Hunter interest. And a reference to the deed of 1858 with this view confirms the correctness of the construction, which we have given to the deed of 1862, that it passed to Preston the entire interest which Heiskell purchased from the Claibornes; and that it was the intention of Heiskell to transfer it to Preston, and of the latter to acquire it.

It is necessary and proper now to
58 inquire, what interest *in the King's salt works Heiskell purchased from the Claibornes; for the same interest he sold and conveyed to Preston. The language of the deed of the 24th of January, 1854 is. "I Duncan R. Claiborne have this day bargained and sold, and do hereby transfer and convey, to William King Heiskell (for a consideration expressed), my whole and entire interest, in and to the estate of William King, deceased, inherited by me from and through Thomas J. King, my half-brother, deceased, together with my share of the dower interest of my mother, Sarah M. Claiborne, also my interest of the interests of my deceased sisters, Charlotte and Anastasia Claiborne."

The deed of 14th of March, 1854 witnesseth that the said James Claiborne doth grant unto the said William King Heiskell all the right,

title, interest and claim which he, the said James Claiborne, has in and to the salt works lying and being in the county of Washington aforesaid, in the state of Virginia, known as King's salt works." Here is inserted other property, and the deed then proceeds: "The interests hereby intended to be conveyed, being the same which descended to the same James Claiborne by the death of his half-brother, Thomas J. King, deceased, and of his sisters, Charlotte and Anastasia Claiborne, deceased, they having died intestate without issue; also all right, title and interest which the said James Claiborne now has, or may have, in the dower interest of Sarah M. Claiborne, his mother, in and to the estate hereby intended to be conveyed."

By the deed of 28th of April, 1854, John Claiborne grants, bargains and sells to William King Heiskell all the right, title, interest and claim which he has in the King's salt works, in almost the exact terms of the deed of his brother James to the said Heiskell, just recited.

The interests conveyed as aforesaid are not enumerated, but the bill alleges that they are eleven five hundred and fortieths of the whole King estate; and this enumeration
59 seems to be correct, by the assent of all the parties. This was then the measure and value of the interests which William King Heiskell purchased from the three Claibornes. We have seen that he bargained and sold to Thomas L. Preston the entire interests he purchased from them, but in the deed he enumerates them as three two hundred and seventieths—that is, six elevenths—of the whole King's salt works: five eleventh interests less than they actually were.

The bill also alleges that the contract of Heiskell and Preston was made under the belief that the Claiborne interests were only one two hundred and seventieths. That, we think, is true, as seems to be admitted. It was a mutual mistake in the enumeration or computation of the interests, which were the subject of the sale and purchase. But we do not agree with the further presumption of the bill that the parties intended to sell and purchase only the fractional interests designated, and that only a part of the fractional interests of Heiskell, as enumerated, passed by his deed from him to the said Preston. But we are of opinion, as we have attempted to show, by the terms of the deed, it was the intention of Heiskell to sell, and of Preston to purchase, the entire interest which the former held in the King's salt works by his purchase from the Claibornes, and that it was only a mutual mistake, made in the enumeration and computation of those interests; which, being merely an attempt to describe what had been before sufficiently described, and being untrue, must be rejected as *falsa demonstratio*. In support of this proposition, we are referred by the learned counsel for appellants to 1 Greenleaf (13th ed.), pp. 356-6, § 301, where the rule is thus stated by the eminent author: "There is a class of cases (he says) in which, upon applying the instrument to its subject

matter, whether person or thing, the description in it is true in part, but not true in every particular." The rule in such cases is
60 derived from the *maxim, "*Falsa demonstratio non nocet, cum de corpore constat*." Here so much of the description as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. They also cite, in support of the same principle, *Wooten v. Redd's ex'or*, 12 Gratt. 196, which seems substantially to affirm it.

Numerous other cases are cited which we deem it unnecessary further to notice, as we think the principle is so well founded in reason, and so well settled by authority, as to need no further citations in its support.

But it appears on the face of the deed that Heiskell only received payment from Preston on the basis of this mistaken enumeration or computation. He or his representative, we think, upon the facts and circumstances of this case, are entitled to compensation, with interest. See 2 Minor's Institute, p. 228, and cases cited. He is certainly entitled to compensation from Preston, without deciding as to the liability of other parties. But Preston alleges in his answer that he has claims against Heiskell, which are a valid set off against such claim. We intimate no opinion as to the validity of his claim, which it would not be proper to do, as the case is not matured for a decision on that claim. But surely Preston, or his assignee, should be allowed an opportunity to assert and establish it, if it is due.

The court overruled Preston's motion for leave to file his answer, upon the ground that it was too late, the bill having been taken pro confesso as to him, and a decree having been pronounced in the cause; but permitted him to file it as a petition for a rehearing.

N. H. Massie, as assignee of Preston, tendered a petition before the final hearing, setting up the claim of Preston, and claiming the right to stand in his shoes, by virtue of the assignment to him, which he exhibited with his bill, and which Preston
61 admitted in his answer, praying *to be admitted a party defendant, and to be allowed to answer. But the court upon the final hearing, rejected his petition, and overruled the motion of Preston for leave to file his answer, or to rehear the cause on his answer taken as a petition for a rehearing; and pronounced a final decree, from which an appeal was allowed Massie and Preston by one of the judges of this court.

If the decree of the 24th of May, 1878, rightly adjudged the effect and intent of the deed of 1862, that only conveyed to Preston, six five hundred and fortieths of the Claiborne interest, and that the residue thereof, being five five hundred and fortieths, did not pass by said deed, then there was no error in refusing to set aside said decree, or in refusing to allow Preston to answer, or in rejecting the petition of N. H. Massie, because upon that adjudication of right, Preston had no interest, and consequently his assignee could have none, in the subject of contro-

versy. But this court has placed a different construction on the deed of 1862, from Heiskell to Preston, and holds that in effect, and according to the intent of the parties, it passed the entire Claiborne interest to Preston, and that therefore he is interested in the question of compensation.

The court is of opinion, that the circuit court erred in refusing Preston a rehearing upon his answer, taken as a petition for a rehearing, and in not setting aside the decree of the 24th May, 1878, as erroneous, for the reasons hereinbefore stated; and then permitting Preston to file his answer, and admitting N. H. Massie as a defendant, and allowing him to answer the plaintiffs' bill. And there being matters involved in which there may be a conflict of interest between him and some of his co-defendants, and in the decision of which he is interested, and to the end that such matters may be decided, it is necessary that he should file a cross-bill to put them in issue, he should have been, and be required to file a cross-bill for that purpose.

62 *In the view we have taken of the case, it is unnecessary to consider the question whether the reservation by the decree of July, 1878, to Stuart and Palmer, of the right afterwards to file their answer, was general as to all matters in issue, or special only as to such matters as were not decided by said decree; nor to decide the questions raised upon the statute of limitations as to the rents, as the plaintiff, the trustee of William King Heiskell, would be entitled to no rents, his grantor having parted with his entire interest in the subject, but only to interest upon what might be due him, if any, of the purchase money.

Nor would it be proper for this court, in the present stage of the case, to decide, or to intimate an opinion, as to what, if any is due him, and what parties are liable therefor, and whether the same is a lien upon the subject, and attaches in the hands of subsequent purchasers; these being questions in which Thomas L. Preston, or rather his assignee, are interested, and upon which they have a right to be heard; and which in fact have not been adjudicated by the court below.

Nor is it deemed necessary to consider the exceptions taken to the account reported by the commissioner, as upon the opinion of this court, that said decree of May, 1878, is erroneous, no account of rents was necessary or proper.

For the reasons stated, the court is of opinion to reverse the decree of the 24th of May, 1878, and the subsequent decrees founded upon it, and to remand the cause to the circuit court of Washington county, for further proceedings to be had therein, in conformity with this opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that William King Heiskell, by the deed of 14th of July, 1862, conveyed to Thomas L.

63 Preston the entire interest which he purchased from the *Claibornes in the

King's salt works, and that his whole interest having passed by said deed, he had nothing of it left to convey, and no part of said interest was conveyed to his trustee by the deed of 1869; but only his claim for any unpaid purchase money which might have still been due him from the purchaser.

In the said sale and purchase the parties, by mutual mistake, having enumerated or computed the shares or interests sold to be less than they actually were, and the amount of purchase money paid was upon that erroneous and mistaken computation. Heiskell was entitled to a correction of the mistake after it was discovered, and to further payment of purchase money or compensation.

The court is of opinion, therefore, that the decree of 24th of May, 1878, is erroneous in holding that William King Heiskell, by his said deed of July 14th, 1862, did not convey to the said Preston his entire interest in the King's salt works which he purchased from the Claibornes, but only a part thereof; and that the residue vested in his trustee by the deed of 1869; and that all the proceedings and the decrees of 17th and 18th of Jan., which are founded on that erroneous decision, are erroneous. Wherefore, it is ordered and decreed that said decrees be reversed and annulled, and that the appellee, Daniel Trigg, trustee, do pay to the appellants their costs expended in the prosecution of their appeal here. And the court, proceeding to make such decree as the court below ought to have made, it is ordered that Thomas L. Preston have leave to file his answer in this cause, and that N. H. Massie be allowed to file his petition to be made a party defendant and have leave to answer plaintiffs' bill. And the court being of opinion that the matters in controversy touching the question of compensation between said Preston and his assignee, Massie, and the other parties to the suit, cannot be satisfactorily put in issue and adjudicated without a cross-bill, it is decreed and ordered that said Preston

64 *and Massie be required, on condition of further relief, to file their cross-bill, putting such matters in issue. And the cause is remanded to the said circuit court for Washington county for further proceedings to be had therein in conformity with this order and the principles declared in the opinion filed with the record, in order to a final decision.

Decree reversed.

65 *Clayton & Tyson v. Henley.

July Term, 1879. Wytheville.

Absent. Moncure, P.

1. *Deeds—Minerals—Construction.*—T conveyed to S president of the M mining company and his successors in office, one-half of all the minerals in a certain tract of land in F county, except iron ore, upon the consideration that said M Co. are to test the lands for mineral, until \$2,000 is expended, if they so desired, one-third of the expense to be paid by T; the tests to be made or abandoned in

- two years—**Held:** This deed vested a fee simple in said minerals in the grantees.
2. **Same—Recordation—Subsequent Purchasers.**—This deed having been duly recorded constituted notice to all subsequent purchasers of the land of the interests of the grantees therein, and those claiming under them.
3. **Same—Same—Same.**—Any subsequent deeds made by T conveying the land in trust for his creditors, or deeds made by commissioners under decrees of court to subject the land to satisfy these creditors, conveyed to the purchasers only such title and interest as T then had, and said purchasers and the persons claiming under them acquired no title to the mineral interests previously conveyed by said T.
4. **Jurisdiction.**—Upon a bill filed by a creditor of the M Mining Co. and the persons constituting that company in the circuit court of C county, to subject to the payment of his debt the land of one of them lying in C county, and the minerals conveyed in the deed of T to S lying in F county, one of the members resides in C county, and the others are non-residents of the state—**Held:** The court has jurisdiction of the cause, both on the ground that a part of the subject sought to be subjected lay in the county of C, and that one of the defendants resided in that county.
- 67 *5. **Limitations.**—In such suit the parties claiming under the deeds made by T and the commissioners under decrees, claiming adversely to the title of the M Co. and its members, said parties thus claiming adversely to M Co. and its members, cannot set up the statute of limitations as a bar to the plaintiff's claim, the M Co. and its members not relying upon the statute.
6. **Same.**—But if all the defendants pleaded the statute, and the circuit court decided the case in favor of the plaintiff, and only the said parties claiming adversely take an appeal—**Held:** That a party appealing must show some error in the decree affecting himself; and as the M Co. and its members have acquiesced in the decree, the adverse claimants cannot rely upon the statute in the appellate court.
7. **Parties—Appeal.**—How an objection for want of

***Statute of Limitations.**—This defense is a personal privilege and may be asserted or waived by the debtor at his election. *McCartney v. Tyrer*, 94 Va. 202; *Smith v. Hutchinson*, 78 Va. 682.

The principal case is quoted in *Welton v. Boggs*, 45 W. Va. 624, to the effect that a plea of the statute of limitations is a personal defence.

†**Parties—Objection—Appeal.**—Where there can be no final adjudication of the matters in controversy on the account of the absence of a party in interest, an objection for want of parties may be made for the first time on appeal. *Hinton et al. v. Bland's Adm'r et al.*, 81 Va. 568, citing *Armentrout v. Gibbons*, 25 Gratt. 371; *Clayton v. Henley*, 32 Id. 65; *Lynchburg Iron Co. v. Tayloe*, 79 Va. 671. See also 4 Min. Inst. (2nd Ed.) 969; *Saunders v. Gregg*, 81 Va. 508; *Shepard v. Starke*, 3 Munf. (Va.) 29; *Tayloe v. Spindle*, 3 Gratt. (Va.) 44; *Thornton v. Grae*, 15 Va. L. J. 102.

The principal case was cited in *Morgan v. Blatchley*, 33 W. Va. 158, in support of the proposition that, although the defector lack of parties be not suggested by demurrer, plea, or answer, yet, if it be apparent on the face of the bill, it will prevail at the hearing; and, even though not raised in any way in the lower court, it is competent to make the objection in the court of appeals.

proper parties should be made, and how such an objection for the first time made in the appellate court will be treated, see the opinion of *Staples, J.*

This was a suit in equity in the circuit court of Carroll county, brought in January, 1874, by Thomas B. Henley against F. L. Hale and seven others, who, with A. V. Brown, deceased, constituted, as the bill stated, the Meigs county Tennessee and Virginia Mining Company, the unknown heirs of said A. V. Brown, and S. S. Clayton and J. E. Tyson. Hale lived in the county of Carroll, and all the other members of the company were residents of the state of Tennessee. The object of the suit was to subject a tract of land in the county of Carroll, and certain copper and mining interests in land in the county of Floyd, which the plaintiff claimed belonged to said company, to satisfy a debt of \$2,000, with interest from the 7th of June, 1861, which was due from said company to the plaintiff for services rendered. This debt was evidenced by the written acknowledgment of F. L. Hale, superintendent of Meigs County Tennessee and Virginia M. Co., at the foot of a statement made out by him showing the work done at the different mines of the company, and the amount due Henley for his services at each mine.

It appears that previous to February, 1854, there was *in Tennessee a company styled the Meigs County Tennessee Mining Company, of which John G. Stuart was the president; that by deed bearing date the 10th of February, 1854, Robert L. Toncray sold and transferred to said Stuart, president of Meigs County Mining Company, and his successors in office, one-half of all the mineral, except the iron ore, in and upon the tract of land therein described, together with all necessary mining privileges, including wood and water; and the tract of land is set out as containing about three hundred acres. The consideration stated in the deed is that the president and members of said mining company are to test the above described lands for mineral: the company to control and carry on the work until \$2,000 was expended, if they so desired—one-third of the expense to be paid by Toncray. The company was to have entire control and management of the work; to keep an account of expenses of mining operations, of which they should pay two-thirds and Toncray one-third. This deed was admitted to record on the day of its date in the county court of Floyd county. After this deed was made, Stuart, as president, &c., admitted F. L. Hale and another into the company, and the company was known as the Meigs County Tennessee and Virginia Mining Company; and Hale was the superintendent.

By deed made in the same month, and recorded on the 27th, Toncray conveyed to Jackson Godbey the tract of land mentioned in his deed to Stuart, with improvements thereon and mining interests in all metals, "with the exception of a copper interest that hath been conveyed to a Tennessee company," in trust to secure his endorssers on a note for \$3,500. It appears further that Toncray subsequently made three other deeds conveying

this land in trust to secure debts, in which no exemption of the mining interest conveyed to the Meigs company is made. And it appears that in 1857, in a suit in the circuit court of Floyd county, in which Toncray 68 was plaintiff and the trustees in *the said four deeds of trust and the parties secured were defendants, the said tract of three hundred acres of land was sold and purchased by Harvey Deskins, Andrew J. Kirby, and nine others, and was conveyed to them in December, 1858. And it appears further that in another suit in the same court, in which A. J. Kirby was plaintiff and Harvey Deskins and others were defendants, the said land was sold by J. L. Tompkins as commissioner, and by deed bearing date the 2d of November, 1872, Tompkins, commissioner, conveyed the same to F. A. Winston, the purchaser at the sale. The defendants, Clayton and Tyson, claim as purchasers from Winston.

The plaintiff in his bill charged that all these parties had both constructive and actual notice of the deed to Stuart; and in fact that all of them, until the sale to Winston, recognized the right of the Meigs County Tennessee and Virginia Mining Company to the mining interest conveyed by said deed to Stuart. And the prayer of the bill was that the land in Carroll belonging to the heirs of the said A. V. Brown, and the said mining interest in the land in Floyd county might be sold and applied to the payment of his debt. And he sued out an attachment upon the land and mining interest in March, 1874. The bill was taken for confessed, as to the absent defendants by publication, and as to the defendants Toncray and Hale by service of process; but at the August term of the court Clayton and Tyson appeared and had leave to answer. They demur to the bill on several grounds, which it is not necessary to state. After expressing their ignorance as to the plaintiff's debt and from whom it is due, they deny that the Meigs County Tennessee and Virginia Mining Company, or its predecessor, has interest, either vested or contingent, in the land, which they call the Toncray property; and insist that they are the fee simple owners of the entire property, including land and minerals.

They deny that any interest in said 69 property was *ever conveyed to either of said companies. They admit the deed from Toncray to Stuart, which they insisted only vested any interest in said minerals upon the performance in two years of the conditions precedent, that the company should test the land for minerals, and that they never struck a lick towards complying with the condition. They refer to the fact of the sale under the deeds of trust, and say that they and those under whom they claim have held possession of the land from 1861.

At the October term, 1874, of the court there is an entry which states—This day came the defendants and filed pleas of the statute of limitations, and S. S. Clayton and J. E. Tyson filed a special plea in writing.

In the progress of the cause the land in Carroll county belonging to Brown's heirs was sold under a decree in this and another case,

and the plaintiff received \$928.68 as his portion of the purchase money.

The cause came on again to be heard on the 12th of August, 1876, when the court made a decree against the Meigs County Tennessee and Virginia Mining Company in favor of the plaintiff for the sum of \$2,000, with interest from the 7th day of June, 1861, and the costs of suit, subject to a credit of \$1,023.18, as of the 18th of October, 1875. And holding that the deed from Toncray to Stuart conveyed a fee simple estate in one-half the mineral interest in and upon said land, except the iron ore therein, and that the subsequent sales, deeds, decrees and judgments referred to in the proceedings in the cause had not in any manner affected the rights or title of the parties legally claiming under that deed, decreed that unless the defendants, or some one for them, should within sixty days pay off and discharge the plaintiff's debt and costs of the suit, a commissioner named should proceed to sell at public auction, &c., the one undivided half in fee simple of the mineral in and upon said land, together with the mining privileges, including wood and water and 70 other *appurtenances, except the iron ore, upon a credit, &c. And thereupon Clayton and Tyson applied to a judge of this court for an appeal; which was allowed. The facts are sufficiently stated in the opinion of Staples, J.

A. A. Phlegar, for the appellants.

J. A. Walker, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that Robert L. Toncray, by his deed bearing date the 10th February, 1854, conveyed to John G. Stuart, president of the "Meigs County Mining Company," and his successors in office, one-half of all the minerals, except the iron ore, in and upon the tract of land now claimed by the appellants, and the interest so conveyed became afterwards vested in the persons composing the "Meigs County Tennessee and Virginia Mining Company," and further that said deed, being duly recorded in the proper county, constituted notice to all subsequent purchasers of the interests of the grantees therein and those claiming under them.

The court is further of opinion that the several deeds of trust afterwards executed by the said Robert L. Toncray, for the benefit of his creditors, and the deeds executed by commissioners, under decrees of the circuit court of Floyd county, conveyed to the purchasers under whom the appellants claim, only such title and interest as the said Toncray then had; and consequently said purchasers, and the appellants claiming under them, acquired no title to the mineral interests previously conveyed by said Toncray to the said John G. Stuart.

It further appears that Deskins & Co., and all the parties claiming under said deeds of trust, and under the deeds of said commissioners, including F. A. Winston, 71 *not only had actual notice of the

claim and title of the said mining company and those composing said company, but that they repeatedly recognized that claim as valid.

It is not directly proved that the appellants had such notice; but the fact is charged in the bill, and not denied in the answers, and a careful examination of the record leads irresistibly to the conclusion that the appellants at and before the time of their purchase were perfectly well aware of the title of the persons composing the "Meigs County Tennessee and Virginia Mining Company." As against these latter parties, then, the appellants acquired no title to the property in controversy. At the time of the institution of this suit it was vested in the persons composing that company, was used as its proper assets, and is justly liable to those having valid claims against it. The justice of the appellee's claim is fully established by the evidence, and is not seriously controverted by any one.

It further seems to the court that one of the members of said "Mining Company" resided in the county of Carroll at the time of the institution of this suit, whilst the others were non-residents of the state of Virginia.

It further appears that the appellee sought by his bill to subject to the payment of his debt, besides the property in controversy, certain mineral interests in the county of Carroll, and that a decree has been obtained by him for the sale of such interest, and the proceeds applied in part to his debt. Under such circumstances there is no doubt the circuit court of Carroll county had jurisdiction of the case, notwithstanding the property in controversy is situated in the county of Floyd. The residence of one of the defendants was sufficient for all the purposes of such jurisdiction independently of the fact that other real estate justly liable to the debt was within the limits of the said county of Carroll. The jurisdiction of the court does not, as seems to be supposed, grow out of the attachment proceedings, which

72 are merely ancillary. The *attachment may be entirely disregarded, and the bill sustained as an ordinary creditor's bill to obtain satisfaction out of the real estate. Both the residence of one of the defendants and the locality of the realty concurring to give jurisdiction.

The court is further of opinion, that the plea of the statute of limitations is in general a personal defence to be made by the party against whom the demand is asserted, or to be waived by him, if he desires so to do. What are the exceptions under which third persons may insist on the defence, when the debtor fails to do so, is not necessary now to be considered. *Dawson v. Callaway*, 18 Georgia, 583; *Grattan v. Wiggins*, 23 Calif. R. 16, 25. It is sufficient to say the present case is not one of them, and it was not competent for the appellants to interpose the bar of the statute against appellee's demand. They do not claim under the Meigs County Tennessee and Virginia Mining Company, or under any of the persons composing that

company. The appellants assert an adversary title to the property in controversy. As the persons composing the "Mining Company" consider the appellee's claim just, and are willing, notwithstanding the lapse of time, that it shall be paid out of their estate, why should the appellants be permitted to interpose and object to the payment? If a debtor, recognizing the indulgence of his creditor and the justice of his demand, is unwilling to plead the statute, it is difficult to tell upon what ground a third person who merely asserts title to the property can be permitted to do so. The debtor might have waived the benefit of the limitations in writing—he could effect the same object by coming into court and acknowledging the debt, or by permitting the bill to be taken for confessed.

It would seem, however, that all the defendants united in the plea of the statute of limitations—at least the record so states—

73 although there is good reason to believe this a *mistake, and that the appellants alone made this defence. Be this as it may, the circuit court overruled the plea, and rendered a decree in favor of the appellee. From that decree neither the "Mining Company" nor any member of it has appealed. Are the appellants entitled to demand a reversal? A party complaining of a decree is required to point out some error prejudicial to his interests. If the proposition already stated be true, that the appellants could not set up the bar of the statute of limitation, it follows they cannot in this court claim a reversal of the decree because the circuit court did not sustain the plea when interposed by the debtor. The latter being satisfied with the decree, the appellants must be held bound by it. They claiming under a hostile title cannot be heard to complain that the court has improperly appropriated the debtor's property to the satisfaction of the creditor's claim—the debtor himself making no complaint. The court is therefore of opinion, that if there be error in the decree of the circuit court in this particular, it is not the subject of review by this court.

The court is further of opinion, that the objection made in the court below and in this court by the appellants, that the "mineral interests" in controversy have not been subjected to the tests required in the deed from Toncray to John G. Stuart, president, and his successors, is not well founded. The evidence satisfactorily shows that such tests were made.

None of the parties under whom appellants claim ever contended otherwise: so far from it, all of them seem to have recognized the tests as sufficient. It is proved indeed that Robert L. Toncray long ago brought his suit claiming that such was the fact, and relying upon it as a ground of relief.

The court is further of opinion, that the objection for the want of proper parties comes too late, if indeed the objection would have availed at any time. The bill 74 filed *by the appellee avers that certain persons named by him now compose the "Meigs County Tennessee and Virginia

Mining Company;" and these persons are made defendants—the home defendants by service of process, and the non-residents by order of publication. None of the defendants controverted this averment; nor is the want of proper parties suggested in the pleadings. One of the appellee's witnesses undertakes to say there are two or three interests not represented—persons who were members of the company in 1854. It is very probable the witness is either mistaken upon this point, or the persons alluded to by him have long since transferred their interests to others who are before the court. Be this as it may, it is an all-sufficient answer to the objection that it is for the first time made in this court. Where that is the case the objection will not avail unless it is manifest that the absent party is indispensable.

The rule on this subject is, that where the defect in not making proper parties appears on the face of the bill, the objection may, and ought, to be made by demurrer. Where it does not so appear it should be made by plea or answer. 2 Rob. Prac. 276, old ed. When, however, the objection is delayed till the hearing in the appellate court—whether it will avail or not will depend much on the circumstances. If the absent party has an interest in the subject matter of controversy, of such a nature that a final decree cannot be made without affecting that interest, the appellate court, of its own motion, will direct that he be brought before the court, whether the objection was or was not made in the court below. If, on the other hand, the interests of the absent parties are separable from those of the parties before the court, so that the court can proceed to a final decree, and do complete justice without affecting the absent parties, the latter are not regarded as indispensable. A defendant who claims that certain persons should be made parties to

share a common burden ought to make

75 *the objection, as a general rule, in the pleadings; and if the objection be delayed until the case reaches the appellate court, that court will not require it unless it is clear that the absent party is likely to be prejudiced by the decree. *Shields v. Barrow*, 17 How. U. S. R. 130; *Story v. Livingston*, 17 Peters R. 359, 375. Here persons, owning more than three-fourths of the interests, are before the court, and the decree is for the sale of those interests only. Such a sale cannot affect the interests, of the absent parties. The purchaser under the decree will occupy the position of tenant in common with the parties whose interests are not sold. The latter will hold their shares exempt from liability until proper proceedings are had against them to enforce contribution. Nor will they be concluded by the decree in this case from making any just and proper defence. It is also to be borne in mind that the objection for want of proper parties is not made by the defendants whose interests are decreed to be sold, but by the appellants who, as has been seen, are not in privity with these defendants, but assert an adverse claim.

For the reasons stated, the court is of opinion there is no error in the decree of the

circuit court, and the same must therefore be affirmed.

Decree affirmed.

76 *Robertson v. Trigg's Adm'r & als.

July Term, 1879, Wytheville.

1. *Co-Sureties—Contribution*—Subrogation.*—Two of the sureties of a United States collector, who has made default, and died insolvent, are entitled to be subrogated to the right of priority of the United States, in the payment of the debt, when they have paid it, as against the estate of another surety who had died before the insolvency of the collector.
2. *Same—Same.**—In such case there having been six sureties to the bond, two of whom were insolvent at the time of the collector's death, and continued to be so until their death, the two sureties who paid the debt are entitled to recover from the estate of the deceased surety one-fourth of what they have paid.
3. *Same—Same—Subrogation—Federal Statute.*—The principles of equity in relation to subrogation, are not affected by the U. S. statute, 1 Brightley's Dig. of Laws, 382, § 206, which provides substitution for the surety against the estate of the principal, where the surety pays the debt, as to which the statute gives the United States priority of right to satisfaction.
4. *Bonds—Scaling—Confederate Money.*—A case in which it was held under the circumstances, that a bond executed in July, 1862, for a loan of Confederate money, should not be scaled; but should be applied as of its date, as a payment of a debt due the borrower.
5. *Exceptions—Waiver—Appeal—Review.*—One defendant, F, files an exception to the commissioner's report; which is relied on by R, another defendant; but at the hearing in the court below, this exception is waived. The exception having been waived, R cannot rely upon it in the appellate court.

Daniel Trigg, of Washington county, died in Feb., 1853, and John A. Campbell 77 qualified as his administrator. *In March, 1855, Campbell filed his bill, in which he stated that he had encountered great difficulties in his administration. That at the time he qualified as administrator, he did not doubt the sufficiency of the estate to pay all its debts; but had changed that opinion in the previous November. He makes a number of the creditors of Daniel Trigg, and among them Wyndham Robertson and James Galt, parties defendants, and asks that he may administer the estate under the direction of the court. He afterwards filed

**Co-sureties—Contribution.*—The holding that if one of a number of sureties discharges the common burden, the others are bound to contribute equally to his relief, in the event of the insolvency of the principal; and if any of them are insolvent, their shares of the burden must be apportioned among those that are solvent, is sustained in *Harnsberger et al. v. Yancey et al.*, 38 Gratt. 527; *Pace v. Pace*, 95 Va. 794. See also 8 Min. Inst. (2nd Ed.) 423 et seq. See also *Findlay v. Trigg*, 83 Va. 539.

On the subject of sureties on official bonds the principal case is cited in *Myers v. Miller*, 45 W Va. 611.

an amended bill, making the widow and heirs of Daniel Trigg parties defendants.

In May, 1855, there was a decree for an account of debts, &c.; and in April, 1856 there was a decree for the sale of the real estate of Trigg.

Prior to the 19th of September, 1856, Campbell, who had been appointed a commissioner to sell the land, and the commissioner to take the accounts, had made their reports. On that day the court made a decree in which, after reciting that the cause not then being in a condition which would authorize the court to direct a distribution of the assets of Trigg's estate, ordered that John A. Campbell, the commissioner, do loan out any money of said estate then in his hands, or which might come to his hands, taking bond and good security therefor, payable to himself as commissioner; and that he give the undisputed creditors of said Trigg, or such of them as may desire it, the preference of borrowing the funds. And Wyndham Robertson being a creditor in his own right as well as representing the estate of Francis Smith, deceased, Campbell, in July, 1862, lent to him \$5,917.13.

No further proceedings in the cause seems to have been taken until September, 1871, when Robertson and Galt filed their answer, and also their cross-bill, setting up a claim against the estate of Daniel Trigg, on the ground that he, with themselves and three other persons, had been the sureties of Lilburn

78 H. Trigg, as collector at the port *of the United States at Richmond; that in 1853 Lilburn H. Trigg fell in arrear as collector to the amount of \$24,618.80; that he was then, and continued until his death to be insolvent; that two of his sureties were also insolvent; that plaintiffs, as sureties of said Trigg, had paid of his deficiency \$14,791.48; that the other solvent surety had settled with them for his one-fourth of the deficiency; and they claimed that the estate of Daniel Trigg was liable to them for his fourth, amounting to \$3,697.87, as of April 7th, 1853, and that they were entitled to priority over the general creditors, on the ground that they were entitled to be subrogated to the right of the United States.

The accounts were again referred to the commissioner, who made his report; to which there were exceptions by Robertson and Galt, and by Findlay and others. The only question in this case related to the claims of Robertson and Galt; and the facts as to these are stated in the opinion of Judge Burks.

The cause came on to be heard on the 23d of Oct., 1875, and again on the 17th of Jan., 1876. By the first decree the court held that the single bill executed by Robertson to Campbell in 1862 should be, to the amount decreed in favor of Robertson, settled as of its full value, and for any balance of said debt it should be scaled as of its date. By the second decree it was held that Robertson and Galt were only entitled as against Daniel Trigg's estate to one-sixth of the amount they had paid; but for this they were entitled to be substituted to the rights of the United States, and to have priority over the other

creditors; and there was a decree in their favor for this sum, with interest from the 25th of April, 1853, until paid. And thereupon Robertson applied to a judge of this court for an appeal; which was allowed.

The case was argued by J. L. White, for the appellant; A. A. Gray, for Galt; Gilmore, for Trigg's adm'r, and J. W. Johnston, for the creditors.

79 • *BURKS, J., delivered the opinion of the court.

Contribution among sureties is founded in natural justice and the equitable principle of equality of burden and benefit. If one of a number of sureties discharge the common burden, the others are bound to contribute equally to his relief, in the event of the insolvency of the principal; and if any of them are insolvent, their shares must be apportioned among those that are solvent. These principles are well settled. *Preston v. Preston* and others, 4 Gratt. 88; *Wayland v. Tucker* and others, id. 267; 1 Story's Eq. Juris., §§ 493, 495; *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. and notes (4th ed.), 120 (top p.).

There were six sureties upon the official bond of Lilburn H. Trigg as collector of customs for the district of Richmond, and if they were all solvent, and James Galt and the appellant (Robertson) have shown themselves entitled to contribution at all, the estate of Daniel Trigg, one of the sureties, would be bound to contribute to Galt and Robertson one-sixth part of whatever sum was paid by them to the United States for their common principal, with interest thereon from the date of such payment. But it is very clear from the evidence that two of the sureties—namely, Henry L. Brooke and Charles Bell Gibson—were, at the time the payment was made and ever afterwards, utterly insolvent, and have never contributed anything to reimburse Galt and Robertson for the amount paid by them. The only witness examined touching the solvency of Brooke and Gibson describes them as being in the most straitened circumstances and as "living from hand to mouth;" further testifying, that he was very familiar with all the circumstances attending the execution of the bond of Trigg as collector, and that he always regarded the names of Brooke and Gibson "as mere make-weights." No countervailing testimony

80 was taken. If any witness could have been found who would have sworn to the solvency of these men, or who would have said that it was even doubtful, it is fair to presume that he would have been produced and examined in the cause.

When the accounts, ordered by the court, were being taken, Robertson furnished to the commissioner a statement made out by Galt, showing the net amount paid by them to the United States on account of the default of the collector, to which statement there was subjoined a written memorandum, signed by them and dated July 30, 1855, in the following words: "Of this (\$14,791.48, the net amount claimed in the statement), C. F. T.

(admitted to be Connelly F. Trigg, one of the sureties on the bond) has paid one-fourth part, and we expect another one-fourth part to be paid out of Dr. Trigg's estate, or by his heirs; but the administrator, seeming not to feel authorized, and referring the matter to the court, we now claim contribution from Dr. Trigg's estate, of what it is legally liable for, of the amount paid by us. We suppose our legal claim is limited to one-sixth, \$2,465.24, with interest from 14th April, 1853." This paper is relied upon by the counsel for some of the appellees, as showing an admission by Galt and Robertson, that they were entitled to receive from Daniel Trigg's estate only one-sixth part of the amount paid by them to the United States.

This is not, we think, a fair construction of this paper. They evidently mean to claim all they are legally entitled to receive, and they "suppose" their "legal claim is limited to one-sixth," &c. At most, this language only shows inadvertence, or mistake in a matter of law. It does not amount to an estoppel. No one has been misled by it to his prejudice. Although they may have supposed and so stated, that they were legally entitled to receive from Dr. Trigg's estate only one-sixth part of the money paid by them, yet if they were really entitled to have one-fourth of that sum instead of one-sixth, *they are not precluded by anything in that paper from receiving the one-fourth. They certainly never intended to release or abandon any right they had. Indeed, in that very paper, they say, that they "expect another one-fourth to be paid out of Dr. Trigg's estate;" and such is their claim, asserted as well in their cross-bill as in their answer to the original bill filed by Trigg's administrator.

So it seems to us very clear, both on the law and the facts, that if Galt and Robertson are entitled to contribution at all, the share to be contributed by Daniel Trigg's estate is one-fourth instead of one-sixth, as determined by the decree of the circuit court, and that said decree in that respect and to that extent, is erroneous.

But it is contended by the counsel for some of the appellees, who are creditors of Daniel Trigg, that Galt and Robertson have not shown themselves entitled to contribution from any of their co-sureties; that the alleged default of the collector and his insolvency, and the payment on account of said default claimed by Robertson and Galt to have been made by them, are not established by the evidence; and that even if such default and payment were established, Galt and Robertson are not entitled to the priority over other creditors of Daniel Trigg accorded to them by the decree of the circuit court.

If we look alone to the accounts of the collector, as stated by the accounting officers of the treasury department, certified transcripts of which are filed by the appellees as evidence in the cause, no default is made apparent. But these settlements by and with the collector were wholly ex parte in relation to the sureties. They certainly are not conclusive in a controversy among the sureties and their

creditors. At most, they can only be accorded the force and weight due to prima facie evidence. *United States v. Eckford's ex'ors*, 1 Howard, 250, 263; *U. States v. Boyd*, 5 How.

U. S. 29. This is all the weight they *would be entitled to in a suit on the bond against the sureties. A fortiori, they can receive no greater consideration in a controversy between the sureties. Their effect may be, and, we think, has been overcome by other competent evidence adduced by the appellant.

It is proved by the witness John H. Bosher, that in April, 1853, in company with Galt, he examined the accounts of Lilburn H. Trigg, and, upon such examination, he found that Trigg was indebted to the United States, as collector and depositary, in the sum of about \$24,600; that Trigg admitted that amount as the correct balance against him, and that he was unable to pay it. It was further proved by another witness, George H. Tompkins, the collector's clerk, that Trigg was then insolvent and so continued as long as he lived. The proof is positive and not contradicted, that as soon as this large balance was ascertained to be owing by Trigg, and that he was insolvent and unable to pay it, the whole amount was paid, a portion by Trigg's friends, and the residue by Galt and Robertson, his sureties. The amount paid by Galt and Robertson was placed in the custody of William H. McFarland, then president of the Farmers Bank of Virginia, who put it in the vault of said bank and kept it there until Lynch, Trigg's successor in office, qualified, when it was paid over to him.

This proof clearly establishes the default and insolvency of Trigg, and the payment by Galt and Robertson. It is immaterial whether Trigg's successor, Lynch, to whom the money was paid, had authority to receive it or not, if he accounted for it to the United States. He must have so accounted and paid over the money to the United States, as no action on the collector's bond or other legal proceeding was ever instituted, as far as appears, to recover the balance due from Trigg. Indeed, the transcripts from the treasury department show, that the government received all it was entitled to, by whomsoever

83 paid. It is *certain that Trigg did not pay that large balance; for it is shown that he was insolvent and confessedly unable to pay it. It must, therefore, have been paid by other persons, and the evidence leaves no room to doubt who those persons were.

Trigg was required by law to render his accounts quarter-yearly to the proper accounting officers of the treasury within three months, at least, after the expiration of each successive quarter. 1 Bright Dig. of Laws U. S. 16, § 3. He could therefore have rendered his accounts for the quarter ending on the 31st day of March, 1853, at any time within three months after that date. The account rendered by him for that quarter, as shown by the transcript, bears date April 6, 1853. His accounts appear to have been audited in the treasury department in July, 1853. He is debited in the audited accounts with \$24,577.86 for duties on merchandize from the

1st Jan. to 31st March, 1853, and is credited by amount of warrant in favor of the treasurer of the United States, No. 224 (deposit), dated 31st of March, 1853, \$24,639.57. This is near the amount of the balance which the witness Boshier ascertained in April, 1853, from an examination of Trigg's accounts in his office, and from Trigg's own admission, to be owing by him to the United States, which, he said, he was unable to pay. In his account rendered to the department, which has been already referred to, he credits the United States with the aggregate amount of \$24,639.57, and debits the same amount in his hands as depositary. It would thus seem that at the date of the rendition of this account, April, 1853, he had not paid into the treasury the balance in his hands, although the warrant before referred to in favor of the treasurer is dated 31st March. The actual settlement of his accounts was, no doubt, made at some subsequent period, and the warrant dated back to the end of the last quarter, when the balance appeared to be owing. He

84 had a strong motive so to adjust *and arrange his accounts and settlements with the government as not to disclose on the face of the papers any delinquency or breach of official duty.

There is some discrepancy in dates in the descriptions of the official bond under which Trigg was discharging the duties of collector when his default occurred. In the accounts rendered by him, he describes the bond as dated June 14th, 1849. In some of the accounts audited by the department, the bond is described as dated June 14th, 1849, and in others October 1st, 1850; while the bond, a copy of which is filed by the appellant, and the only copy of any bond which is filed, purports to be dated 27th day of September, 1850. Whether there were really more bonds than one, or whether the apparent discrepancies are the result of mistake or inadvertence, we have no means of determining with certainty. If there were others, however, besides the one relied on by the appellant, those of the appellees who are contesting the appellant's claim, when they were procuring transcripts of the accounts, might and probably would have obtained copies of those bonds, and exhibited them as proofs in the record. It is affirmed by the counsel for the appellant that the bond—a copy of which is filed—is the only one ever given by Trigg during his term of office. Such, we think, is the fair presumption from the circumstances. The condition of that bond, which is in the form prescribed by statute, is certainly sufficient to bind the sureties for any default of the collector occurring subsequently and during the term of his office. 1 Howard, *supra*. If that bond has been superseded by another, it devolved upon the contesting appellees to show it. They have not done so.

The defalcation and insolvency of Trigg, and the payment on account thereof by Galt and Robertson, two of the sureties, bound by their obligation to answer for the default of their principal, being established, it is insisted, nevertheless, that these two sureties

are not entitled to the priority given them by the decree of January 17, 1876.

85 *Under the statutes, both of the United States and of this state, if the estate of a deceased debtor in the hands of his personal representative is insufficient to pay all the debts of the decedent, the debts owing to the United States shall be first satisfied. 1 Brightly's Dig. of Laws, 17, § 10; Id. 381, § 265; Rev. Stat. U. S. (1st ed.), 691, § 3466; Code (Va.), 1873, ch. 126, § 25.

Daniel Trigg being dead at the time of Lilburn H. Trigg's default, and his estate in the hands of his administrator being insufficient to pay all his debts, the United States were entitled to priority of payment out of his estate, of the debt for which he was bound as surety of Lilburn H. Trigg, and the said debt having been paid to the United States by Galt and Robertson, his co-sureties, they are permitted, on the principle of subrogation, to stand in the shoes of the United States and to recover and receive from the estate of said decedent what the United States would have been entitled to receive therefrom, if the payment aforesaid had not been made by Galt and Robertson.

That the surety has this right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal, would seem to be settled in Virginia by the decisions of this court, although the rule seems to be otherwise in England. See *Powell's ex'ors v. White and others*, 11 Leigh, 309, and the cases referred to by Judge Tucker in his opinion, especially the case of *Enders v. Brune*, 4 Rand. 438. For the general doctrine, see *Dering v. Earl of Winchelsea*, and notes, 1 Lead. Cases Eq. (4th ed.), top p. 138, et seq.

The rule of substitution, for the purpose of enforcing contribution among co-sureties, is not different. One surety who pays the common debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his co-sureties, in

86 precisely the same manner as *against the principal debtor. 1 Lead. Cas. Eq. (ed.), top p. 170; *Horton v. Bond*, 28 Gratt. 815, 825; *Lidderdale v. Robinson*, 2 Brock. 159; S. C. 12 Wheat. R. 594.

The statute of the United States provides substitution for the surety against the estate of his principal, where the surety has paid the debt as to which the statute gives the United States priority of right to satisfaction. 1 Bright. Dig. of Laws, 382, § 266; Rev. Stat. of U. S. (1st ed.), 691, § 3468; and it is argued, that because the same statute makes no express provision for substitution of a surety to the rights of the creditor against a co-surety, it was intended to exclude such substitution on the principle, *expressio unius est exclusio alterius*.

We are not prepared to say, that the remedy provided by the statute for the surety against his principal would not have existed under the general rules of equity as administered in the Federal courts, independently of any statutory provision. Whether that be so or

not, the rule of substitution, for the purpose of enforcing contribution between sureties, is too well established in equity jurisprudence to be set aside by implication of less force than an express statutory denial of the remedy.

This disposes of the questions arising upon the appellant's first assignment of error.

The circuit court, by the decree of October 23, 1875, decided that the single bill of the appellant (Robertson) for \$5,917.13, dated July 15, 1862, and payable to John A. Campbell, commissioner, should be settled, to the extent of the amount which might be decreed in favor of said Robertson (he being a creditor of Daniel Trigg), as of its face value, and that any balance on said single bill which might remain unpaid, after deducting from the amount thereof such sum as should be decreed in favor of said Robertson, should be scaled as of the date of said single bill: and this is the ground of the appellant's second assignment of error. He con-

87 tends, that the bond was *given for Confederate money loaned to him by the commissioner, and that the nominal amount should be scaled and reduced to its true value as of the date of the loan: or if treated as a payment for the full nominal amount on the debts owing to him by the decedent, it should be applied as a payment at the date of the bond.

We are of opinion, that although the bond was given for Confederate money received by Mr. Robertson from Judge Campbell, the commissioner, it ought not, under the circumstances, to be scaled. By decree of September 19, 1856, Judge Campbell, as commissioner, was directed to loan out any money of the estate of Daniel Trigg then in his hands, or which might thereafter come into his hands, taking bond therefor with good security, payable to himself as commissioner; and he was further directed by the same decree to give the undisputed creditors of said Trigg, or such of them as might desire it, the preference of borrowing said fund. Among the debts owing to Trigg's estate there was a judgment against Thomas L. Preston for a large amount and of long standing. It was, however, safely secured. On the 15th day of July, 1862, Robert Gibboney, Preston's trustee, offered to pay off this judgment to Campbell, the administrator of Trigg's estate and commissioner as aforesaid, in Confederate money. Campbell was unwilling to receive the Confederate money, but seeing Dr. Robertson, he informed him of Gibboney's proposition and said to him, that he would receive the money from Gibboney, if Robertson would borrow the money from him (Campbell) as commissioner. Robertson replied, that he would take the money. Whereupon, Campbell received it from Gibboney, and Robertson took it and gave his bond with surety for it. These facts are shown by Campbell's statement, which is the only evidence in the record touching this transaction. He concludes his statement by saying, "my impression further

is, that I remarked to Mr. Robertson **88** that as he was a large creditor *the probabilities were that he would never have to pay the money back, but I am not so satisfied as to this as of what I have before stated. My habit was to loan to the creditors when I could, and this causes me to doubt somewhat whether the impression above was made by a conversation or the habit."

We think the giving a preference in loans to "undisputed creditors," by the decree of September 19, 1856, indicates an intention that loans, when made under the decree to such creditors, were to be treated in the further proceedings in the cause as payments, so far as such loans did not exceed in amount the claims of such creditors, and the statement of Judge Campbell tends to show, that such was the intention in the collection from Gibboney and the loan to Robertson.

We are, therefore, of opinion that the amount of the bond of Robertson to Campbell (commissioner) should be treated, without reduction by scale, as a payment at the date of said bond on the debts owing by Daniel Trigg to said Robertson, whether said debts be owing to him in his individual right or as a fiduciary. The debt held by Robertson as administrator of Francis Smith, deceased, is practically a debt owing to Robertson individually, as his wife is the sole distributee of Smith's estate. This was stated in argument by the counsel for the appellees and was admitted by the counsel for the appellant. The decree does not definitely fix the date at which the amount of the bond is to be credited on the debts held by the appellant. It should be modified in that respect.

The third and last assignment of error by the appellant is, that "the court erred in decreeing that the interest upon the debts of creditors should stop in April, 1856, and that the court erred in overruling the exception of creditors upon that point."

It is a sufficient answer to this assignment that the exception referred to was **89** waived at the hearing of the cause *in the court below. This exception (among others) was filed by Findlay's executor, and relied upon by the appellant, without making any separate exception. The decree of January 17, 1876, recites that the exceptions of Findlay's executor not disposed of by the decree of October 23d, 1875 (among which exceptions not so disposed of was the one for not allowing interest on the debts beyond April, 1856), "not being insisted on, be and the same are now overruled." The not insisting on the exception was equivalent to a waiver thereof not only by Findlay's executor, but also by the appellant, who had adopted the execution as his own. Of course, he cannot be allowed to insist in this court upon an exception which he waived in the court below.

So far as the decrees complained of here are in conflict with the views expressed in this opinion, they will be reversed, and the cause will be remanded to the circuit court

for further proceedings to be had therein, in conformity with those views.

The judgment was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that so much of the decree aforesaid, rendered on the 23d day of October, 1875, as adjudges that the "single bill" executed by Wyndham Robertson to John A. Campbell, commissioner, in the year, 1862, should be, to the amount which may be decreed in favor of said Robertson, settled as of its face value, and that any balance of said single bill which may remain unpaid, after deducting therefrom such sum as may be decreed in favor of said Robertson, should be scaled as of the date of the said single bill, is erroneous.

90 *And, for the reasons aforesaid, the court is further of opinion that so much of the decree aforesaid, rendered on the 17th day of January, 1876, as ascertains and adjudges the amount for which Daniel Trigg's estate is liable to Galt and Robertson for contribution, to be the sum of \$2,465.24, with interest thereon from the 25th day of April, 1853, till paid, is also erroneous; therefore it is decreed and ordered that so much of the decrees aforesaid, respectively, as is hereinbefore declared to be erroneous, be reversed and annulled, and the residue thereof be affirmed, and that the appellee, John A. Campbell, out of the estate of Daniel Trigg, deceased, in his hands, whether as administrator of said decedent or as commissioner in this cause, do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And, in lieu of so much of the decree aforesaid, rendered on the 23d day of October, 1875, as is hereinbefore declared to be erroneous, and is therefor reversed, this court, now proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the full nominal amount of the bond of the appellant, Wyndham Robertson, and his surety, Charles S. Bekem, bearing date on the 14th day of July, 1862, and payable to John A. Campbell, commissioner, to wit: the sum of \$5,917.63, be considered and treated, without being scaled and reduced, as a payment at the date of the said bond on the debts owing to the appellant by the estate of Daniel Trigg, deceased, as well as the debt owing to him as administrator of Francis Smith, deceased, as on the debt owing to him in his individual right. And in lieu of so much of the decree aforesaid, rendered on the 17th day of January, 1876, as is hereinbefore declared to be erroneous, and is therefore reversed, this court, further proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the sum for which the estate of Daniel Trigg is liable to the appellee,

91 *James Galt, or his personal representative, and the appellant, Robertson, for contribution, is \$3,697.87, with le-

gal interest thereon from the 25th day of April, 1853, till payment.

And it is further ordered that this cause be remanded to the said circuit court for further proceedings to be had therein in order to a final decree, in conformity to this decree and the opinion therein expressed; which is ordered to be certified to the said circuit court of Washington county.

Decree reversed.

92 *Tilson v. Davis' Adm'r & als.

July Term, 1879, Wytheville.

1. G died early in 1849, leaving a widow, T, and three infant children, and in March, 1849, D qualified as his administrator. In March, 1851, D settled his account, and had for distribution \$6,000.08; and having qualified as guardian of the children, he retained in his possession two-thirds of this sum as their guardian. He had in 1850 executed his bond for the balance due to T, as widow. There is some uncertainty as to the provision of the bond, whether given to her as payment of the third due to her as widow, or as a mere acknowledgment of what was due to her; and whether it provided only for the payment to her of the interest during her life, and then of the principal to her children. In April, 1875, T instituted a suit in equity against the administrator and sureties of D, to recover the amount of her interest in the estate of her husband G, and the sureties answered, insisting that T had accepted the bond of D in satisfaction of her claim, and pleading the statute of limitations—HOLD:

1. *Administrator's Bond—Sureties—Novation.*—If the bond was so given that T was only entitled to the interest during her life, and then it was to go to the children, it was a novation of the debt due by D as administrator, and his sureties were not bound for the claim.

2. *Same—Same—Limitations.*—That D having settled his administration accounts finally in 1851, and given the bond to T, if it was intended merely as an acknowledgment that that much was due to her, it was a settlement to the amount of the bond, and from the moment of its execution and delivery to T, right of action accrued thereon, and more than ten years having elapsed before she brought her suit, his sureties are discharged from their liabilities by the statute of limitations. Code of 1877, ch. 146, §§ 8, 9.

93 *2. At the time said suit was brought by T, there was pending in the same court a creditor's bill against D's adm'r and heirs, and in that case T had filed her petition claiming a share of the estate of one of her sons, who had died intestate, and this claim had been reported as a fiduciary debt; but she did not claim in her petition her share as widow of G. In this case there was a final decree directing the payment of the fiduciary debts reported, and a distribution of the funds of D's estate in the hands of the receiver, or which he should afterwards collect, *pro rata* among the general creditors. After this decree T filed her bill to subject a fund in the hands of said receiver, not yet paid out to the creditors, to the payment of her claim as widow of G—HOLD:

1. *Res Judicata*.—That T having made herself a party in said creditor's suit, without settling up this claim, she is concluded by the final decree in said suit, and cannot set up a claim to the fund in the hands of the receiver.

In April, 1875, Mrs. Ann Tilson instituted her suit in equity in the circuit court of Wythe county, against Rufus Brown, as surviving administrator of Eli Davis, Elizabeth G. Gibboney, executrix of Robert Gibboney, deceased, John G. and Jos. M. Crockett, administrators of Allen T. Crockett, deceased, and John C. Graham. In her bill she stated that in 1849, Jacob Groseclose, of said county, departed this life intestate, leaving the plaintiff as his widow, and Eli Groseclose, George, and Jane, wife of H. H. Tilson, as his children and heirs and distributees. That on the 12th of March, 1849, Eli Davis qualified as administrator of said Jacob Groseclose, with John P. Matthews, Robert Gibboney, Allen T. Crockett and John C. Graham, as his sureties. That Davis took possession of the personal estate and sold it, and collected the debts; and in March, 1851, settled his accounts showing a balance for distribution of \$5,090.63. Of this sum Davis, who had qualified as guardian of the three children, retained in his hands two-thirds, viz: \$3,393.74 $\frac{2}{3}$; all of which sum of \$3,393.74 $\frac{2}{3}$ had lately been adjudicated in the cases of Meek, 94 guardian and als. *against Eli Davis' adm'r and als. and Eli Groseclose and al. against the same defendants, in which the plaintiff recovered only her interest in the one-third share of said George her son, who died intestate and without issue; which two cases are referred to as exhibits. She further states that by the said settlement in March, 1851, there was due to her as the widow of said Jacob Groseclose, the sum of \$1,696.87 $\frac{1}{2}$, with interest from the date of said settlement, which is still due from said Davis and his sureties. That she purchased at the sale of the personal property made by said Davis as administrator to the amount of \$943.28, which should be deducted, and the balance, with interest and costs of this suit, decreed to her.

Plaintiff further states that after the death of Jacob Groseclose, she married Ransom Tilson, and he is dead; that Eli Davis died in 1861 or 1862; and stating the deaths of Matthews, insolvent, of Gibboney, and Crockett, and that the estate of Davis, both real and personal, was, as she is informed, wholly exhausted by debt, and that nothing remains out of which her debt could be made, she calls upon the defendants to answer, prays that proper accounts may be taken, if

**Res Judicata*.—A judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question, in another suit between the same parties. *Corprew v. Corprew*, 84 Va. 599 citing *Withers' Adm'r v. Sims*, 80 Va. 651-8; *McComb v. Lobbell*, 83 Gratt., 185; *Tilson v. Davis' Adm'r*, 83 Gratt., 92-108; *Chrisman v. Harman*, 29 Gratt. 499. See also 4 Min. Inst. (2nd. Ed.) 798 *et seq.*

The principal case was distinguished in *Shepherd v. Brown*, 30 W. Va. 24.

deemed necessary; and that the said amount may be decreed to her from Davis' estate if he has any, and if not, against his sureties; and for general relief.

Graham and the executrix of Gibboney answered the bill in September, 1875. They insist that Davis having finally settled his accounts in March, 1861, and more than ten years having elapsed since that settlement, and the plaintiff having failed to collect said debt or attempt its collection in the mode prescribed by the statute, the same is barred by the statute of limitations as to them. They say further that if the claim is a fiduciary debt, there are ample means of Davis' estate out of which it may be paid:

That recently by the decree of this 95 court in the suit of *Eli Groseclose and others against Eli Davis, guardian and others, the real estate of Davis has been sold, and there is still a large fund under the control of the court, which they claim shall be appropriated to satisfy the plaintiff's debt.

Crockett's adm'r's, who answered in December, 1876, after relying upon the same grounds, state further that they are advised there is pending in this court, in the name of Joseph Meek, guardian, &c., v. Rufus Brown, adm'r &c., a general creditor's bill, the object of which is to distribute the estate of Eli Davis, deceased, among his creditors, according to priority; that final decrees have been entered in said suit distributing said Davis' effects; that Ann Tilson is a party petitioner in said suit; that she failed to assert the claim she is attempting to enforce in this suit, and they plead the decree in that suit as an estoppel, and vouch the record.

The cause came on to be heard on the 23d of December, 1876, when the court, holding that, at the institution of this suit, there was pending in the creditor's suit, having for its object the distribution of the estate of Eli Davis, deceased, among his creditors, and that the plaintiff was a party thereto, upon her own petition, to participate in the funds; that an account in that cause had been directed and confirmed, and the assets decreed to be distributed, without the plaintiff ever setting up any claim to this debt, which, if presented by her, would have been paid, if just, as it was a preferred debt, dismissed the bill which costs, but without prejudice to the right of the plaintiff to such satisfaction of her demand against the estate of Eli Davis which may be distributed, but not against his sureties as administrator of said Groseclose.

Upon the decision of the foregoing case, Mrs. Tilson, in February, 1877, filed her bill in the same court, setting out the facts of her claim as stated in the former case, and

further saying that a final decree was 96 rendered on the 18th *of September, 1875, in the case of Meeks, guardian, &c., against Davis' adm'r, and Groseclose v. the same defendant; by which is reserved to any party the right to have said causes reinstated, and for relief; that while in said cause an account was taken by a commissioner of the debts due from Eli Davis, yet

her dower interest, or one-third interest, in Jacob Groseclose's estate was not taken, reported or in any wise passed on in said cases, and that is the purpose of this bill. She then refers to said report, which shows that the debts due to the three children of Jacob Groseclose aggregated \$6,630.24, and were the only fiduciary debts reported; that the receiver, Isaac J. Leftwich, had paid the whole of the preferred debts, and there was still in his hands as receiver \$1,225.64 due the estate for distribution to creditors. The residue of the debts reported by Commissioner Holbrook are simple contract debts.

She further states that she made an effort to have her claim proven and allowed in said suit. She is old and confined to her house, and she asked her stepson, W. V. B. Tilson, to see to it, and she supposed he was employing James H. Gilmore for this purpose, among others, but he simply turned over to Mr. J. W. Caldwell, as commissioner, a paper for proof, which was Davis' own acknowledgment of the amount due the plaintiff on account of said Jacob Groseclose, deceased; and between Mr. Gilmore and Mr. Caldwell the paper was lost. She claims that her said debt is still due and unpaid; that it is a fiduciary debt, and she is entitled to have the said sum of \$1,225.64, still in the hands of the receiver, Leftwich, applied to its payment. She makes Davis' adm'r. all the second class creditors reported by Commissioner Holbrook, and Leftwich, the receiver, defendants, and prays that Leftwich be restrained from distributing any balance of the fund in his hands until the further order of the court; that she may have a decree for the amount due her, and that payment

97 *may be made out of said fund in the hands of Leftwich.

Leftwich demurred to, and answered the bill. He says that before he had heard this suit would be instituted he had collected the whole of the outstanding purchase money of the land, and out of the proceeds he had paid a debt to himself of \$368.37, and to David Sexton \$160.20, which debts were reported by the commissioner, and decreed to be paid. He insists the plaintiff is entitled to no portion of her demand as against the fund in his hands. That she had settled her claim with Eli Davis, and had received his bond in full discharge of the balance due to her. That Davis was the brother of the plaintiff, and was at the time of this transaction and to the day of his death a man of large means, in full credit, and regarded as solvent as any man in Wythe county, and was only rendered insolvent by the exigencies of the war.

He further says, that in the suit of Meeks, guardian, against Davis' adm'r and others, the object of which was to distribute the estate of Davis among his creditors, the plaintiff was a party upon her own petition; that she adjusted in that suit the claim set up in the petition, and failed then to claim this debt against the estate of Davis, either as a prior lien upon the effects to be distributed, or pro rata. That a final decree had been entered in said suit distributing said Davis' effects, and that she failed to assert the lien

she is now attempting to enforce. That plaintiff is estopped by the proceedings in that cause from setting up her demand in this suit, and he relies upon the estoppel.

In the case of Meeks, guardian, v. Davis' adm'r and others, a final decree was entered on the 18th of September, 1875, by which, after reciting that the preferred debts had been paid, and that the fund remaining in hands, or yet to be collected by the receiver, amounted to \$1,398.05, after reserving enough to pay the costs of the suit, the 98 *court decreed that the receiver Leftwich should pay out this fund ratably among the creditors of the second class reported by the commissioner. And the objects of this suit having been obtained, the cause is ordered to be stricken from the docket; but with leave to any party in interest to apply to this court to restore the same to the docket, if necessary for the enforcement of this decree.

This cause came on to be finally heard upon, &c., when the court dissolved the injunction which had been awarded the plaintiff to restrain the defendant Leftwich from any further distribution of the funds in his hands on account of the land sold, and dismissed the bill with costs, and from the decrees in both cases Mrs. Tilson obtained appeals.

The facts as viewed by the court are presented in the opinion of the court delivered by Judge Anderson.

Crockett & Blair, for the appellant.

R. C. Kent and J. H. Gilmore, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is an appeal from decrees in two suits in which the appellant was plaintiff, and, in one, the administrator of Eli Davis, deceased, and the sureties of said Davis, in his administration on the estate of Jacob Groseclose, were defendants; and in the other the said Eli Davis' administrator, and his creditors were defendants.

The first suit was brought to recover the plaintiff's claim against the administrator of Jacob Groseclose, her first husband, from his sureties—the estate of Davis being insolvent. This suit was dismissed by the decree of 23d December, 1876; but without prejudice to the right of the plaintiff to seek the satisfaction of her demand against the 99 estate of *Eli Davis, which may be undistributed, but not against the sureties of said Davis as administrator of Jacob Groseclose.

The second suit was afterwards brought against Eli Davis' adm'r, and his creditors to subject a fund which was in the hands of the receiver, I. J. Leftwich, for the satisfaction of her claim. This suit was also dismissed by the decree of 16th of March, 1878, on final hearing. And the appeal is from those two decrees.

When the appellant's bill in the first suit was filed, there was a suit depending in the same court, in which Jacob Meeks, guardian,

&c., was plaintiff, who sued for himself and all other creditors of Eli Davis, deceased, who would come in and participate in paying the costs of the suit; and Rufus Brown, surviving administrator, and the heirs of Eli Davis, deceased, were defendants. The appellant filed her petition to be made a defendant in this suit, in which she sets up her claim against Eli Davis as administrator of her deceased son, George Groseclose, and refers to a decree of the court which establishes her claim as exhibit A in the cause, but which I have not been able to find in the record. But it is allowed by Commissioner Holbrook in his report, as established by a decree of the court in the suit of Eli Groseclose and *als. v. Davis' adm'r*, entered August 10, 1859, and the same was paid her out of the fund then in possession of the court. The plaintiff in her bill says those two suits were consolidated and heard together. But I do not find that it so appears in the record. And the claim in the Eli Groseclose suit referred to by the court, it seems, was entered years before the Meek's suit was brought. But this is the only claim which the appellant made in that suit against the estate of Eli Davis. She set up no claim against Eli Davis as administrator of her first husband, Jacob Groseclose. If she had done so and proved it to be just, and that it was fiduciary, it would have been put with the first class debts, *and the most, if not the whole of it would have been paid out of the fund then under the control and in the power of the court; and if not fiduciary, would have been paid pro rata with the second class creditors. But she made no such claim, although she was a party to the suit. Her petition was filed by order of the court on the 11th of June, 1872.

It was not until April, 1875, that she filed her bill seeking satisfaction from the sureties of Eli Davis. But at that time there had been no final decree in the Meeks creditors' suit. It was still depending and undetermined and the final decree was not pronounced until the 18th of September, 1875. If, instead of bringing that suit, she had then, or any time before the final decree, filed her petition, setting up the claim of which she is now seeking satisfaction, it would have been in time to have saved at least a part of her debt. Mrs. E. G. Gibboney, executrix of Robert Gibboney, deceased, did not prove her husband's debts of \$5,421.76 until September 17th, 1875, only one day before the final decree was entered, and it was allowed. But the appellant, who knew of that suit—for she was a party to it—for some reason that is unexplained, preferred to pursue the sureties of Davis for her debt in a separate and independent suit, rather than to seek satisfaction out of the estate of Davis, the principal in a suit already depending, and in which she was a party.

Having made this statement of the case, we will first inquire whether there is error in the decree of December, 1876? That involves the question as to the liability of the sureties.

It is shown by the testimony of Mrs. Ann

Tilsen herself that she received the note of Eli Davis, the administrator, for the balance due her from the estate. She had received before, in property which she had purchased at the sale, to the amount of \$943.28. She thinks, and seems to be confident, that the writing was signed by him *as administrator. Mr. Davis was her brother, and was at the time a man of large possession, was regarded as a wealthy man, and had very great credit.

There is evidence strongly tending to prove that the bond or note was given in anticipation of her second marriage; that this considerable sum might be secured to her use during her life, and not be reduced to the marital rights of a second husband by her contemplated marriage, and after her death to go to the children of Jacob Groseclose, from whom it was derived. And this view receives support and countenance from her own testimony. In answer to the question, was the note spoken of turned over to her second husband after their marriage? she answers, "It was not turned over by me; I know that he was not to have it."

Again she says, speaking of the note, "I saw it frequently while I had it. I kept it in a secret place, and examined it frequently while it was there, but finally missed it, but don't know where it went." W. V. B. Tilsen, who, it was mentioned at the bar, is administrator of Ransom Tilsen, his father, testifies that he found a note among his father's papers signed by Eli Davis; says his recollection is it was for \$810. Does not remember whether the note was payable to Ann Groseclose, or her heirs. Gave the note to Mr. Gilmore to collect the interest on it, which he understood was coming to his father during his life. Don't remember whether it stated it was for her distributive share in Jacob Groseclose's estate or not. Would not be positive it was not. Mr. Gilmore remembers Mr. Tilsen giving him the note to place in the hands of a commissioner who was taking an account in some case in which Eli Davis' estate was before the court in Wythe for settlement, so that his father's estate could get the benefit of the interest on the note, he claiming that his father's estate was entitled to the interest on it whilst he lived. He gave

the note to Jos. W. Caldwell, under-
 102 standing that he *was the commissioner, and has never seen it since. If the note had been executed to Ann Groseclose, and her husband had reduced it to possession, he would have been entitled to collect the principal as well as the interest, unless there was some stipulation on the face of the note that would make it uncollectible in the lifetime of his wife, or indicating that the principal was not due to her. His claiming the right to collect the interest only, and that limited to his lifetime, would imply that his wife was not entitled to the principal, but only to the annual interest. But this inquiry need not be pressed further. If this hypothesis should be received, it would establish a novation and conversion of the debt, and the sureties of the administrator would not be liable for it. It would have become the indi-

vidual debt of Eli Davis, and he alone would have been liable for it; and there is very much in the facts and circumstances proved, which need not be detailed in this opinion, tending to show that Ann Groseclose, the sister of Eli Davis, took the writing in question from him as a permanent security for the balance due her from the personal estate of her first husband, and looked to him alone for payment. But if this be not so, it was a settlement of her interest in the estate, at least pro tanto, and her right of action accrued from the moment said note was delivered to her. And the evidence as to the amount of the note shows that it was for a larger amount than was actually due Mrs. Groseclose, as shown by the settlement of the commissioner. The facts proved by the appellant herself shows that the note was executed to her whilst a feme sole, and her subsequent marriage could not create a disability which would prevent the running of the statute of limitations. That a note was executed by Davis to the appellant before her second marriage, and whilst she was a feme sole, for a larger amount than was afterwards shown by the commissioner's settlement was due her from the estate of Jacob Groseclose; and that she accepted said *note, and held it in her own custody for many years after her second marriage, and that it afterwards got into the possession of her second husband, and was found amongst his papers after his death, and that she regarded her interest in the estate as safely invested and secured by said note, long after it was received by her, are facts in the cause, well established by the testimony. If said note was given and received as a satisfaction in full of the appellant's interest in the estate, the sureties were clearly discharged by it from their liability as sureties. And if it was not so given and received, but was intended only to be an acknowledgment by the administrator that so much was due her from the estate, it was a settlement at least to the amount of the note; and from the moment of its execution and delivery to the appellant, right of action accrued to her thereon, and more than ten years having elapsed before she brought her suit, his sureties are discharged from their liabilities by the statute of limitations on which they relied; and in whatever light said transaction may be viewed, the sureties were relieved from their liability on the administration bond, and there is no error in the decree of 1876.

103 We have next to inquire whether there is error in the decree of March 16th, 1878, for which it should be reversed? This involves the question whether the plaintiff in this suit was concluded and estopped by the final decree in the Meeks' creditor suit, to which she was a party defendant? In the *Duchess of Kingston's case*, 2 Smith's Leading Cases, top p. 623, marg. 587, it is said, The rule laid down in the celebrated judgment of De Grey, C. J., is, that the judgment is conclusive between the same parties. And again top p. 624, it is held that the record of a verdict followed by a judgment

in a suit inter partes will estop, first parties, second, privies. It is well established law that a final decree in chancery is as **104** conclusive as a *judgment at law. A verdict and judgment of a court of record or a decree in a court of chancery puts an end to all points decided between the parties to the suit. There is and ought to be no difference between a verdict and judgment in a court of law and a decree in a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. There is nothing anomalous or unusual in setting up a former adjudication as an estoppel to an action for equitable relief. The rule is a beneficial one, and it is a matter in which it is said the public has an interest as well as the parties, that there should be an end to litigation. Freeman on Judgments (2d ed.), § 248—citing Sibbald's case, 12 Pet. R. 488; Kirby v. Murphy, 26 Penn. State R. 78; Maguire v. Tyler, 40 Missouri R. 406; Smith v. Kernochen, 7 How. U. S. R. 198; Hopkins v. Lee, 6 Wheat. R. 100; Marsh v. Burroughs, 19 Amer. L. R. 718; San Francisco v. Spring Valley W. W., 39 Calf. R. 473; Crowdsen v. Leonard, 4 Cranch's R. 436; Lore v. Truman, 10 Ohio St. R. 45; and Wales v. Lyon, 2 Mich. R. 276, and numerous other cases. The case of Jones, &c. v. Myrick's ex'or and Myrick's ex'ors v. Epes & als., 8 Gratt. 179, is a decision of our own court, and settles the law of this state to be as it is declared to be by decisions of other courts in the cases cited.

That case strikingly resembles this. Both suits were in the same court, and in both of them creditors were seeking enforcement of their respective liens against the property of a common debtor. The suit of Myrick's ex'ors v. Epes & others was brought first, on the 21st of June, 1828, and that of Jones v. Myrick's ex'ors, was brought on the 27th of August of the same year. Myrick was plaintiff in the former, and defendant in the latter, and answered the bill of plaintiffs. The Epes suit, though brought last, was decided first. There was a final decree in it

105 on the 11th *of April, 1834. The appellate court was of opinion that Myrick's judgment lien on the proceeds of the sale of the Dinwiddle land, was paramount to the lien of the schedule creditors, if he had asserted it in the Jones v. Myrick's ex'ors' suit, before there was a final decree in that suit—if he had asserted it in that suit, to which he was a party, before the final decree, while the fund was in the hands of the sheriff, or otherwise in the control of the court. But Judge Baldwin, speaking for the whole court, said, "It was too late, however, at the hearing of the present suit in 1845, to subject the proceeds of the sheriff's sale of the Dinwiddle land, which proceeds were recovered by the schedule creditors by the decree rendered in 1834, in the suit brought by Epes, &c. That decree is an insuperable bar to the pretension now made by the executors of Myrick, who was a party in that suit,

to a recovery against the schedule creditors of the money paid to them, under the authority and by the direction of the decree of 1834. It was a decree not only upon the same matter, the apparent paramount lien and title of the schedule creditors in regard to the Dinwiddie land, which carried with it the negation of a paramount lien or title in all other persons; but it was a recovery of the identical subject, the proceeds of the sale of that land made by the sheriff. Nor was it the less decisive and conclusive (the court further says, that the money was not in the hands of Myrick, but in the hands of the sheriff, who held it subject to the control and decision of the court (of course until disposed of by final decree); nor that Myrick in his answer did not deny the lien or title asserted in the bill, and asserted no lien or title in himself; nor that the present suit was then pending, and the first brought, for it is not the institution of the suit, but the judgment or decree therein, which concludes the rights of the parties. The pendency of the present suit, however, serves to show, if that were material, that Myrick was not ignorant of his own paramount lien

106 upon the *Dinwiddie land, but chose not to insist upon it, proposing and desiring, as would seem from his own bill, to obtain satisfaction of his larger judgment out of his debtor's other lands."

We have recited so much of the opinion of Judge Baldwin that the principle decided by that case might be accurately apprehended, and because his remarks are so apposite to the case in hand, that they might be applied to it by putting the name of the appellant in the place of "Myrick," and receiver or commissioner in the place of "sheriff," and Davis' lands in the place of "Dinwiddie land," except that the Meeks' creditor suit had been determined by a final decree and stricken from the docket long before the second suit was instituted by the appellant, Mrs. Tilson, which is the only suit by which she sought to subject the proceeds of the sales of the Davis lands to the satisfaction of her debt—her first suit, as we have seen, being intended to recover the amount of her debt from Davis' sureties. The Meeks' creditor suit, in which she was a party, was determined by a final decree on the 18th of September, 1875, and stricken from the docket. And her bill to subject the fund appropriated and disposed of by that final decree was not filed until the February rules, 1877. Like Myrick, "by her wilful waiver or gross neglect," she submitted to the pretensions of other creditors of Davis, and so allowed the fund to be appropriated for their benefit, in the language of Judge Baldwin, "by an unreversed and irreversible decree." She has lost her debt by failing to pursue the plain and obvious remedy by which it might have been secured, and this court has not the power to give her relief, however they would be inclined to it if it were in their power. But to do so would be to divest rights which have been long vested, and to overturn the well established principles

of law and equity. The decrees of the court below must therefore be affirmed.

Decree affirmed.

107 *Hanks, &c., v. Price, &c.

July Term, 1879, Wytheville.

1. Landlord and Tenant—Ejectment—Parties.—In an action of ejectment, brought against the person in possession, the landlord of such person may come in and be allowed to defend the action under § 5, ch. 181, Code of 1873, whether the actual relation of *lessor* and *lessee* exists between them or not; and this will be permitted even where the plaintiff and defendant in possession have submitted the matters between them to arbitration, an award made in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him.

2. Same—Implication.—In general, the law will imply a tenancy whenever there is an ownership of land on the one hand and an occupation by possession on the other.

Joseph Price and Julia A., his wife, brought an action of ejectment in the circuit court of Carroll county against Sally Hanks, the person in possession, to recover a certain tract of land. She was the widow of William Hanks, Jr., and merely occupied and cultivated the land by permission of her children, it being no part of her dower. Pending the controversy, the whole matters were referred by the plaintiffs and defendant to arbitration, and the award made in favor of the plaintiffs. This was returned to the court, and a rule was issued against the defendant to show cause, if any she could, why the award should not be entered up as the judgment of the court, when James S. Hanks, Gilbert Hanks, George W. Jones, and Louisa J., his wife, Jonathan L. Hanks 108 Ewell Hanks, *Mary E. Hanks, and W. G. Hanks, the last four infants, by James S. Hanks, their brother and next friend, who were the children of the defendant, and who claimed to be the owners, in fee, of the land, asked leave of the court to be made defendants with their mother, and to be allowed to defend the said action. This was denied by the circuit court, and a judgment rendered in favor of the plaintiffs for the land. Whereupon the said James S. Hanks, and the other children above named of said Sally, applied to a judge of this court for a writ of error; which was awarded.

The other facts are sufficiently stated in the opinion of the court.

Shelton, for the appellants.

Walker, for the appellee.

STAPLES, J. This is an action of ejectment in which the plaintiffs claimed title to the premises in fee. The declaration and notice were served upon the tenant in possession. During the pendency of the action, plaintiffs and the defendant referred all matters of controversy to arbitration. The arbitrators rendered an award in favor of the plaintiffs, and upon its return a rule was

issued against the defendant to show cause why the award should not be entered up as the judgment of the court. Upon the return of the rule, the plaintiffs in error appeared, and asked to be made defendants. The application was refused by the court, and an exception taken.

The defendant, the tenant in possession, is the mother of the plaintiffs in error, and the widow of their father. She claims no interest in the land in controversy, but occupies and cultivates it with the consent of the plaintiffs in error, who claim to be the owners in fee of the premises.

109 *The decision of the circuit court, as is conceded, was based upon the provisions of the fifth section of chapter 131, Code of 1873, which declare "the person actually occupying the premises shall be named defendant in the declaration. If a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in place of his lessee."

It is insisted that under this section the person claiming title can defend only where the occupying tenant is his lessee; and here there was no lease, or contract for a lease, express or implied, but a simple occupancy of the premises by the widow, under the license of the children.

Passing by, for the present, the question of the correctness of this construction of the tenancy, it is obvious that the decision of the circuit judge is based upon a misconception of the meaning of the section already cited. This will be the more apparent from a brief examination of the doctrine of the common law. Long before any statute on the subject, it was the constant practice of the English courts to admit the landlord, or other person under whom the occupying tenant claimed, to come in and defend the action. This privilege was not confined to those who were technically lessors of the tenant in possession, but (to use the language of Mr. Justice Wilmot) was extended "to all those that stood behind him." It was, however, made a question, whether this right of the landlord to defend could be asserted without the consent of the occupying tenant. To remove all difficulty on this point, the English statute was passed empowering the landlord to appear and defend the action with or without the consent of the tenant in possession. The practice of the English courts has been generally followed in those states where the common law prevails. In *Herbert v. Alexander*, 2 Call. 498, decided long anterior to our statute, the right of the landlord to be made defendant was fully recognized by this court.

110 *In a case before Lord Mansfield, he said: "By the words of the statute, the courts admit landlords only to defend, and difficulties had often arisen as to the meaning of the word landlord in the act. He was of opinion that where a person claimed in opposition to the title of the tenant in possession, he can, in no light, be considered as landlord; but where there is privity between them, the defence must be upon the same

bottom, and letting in the person behind can only operate to prevent treachery and collusion." He further said, "It is no answer, that any person affected by the judgment may bring a new ejectment because there is a great difference between being plaintiff and defendant in ejectment." This construction of the statute has been almost universally followed by the American courts. So that the principle of the cases, both at common law and under the statute, is to extend the word "landlord" to all persons whatever whose right or title is connected to or consistent with the possession of the occupying tenant. See *Adams on Ejectment*, 231, and *Tyler on Ejectment*, 448, where the cases are cited; *Fairclaim v. Showtitle*, 3 Burr, 1290-4-5; *Barton Prac.* 355.

A moment's reflection will satisfy any one of the soundness of this construction. Very frequently it is a matter of great difficulty to determine whether the agreement under which the tenant holds is technically a lease or a mere license. The decisions on this subject are numerous and extremely difficult to reconcile. 2 Bing. on Real Prop. 78-9-80.

Still greater difficulties often occur in deciding whether the agreement constitutes the tenant a lessee of the land, or a mere joint tenant of the crops. *Lowe v. Miller*, 3 Gratt. 196, is one of that class of cases in which this court, after much deliberation, held that, under the contract, there was no lease but a mere joint tenancy in the crops raised on the land. 1 Washburn on Real Prop. 367.

111 *It can scarcely be supposed it was ever intended the courts should pass upon difficult questions of this sort before determining whether the real party in interest has the right to be heard in defence of his title and his possession. If, in the case of a lessee, it is proper to receive his lessor as the real defendant, surely the same privilege should be extended to the landlord, whose tenant is a mere licensee or joint tenant of the crops. To suppose that the legislature intended to apply a different rule in these cases is to attribute to them a palpable absurdity. It is very true the statute uses the word "lessee," but it also uses the word "landlord" as its correlative. The word "lessee" was used, not so much to define a particular estate or interest, as to express a relation—that of landlord and tenant, a person holding under and in subordination to the title of another.

This construction of the statute is consistent with justice and sound policy, and is sustained by the authorities.

But if we are wrong in this view, and the interpretation of the statute claimed by the learned counsel for the defendants in error be the correct one, we should still hold the judgment of the circuit court erroneous. We are of opinion the tenant in possession is a lessee under an implied contract of renting. As already stated, she claimed no title to the land in controversy. It was no part of her dower interest. It had no connection with the mansion house and curtilage. The tenant, however, cultivated the land with the tacit permission of the heirs, five of whom

were infants living with her in the mansion house. It is true she neither paid rent nor expressly contracted to do so; but we do not understand that is essential. In general the law will imply a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other, for in all of such cases it will be presumed that the occupant intended to pay for the use of the premises.

112 *Whether such an occupancy amounts to a tenancy from year to year, or a mere tenancy at will, determinable at the pleasure of the owner, must depend upon the circumstances of the case. *Adams on Ejectment*, 102, 103-4, 108; *Taylor's Land and Tenant*, secs. 19, 59; *Tyler on Ejectment*, 206, 212. In the present case the occupying tenant was either a tenant from year to year, or a tenant at will; and whether one or the other, she is to be regarded as a lessee of the premises, according to a literal interpretation of the statute.

It only remains to inquire whether the award precludes the plaintiffs in error from being heard. If the rule of law be as already stated with respect of the right of the real party in interest to appear and defend the action, it is vain to say the tenant can do any act to defeat or impair that right. An arbitration is as ineffectual for that purpose as an attempted surrender or attornment to another. The award may bind the tenant, but it cannot bind the landlord, who is no party to the agreement to refer. As to him, it is a nullity, and all his rights remain precisely as if no award had been made.

The books abound with cases in which, even after judgment against the casual ejector, the real party in interest has been let in to defend the action. In some instances this has been done after judgment signed and a writ of possession executed. *Tyler on Ejectment*, and cases cited, 451, 2-3; *Doe on De of Mullarky v. Roe*, 39 Eng. C. L. 194; *Adams on Ejectment*, 239, and notes; *Jackson v. Stiles*, 4 John. R. 492. It is true the casual ejector was always a fictitious person having no title, the tenant in possession being the real party concerned. And it was for the reason that the latter was the real party in interest that the courts permitted him to make defence. As was said by Lord Mansfield, the plaintiff ought not to recover without a trial with the person interested in the question and affected by the judgment. The

113 like considerations *ought to control at the present day where the action is against the occupying tenant who asserts no title in himself, but claims in subordination to the title of another.

In the case before us, at the time the plaintiffs in error appeared, no judgment had been entered on the award, and there was no difficulty in the way of a proper defence on the title. And even though the award had been entered up as the judgment of the court, they might have made defence at any time during the term.

It has been asked, however, upon what ground are the plaintiffs in error permitted to enter and oppose an award which does not

affect their interests? So far as the award itself is concerned, the plaintiffs in error may not be interested in it, but they are concerned that it shall not be used for the purpose of giving the plaintiff in the action an undue advantage over them. If they are not permitted to defend by reason of the award, a judgment will of course go against the tenant in possession, a writ of possession immediately issued, by which the plaintiffs in error will be ousted from the possession and their adversaries let in. How will they regain that possession except by a new ejectment, in which the relative position of the parties will be shifted and the plaintiffs required to show title? If this be the rule of law, every landlord is at the mercy of a fraudulent or ignorant tenant, who may be persuaded or deceived into an arbitration.

For these reasons we are of opinion that the circuit court erred in refusing to permit the plaintiffs in error to be made defendants in place of the tenant in possession. The judgment must be reversed and the cause remanded to the circuit court with instructions to allow the plaintiffs in error to defend the action if they shall so desire.

The judgment was as follows:

114 The court is of opinion, for the reason stated in writing *and filed with the record, that the circuit court erred in overruling the motion of the plaintiffs in error to enter themselves as defendants in the cause, and to file an answer to the rule then to be awarded. It is therefore insisted that both the judgment refusing said motion and the judgment in favor of the defendants in error for the land in controversy be reversed and annulled; the defendants pay, &c.

It is further considered by the court that the cause be remanded to the said circuit court for further proceedings; and if the said plaintiffs in error again apply to become defendants in the action and to file said answer, they shall be permitted to do so. And all further action upon said award is to await the termination of the cause as between the plaintiffs in error and the defendants in error.

Judgment reversed.

115

**Carter v. Hale & al.*

Same v. Watson's Adm'r.

July Term, 1879. Wytheville.

Witnesses.—In an action of debt by *Againt H and I.* the surviving obligors in the bond sued on, the defendants plead set off, and file a list of bonds de-

***Witnesses.**—See also *Hall v. Rixey*, 84 Va. 790; 4 Min. Inst. (2nd Ed.) 767 *et seq*; *Hoge v. Turner*, 96 Va. 681; *Brock v. Brock*, 92 Va. 173.

In *Hall v. Rixey*, *supra*, *Lewis, P.*, in delivering the opinion of the court said: "In *Carter v. Hale*, 32 Gratt., 115, it was held, upon the authority of previous decisions, that in an action upon a bond, 'the subject of investigation,' within the meaning of the statute, is the bond, and that the test of competency of a party is not the fact to which such party is called to testify, but the contract or other transaction

livered by H to C, which the plea states C received and undertook to collect and apply to the payment of the bond, and that C had collected the debts—**Held:** That H was not a competent witness, at the time of the trial in April, 1876, to prove what passed between himself and C in relation to said set offs. And the law is the same in an action on the same bond against the administrator of the deceased obligor.

These were actions of debt in the circuit court of Carroll county, both of them founded on the same bond. One was against Fielden L. Hale, the principal, and Ira B. Coltrane, one of the sureties in a bond to the plaintiff, Thomas W. Carter, for \$3,200, dated the 10th of October, 1857, and payable in two years, executed by said Hale and Coltrane and John Watson, another surety. Watson being dead, the second action was against his administrator.

The pleadings and issues in both cases were the same, and were "payments" and a special plea with a list of set offs. These consisted of four notes amounting to \$3,309.43, which the plea alleged had been transferred and delivered by Hale to the plaintiff before the bond became due, which the plaintiff accepted and undertook to collect and apply the proceeds to the payment of the bond sued upon; and that he had collected of these notes enough to discharge the bond.

116 *The causes came on to be tried on the 28th of April, 1876, when the defendants, to sustain the issues on their part, offered the defendant Hale as a witness. The plaintiff objected to his competency on the ground that Walton, one of the obligors in the bond, being dead, the plaintiff was incompetent to testify, and, therefore, the other parties to the bond were incompetent. But the court overruled the objection, and admitted the witness to testify; holding that while said witness was incompetent to testify as to the execution of the bond, he was a competent witness to prove any subsequent transactions had between himself and the plaintiff involved in the pleas upon the issues joined. And the plaintiff excepted.

Hale having been admitted as a witness, he was requested by the counsel for the defendants to "state what transactions, if any, took

which is the subject of investigation, and that if such contract or other transaction was with a person who has since died, or for any legal cause has become incompetent to testify, the other party is not admitted as a witness at all, and cannot testify to any fact in the case. That was an action upon a bond, to which the pleas were payment and set-offs. One of the obligors being dead, the plaintiff was incompetent to testify, and the question was, whether a surviving obligor, one of the defendants, was a competent witness to sustain the issues on the part of the defendants. The circuit court held that he was, and permitted him to testify, holding that while he was incompetent to testify as to the execution of the bond, he was a competent witness to prove any subsequent transactions had between himself and the plaintiff involved in the issues joined. But this court held otherwise, and reversed the judgment, referring to *Mason v. Wood*, 27 Gratt., 783; and *Grigsby v. Simpson*, 2d Id., 343."

place between the plaintiff, Thomas W. Carter, and yourself, after the bond sued on was executed, in relation to the payment or satisfaction thereof." To which question and to the witness answering the same, the plaintiff objected, on the ground of the incompetency of the witness; but the court overruled the objection and permitted the witness to answer. The answer referred to the transfer to the plaintiff of the notes mentioned in the special plea, and what had passed after the transfer between himself and the plaintiff. The plaintiff excepted to the ruling of the court permitting said question and answer.

The jury found verdicts for the plaintiff in each case for \$48.88, and the court, overruling a motion for a new trial, rendered judgments in accordance with the verdict. And Carter thereupon obtained writs of error in both cases.

Robert Crockett, for the appellant.

J. A. Walker, for the appellees.

BURKS, J., delivered the opinion of the court.

117 *These two causes are heard together. The same questions precisely are presented for decision in each. Only one of those questions need be considered and decided, and that is, whether, under the law as it stood on the 28th day of April, 1876 (the date of trial in the court below), in an action of debt instituted on a joint and several bond by the obligee against the surviving obligors, or against the personal representative of a deceased obligor, any one of the surviving obligors was a competent witness on behalf of the defendants against the plaintiff.

Upon the authority of several recent decisions of this court, this question must be resolved in the negative.

In *Grigsby & others v. Simpson*, ass'ee &c., 28 Gratt. 348, the action was debt on bond, brought by and in the name of the assignee of the deceased obligee against the surviving obligors. The pleas were "payment" and "usury." Two of the obligors offered to testify on the trial on behalf of themselves and their codefendants, and it was held by the court of trial and by this court, that they were incompetent so to testify. This court decided that the bond sued on was the contract, which was "the subject of investigation," within the meaning of the statute; and the principle of the decision is, that the test of competency of a party under the statute is not the fact to which such party is called to testify, but the contract or other transaction, which is the subject of investigation, and if such contract or other transaction was with a person who has since died, become insane, or incompetent to testify by reason of infamy, or other legal cause, "the other party is not admitted as a witness at all, and cannot testify to any fact in the case."

The same principle had been previously affirmed, in substance, in *Mason & others v. Wood*, 27 Gratt. 783. There, as in one of the cases now before us, the action was on a bond by the obligee against surviving obligors.

118 The defence was, that the consideration of the bond was the price *of an animal warranted sound, &c., and that there was a breach of the warranty. On the trial, the plaintiffs having introduced witnesses who testified to conversations held with two of the obligors long subsequent to the purchase of the animal for the price of which the bond was given, tending by implication to disprove the alleged breach of warranty, the defendants, in order to rebut that testimony, offered the two obligors, with whom the alleged conversations were had, as witnesses to prove what those conversations were. The circuit court decided, that these obligors were incompetent to testify in the case on behalf of themselves and the other defendants, and excluded them as witnesses, and this decision was affirmed by this court.

Judge Anderson, in the opinion of the court delivered by him, after citing the statute (the same which applies to the cases in judgment), Code of 1873, ch. 172, § 21, says: "By the express terms of the above recited clause of this section, Funsten [co-obligor], one of the parties to the contract, being dead, Wood [obligee], the adverse party, is made incompetent to testify in his own favor, or in favor of any other party having an interest adverse to Funsten. And Wood being incompetent to testify, can either of the parties adverse to him be admitted to testify? The language of the statute seems to be explicit. When one of the original parties to the contract is dead, 'or incompetent to testify by reason of infamy, or any other legal cause, the other party shall not be admitted to testify in his own favor,' &c. The legislature may have intended to limit the incompetency to testify to transactions between the living and deceased parties, or to the acts and declarations of the deceased party, and not to have otherwise restricted his general competency, as given by the twenty-first section; but if so intended, it is not so expressed. By the terms and the express letter of the law, parties in such cases are declared to be incompetent to testify

119 in their own favor, &c. There *is no limitation of the incompetency as to the subject matter of the testimony. It is general and unrestricted. They are declared to be incompetent to testify in the cause in their own favor. It might have been reasonable in the legislature to have restricted the incompetency to such matters as the other party, if not incapacitated, might be qualified to speak to, as acts and declarations imputed to him, or transactions in which he acted a part, and left untouched his competency as to other matters; and such restriction might comport with the spirit of the act; but the legislature has not so said, and the court is not disposed to extend the operation of the act beyond its terms and express provisions; and the incompetency of parties to testify in their favor, &c., in such cases being declared by the act in express terms, they must be held incompetent to testify to any matter bearing upon the issue in the cause."

In the opinion the case of *Field v. Brown* and al., 24 Gratt. 74, is adverted to and ex-

plained, so far as it relates to the question of the competency of parties to testify in their own behalf, when the adverse parties are incompetent.

Whether at common law a witness is competent to give evidence in a cause for one purpose only, and if he is competent at all, whether he may not be examined upon any matter in the record, see *Stephoe v. Read*, for, &c., 19 Gratt. 1.

Since the trial of these causes in the court below, the statute in force at the time of trial has been amended by the legislature, and as amended, it is alleged that the incompetency of the parties to testify has been removed. Acts of 1876-7, pp. 184, 185; lb. pp. 265, 266.

The law as it stood at the time of trial is the law by which this court must determine, whether, in the rulings then made and judgments recorded, there was any error to the prejudice of the plaintiff. See *Crawford v. Halstead & Putnam*, 20 Gratt. 211.

120 *Tested by that law, as expounded by this court in the decisions before cited, there was such error, and the judgments must therefore be severally reversed, the verdicts set aside, and the causes remanded for new trials therein respectively.

The judgment in each case was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous; therefore, it is considered and ordered, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendants in error his costs by him expended in the prosecution of his writ of error and superseas aforesaid here; and it is further considered and ordered, that the verdict of the jury be set aside, and that this cause be remanded to the said circuit court for a new trial and other proceedings to be had therein, in order to a final judgment, in conformity with this judgment and the opinion therein expressed; which is ordered to be certified to the circuit court of Carroll county.

Judgments reversed.

121

**Compton v. Tabor.*

July Term, 1879, Wytheville.

Practice in Chancery.—Upon a bill filed by a judgment creditor to subject the land of his debtor to satisfy his debt, the court, in order to ascertain whether the rents of the land will pay the debt in five years, should generally direct the commissioner to offer it first for one year, and if that will not pay the debt, then for two, and so on, if necessary, up to five years, closing the contract whenever the rents will pay the debt. The terms of payment of the rent to be fixed by the court, looking to the kind of property and the usage of the

**Practice in Chancery.*—This case was followed in *Daingerfield et al. v. Smith et al.*, 38 Va. 81.

country. If it will not rent for enough in five years, the commissioner should report the fact to the court.

This was a suit in equity in the circuit court of Tazewell county, brought in October, 1878, by James H. Tabor against Wm. E. Compton and J. M. Davis, to subject their lands to satisfy a judgment he had recovered against them for \$510, with interest from the 17th of May, 1877, and costs. The judgment was founded on a bond in which Compton was the principal and Davis his surety.

The bill states the defendant Compton owned three parcels of land, one a mill property, and one tract of sixty, and another of one hundred and ten acres. It appeared also that Davis owned several small tracts.

Compton answered the bill and insisted that the rents of the mill would pay off the plaintiff's debt in five years; and if the mill did not rent for enough to discharge the judgment in five years, he asked that

122 the tract of sixty *acres might be rented. He claimed his homestead in the one hundred and ten acre tract, but not so as to affect his surety Davis; but he was satisfied the rents of the land and mill property before named would in five years meet the demand of the plaintiff.

The cause came on to be heard on the 19th of November, 1878, when the court made a decree in favor of the plaintiff for the amount of his judgment, and if the same was not paid by the 1st of December, 1878, then S. C. Graham, appointed a commissioner for the purpose, will rent the land in the bill mentioned belonging to the defendant, Wm. E. Compton, provided the rents and profits thereof will satisfy this decree in five years. Said commissioner will rent said land on a credit of six, twelve, eighteen and twenty-four months, equal installments, except for cash enough to pay costs of suit and expenses of sale. He will rent only so much of said land as is necessary to satisfy this decree, and the order of renting shall be as asked for in the answer of the defendant, Wm. E. Compton, as follows, viz:

First, the property mentioned in the bill and proceedings as the mill property. Should it not satisfy the decree, then said commissioner will next rent the 60 acres, and last the 110 acres. Said commissioner will rent said land at the front door of the courthouse of Tazewell county, on some court day held for said county, after having advertised the time, place and terms of renting for 30 days prior thereto, by written notice posted on the front door of said courthouse, and at St. Clair's store, near the premises. Said commissioner will take bonds with good security of the lessee, payable to himself as commissioner, bearing interest from the day the lessee may be placed in possession of the premises rented.

The term for which said land shall be rented shall commence the day the lessee may be placed in possession of the premises.

123 *And thereupon Compton applied to a judge of this court for an appeal, which was awarded.

Dinwiddie and Kilgore, for the appellant. A. J. May and S. C. Graham, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that under the statute (chap. 182, § 9, Code of 1873), which authorizes the sale of a judgment debtor's land to satisfy the judgment only in case the rents and profits thereof will not satisfy the debt and costs in five years, it is entirely competent for the court to ascertain whether they will or not, to cause the same to be offered for rent. The terms of renting, whether the rents shall be payable annually or at shorter periods, must be determined by the court before whom the cause is depending, in the exercise of a sound discretion, under all the circumstances, as to the character of the property, its locality, and the usage of the country, &c. For some species of property, and in some localities, the rents may be payable monthly, or quarterly, or semi-annually. For other species, or in other localities, the usage may be to pay annually—as land, for instance, which yields its products, for the most part, annually. The statute does not prescribe the terms, and it would not be practicable or judicious to prescribe any inflexible rule.

We think, in general, it would be best to offer the land for rent first for one year, and if it did not rent for enough to pay the debt, then to offer it for two years, and if it did not yield enough, then to offer it for three years; and so on until it was offered for five years, if necessary to raise enough to pay the debt—and to rent for no longer period than was necessary for that purpose. If it rents

124 for enough to pay the debt in five years or less, then the commissioner *should close the contract of renting. If not, he should report the fact to the court, to the end that the cause might be further proceeded with.

We understand the decree in this case as intending to direct and authorize the commissioner to offer the lands for rent for a term of five years, payable semi-annually—first, the mill property; then the sixty acres, and last the one hundred and ten acres; which is favorable to the debtor. It was within the discretion of the court to make the rents payable semi-annually; and there is nothing in the record to show that it abused its discretion. The first to be offered was a mill property, which, unlike the soil yielding its products annually, may be presumed to yield its returns semi-annually, or oftener. And although the rents for the sixty acres and the one hundred and ten acres, should it be necessary to offer them, are made payable semi-annually, the court cannot disturb the decree on that ground, which, upon the whole, as we construe it, is very favorable to the debtor.

But the decree, whilst it expressly authorizes the commissioner to rent the lands, if the rents will pay the debt in five years, probably upon the assumption that the rent for two years would pay the debt, does not prescribe, if they do not, how the lands shall be rented

for the remainder of the five years, or until the rents are sufficient to pay the debt; and in this respect it may be amended, and the omission supplied, by directing that if the rents of said three properties for two years should not be sufficient for that purpose, the commissioner shall offer them for three years, in the order of renting prescribed by the decree for two years, and on the same terms, the rents to be payable semi-annually; and then for four years, if the rents for three years be not sufficient; and finally, for five years, if the rents offered for four years be not sufficient to pay the debt—in which is included interest and costs. And if the rents for five years offered are not sufficient,

125 to report the fact to the court for further proceedings to be had in the cause.

The court is of opinion, therefore, with the foregoing interpretation of the decree, which is declared to be its true construction, and, as amended, in the manner and measure hereinbefore indicated, to affirm the same.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court, rightly construed, authorizes the commissioner to rent the lands mentioned in said decree for five years, if necessary to satisfy the appellee's judgment and the costs, and they can be rented for enough for that purpose, but omits to prescribe the terms for which they shall be rented for three, four or five years, as may be necessary, in case the rents bid for two years, payable semi-annually, should not be sufficient for the purpose aforesaid, which omission can be supplied by this court, and the decree amended, so as to require the commissioner, if the rent bid for two years should be insufficient for the purpose aforesaid, to offer the lands for rent for three years in the order of renting, and upon the terms of payment semi-annually prescribed by the decree for two years; and if the rents bid for three years be insufficient for the purpose aforesaid, that he offer the lands for four years, in the same order of renting and on the same terms; and if the rents bid for a term of four years be insufficient, that he offer them for five years in the same order of renting and on the same terms; and if at either offering the rents bid be sufficient to satisfy the judgment and the costs of this proceeding, that he make no further offering, and close the contract of rent. But if the rents bid for a term of five years be sufficient to satisfy the judgment and costs aforesaid, that he report the fact to the court for further proceedings to be had in the cause as the court shall determine to be right and proper. It is therefore adjudged, ordered and decreed that the decree aforesaid, as thus construed and amended, be affirmed, and that the appellant pay to the appellee his costs expended in defending the appeal here; and the cause is remanded to the said circuit court for further proceedings to be had therein, in conformity with this order and the principles declared in the opinion filed in the record.

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Decree amended and affirmed.

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*Grubbs v. Wysors.

July Term, 1870, Wytheville.

G sold a tract of land to W. Jr., the purchase money to be paid in three equal annual instalments, and G retaining the title until the whole was paid. For the first instalment W. Jr., executed a negotiable note with W. Sr., as surety, payable at one year, and he gave his own notes at two and three years for the rest of the purchase money. G assigned the note for the first payment to M, and M assigned it to H, and it was paid after maturity and protest by W. Sr., the surety. On a bill filed by W. Sr., to be subrogated to the lien rights of G, and to be paid out of the proceeds of the sale of the land before the two bonds given for the second and third instalments held by G, were paid—HELD:

1. *Subrogation of Surety.*—While the assignment of the note for the first payment by G carried with it to his assignee so much of the lien on the land as was necessary to secure the same, and, as between G and the assignee, gave the latter a prior lien; these equities of the parties *inter se* are not available to the surety, W. Sr., by subrogation in a case like this, where the rights of G, the creditor, would be impaired thereby, and therefore the lien of W. Sr., the surety, must be postponed to that of G, the vendor.

2. *Same.*—While a surety who pays a debt of his principal will ordinarily be subrogated to all of the lien rights of the creditor, when the latter has no longer occasion to hold them for his own protection, equity will never displace the creditor to his prejudice merely to give the surety a better footing.

On the 5th of May, 1874, Frank S. Grubb sold to George W. Wysor, Jr., a tract of land for \$3,199, payable in three equal annual installments. *In the first installment Wysor, Jr., executed a negotiable note, with his father, George W. Wysor, Sr., as surety, payable twelve months after date, and for the other two installments executed his own bonds, payable at two and three years; the title to the whole land was retained by the vendor to secure the purchase money. The note for the first payment was assigned by the payee, Grubb, before maturity, to E. McCormick, and by him endorsed to Hurst, Purnell & Co., and, after protest at maturity, paid to the holder by Wysor, Sr., the surety. Wysor, Sr., then filed his bill in the circuit court of Carroll county against Wysor, Jr.,

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**Implied Assignment of Security.*—The doctrine involved in the holding stated in the first headnote, that the assignment of the note carried with it so much of the lien on the land as was necessary to secure the note, is sustained in *Gregg v. Sloan et al.*, 76 Va. 499. See also 2 Min. Inst. (4th Ed.) 382 *et seq.*

In *James v. Burbridge*, 38 W. Va. 376, and *Tringle v. Fisher*, 20 W. Va. 506, the principal case was cited in support of the proposition that an assignment of a debt carried with it the lien.

†*Subrogation of Surety.*—The right of subrogation, even in favor of sureties, is never enforced to the prejudice of the creditor, whose rights and remedies are sought to be used. *Sherman's Adm'r v. Shaver et al.*, 75 Va. 1. See also 3 Min. Inst. (2d Ed.) 417; 24 Am. & Eng. Ency. (1st Ed.) 200; this rule was held not applicable in *Brighthouse Ry. Co. v. Rogers et etc.*, 76 Va. 443.

and Grubb, claiming that having paid said note for the first installment of the purchase money of said land as surety for his son, Wysor, Jr., who has no other property than his interest in said land, he is entitled to be subrogated to the lien rights of Grubb, the vendor, and to be paid out of the proceeds of the sale of said land before Grubb should be paid the balance of the purchase money, and asking that a sale of said land should be directed for this purpose. A decree to affect this having been rendered by the circuit court of Carroll county, Grubb appealed therefrom to the court of appeals.

Crockett & Blair, for the appellant.
Walker, for the appellee.

BURKS, J., delivered the opinion of the court.

That the negotiable note of June 1, 1874, was given for the first installment of purchase money for the tract of land sold by the appellant, Grubb, to the appellee, George W. Wysor, Jr.—that the appellee, George W.

Wysor, Sr., was surety for the latter on said note—that the note was assigned by Grubb, the payee, to McCormick, and by the latter endorsed to Hurst, Purnell & Co., and after protest at maturity for non-payment, was paid to the holder by the surety, are facts not questioned in this case.

The averments in Grubb's answer to the bill, that the note was paid by the complainant, not as surety, but on his own account, or if paid by him as surety, that he had received satisfaction from his principal for the amount so paid, are affirmative statements and not supported by the proof. So that the only question left for decision by this court is, whether the surety is entitled to the substitution and priority granted him by the decree of October 12, 1877.

The subrogation of the surety, for indemnity, on payment of the debt of his principal, to all the rights, remedies and securities of the creditor against the principal for the debt, is a familiar doctrine of courts of chancery everywhere. It is founded, it is said, not upon contract, but upon a principle of natural equity and justice. "It is a mode," observes Judge Strong, "which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. To effect this, the latter is allowed to take the place of the creditor, and make use of all the creditor's securities as if they were his own." *McCormick v. Irwin*, 11 Casey, 111, 117.

But this principle has no application where its enforcement would be unjust and inequitable. It may be invoked for indemnity, and sometimes, and on certain conditions, for exoneration, by a surety against his principal, but not in a case where it would operate to the prejudice of the creditor. For instance, it has been held by one, whose judgments always command, as they deserve, the highest respect, that the surety, upon paying the debt, is entitled to all the securities held by the creditor, "provided the creditor has no lien upon them or right to make them

to enforce the payment of a debt different from that which the surety has paid. But if the creditor has such a right, and one arising out of the transaction itself, of which the suretyship forms a part, then the right of the surety to the benefit of the securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satisfied." *Sir John Romilly, M. R., in Farebrother v. Wodenhouse*, 23 Reav. R. 18, cited in *Brandt on Suretyship*, § 279.

The principle here enunciated would apply, as it seems to us, with equal if not greater force, to a case where the creditor has a security for an entire debt, payable in installments, for one only of which the surety is personally bound. To allow the surety, on payment of this installment, to have the benefit of the security, which was provided for the entire debt, and postpone the creditor until the surety is indemnified, would be, in effect, in a case where the security is insufficient to pay the whole debt, to require the creditor to indemnify, instead of the principal debtor; for, in the case supposed, the creditor has the prior, subsisting paramount right to resort to the security until his entire debt is satisfied.

Such is the case in judgment. Grubb, by written contract, stipulated to sell his tract of land to Wysor (the younger) at the price of \$3,199, payable in three equal annual interest-bearing installments, and expressly retained the title until all the purchase money should be paid. One month thereafter, the negotiable note was taken for the installment first to be paid. The land, no doubt, was deemed inadequate security for the payment of the price agreed upon, and the object of the note was to strengthen the security. The land stood as security for the entire purchase money, and the note as additional security for one installment. If the

view of the circuit court prevails, what was intended as further security amounts practically to no security whatever; for, by substitution, as applied in the first decree, and the priority therein given to the surety, and by the sale under that decree, the whole tract of land has been taken to indemnify the surety for the payment of the note, and the creditor is left without any security for the two-thirds of the purchase money due him and unpaid. This cannot be equity. The surety will be permitted to occupy the place of the creditor, when the latter has no longer occasion to hold it for his own protection, but equity will never displace him, to his prejudice, merely to give the surety a better footing.

The assignment by Grubb carried with it to his assignee so much of the lien on the land as was necessary to secure the payment of the note assigned, and, as between Grubb and his assignee, a prior right to satisfaction out of the proceeds of the sale. Such is the effect of the decisions of this court in *McClintic v. Wise's adm'r's* and others, 25 Gratt. 448, and *Gordon v. Fitzhugh* and others, 27 Gratt. 835. But these decisions only settle the rights and

130 *available against the principal debtor.

priorities, growing out of assignment, between the original assignor and assignee, and among successive assignees of debts having a common security. These equities of the parties inter sese are not available to the surety by subrogation in a case like the present, where the rights of the creditor will be impaired thereby. On the contrary, the case presented is one of which the doctrine of marshaling of securities for the benefit of the creditor has application. If the assignee, holding the note unpaid, had filed his bill to have satisfaction out of the land, as he held two securities and the vendor only one, equity would either have required him in the first instance to resort to the security of the note before coming upon the land, or if permitted to obtain satisfaction out of the land, and that proved insufficient to pay both debts,

he would have been required to turn over the note to the vendor as a substituting security for the re-payment, as far as necessary, of what had been taken by the assignee out of the land. It is apparent, therefore, that payment of the note by the surety could give him no equity to be let in upon the land, until the vendor's debt has been fully paid.

The land was sold under the decree of October 12, 1877, and purchased by the surety at a price not quite sufficient to indemnify him for the amount he paid for his principal. It appears by the report of the commissioner, that the sale was made on the 20th day of May, 1878. Grubb excepted to the report, on the ground that the land did not sell for its value, and he made an upset bid of \$1,500, and asked a day to make good his bid. The decree of August 8, 1878, gives him sixty days to make good his bid in the mode prescribed by the decree, and if the terms should be complied with, orders a resale of the land at the upset bid; if the terms should not be complied with, it orders the report to stand confirmed.

The decree of October 12, 1877, must be reversed so far as it gives priority to the appellee, George W. Wysor, Sr. It is not otherwise erroneous, as the said Wysor is entitled, by substitution, to a lien on the land subordinate to the paramount lien of the appellant, and he had the right to bring his bill to enforce his lien subject to the superior rights of the appellant. The sale of the land was therefore properly ordered; and if it had been error to order the sale, and for such error the decree should be wholly reversed, if the conditional confirmation of the report by the decree of August 8, 1878, has become absolute, such reversal would not, under the statute, affect the rights of the purchaser, as the sale was made six months from the date of the decree ordering it. Code of 1873, ch. 174, § 11.

The cause will be remanded to the circuit court, with directions to order an account of the purchase money, yet unpaid and owing to the appellant, and when the amount thereof has been ascertained, if the conditional confirmation of the sale by the decree of the 8th of August, 1878, has become absolute, to direct the payment of

said amount out of the proceeds of said sale, when collected, and after said amount has been fully paid, to apply the residue, if any, of said proceeds towards the satisfaction of the sum recovered by the said George W. Wysor, Sr., against the said George W. Wysor, Jr., under the decree of October 12, 1877; and if the confirmation of the sale by the decree of August 8, 1878, has not become absolute, the said circuit court will be further directed to cause the land to be resold, and to apply the proceeds of the resale in the order and in the manner hereinbefore indicated.

The decree was as follows:

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that while the appellee, George W. Wysor, Sr., is entitled, by substitution, to a lien on the tract of land in the bill mentioned for the amount of money paid by him as surety for the appellee, George W. Wysor, Jr., yet that such lien is subordinate to the lien of the appellant on said land for the balance of purchase money owing by said George W. Wysor, Jr., to the appellant, under the written contract between them, bearing date on the 5th day of May, 1874, set out in the record, and that so much of the decree aforesaid of the said circuit court, rendered on the 12th day of October, 1877, as adjudges, orders and decrees that the said lien of the said George W. Wysor, Sr., is entitled to priority over the said lien of the appellant for the unpaid balance of purchase money owing to the appellant, is erroneous.

*And the court is further of opinion that there is no error in the decree aforesaid of said circuit court rendered on the 8th day of August, 1878. Therefore, it is decreed and ordered that the said decree of the 8th of August, 1878, be affirmed, and that so much of the said decree of the 12th of Oct., 1877, as is hereinbefore declared to be erroneous, be reversed and annulled, and the residue thereof be affirmed, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal aforesaid here. And this cause is remanded to the said circuit court with directions to order an account of the purchase money owing to the appellant by the said George W. Wysor, Jr., under the contract aforesaid between them; and when the amount thereof has been ascertained, if the conditional confirmation of the sale by the said decree of the 8th of August, 1878, has become absolute, to order the payment of the said amount to the appellant out of the proceeds of said sale, when collected, and after such payment to apply the residue, if any, of said proceeds towards the satisfaction of the sum recovered by the said George W. Wysor, Sr., against the said George W. Wysor, Jr., by the said decree of the 12th day of October, 1877; and, if the conditional confirmation of the sale by the said decree of the 8th of August, 1878, has not become absolute, the said circuit court is further

directed to cause the said land to be resold and apply the proceeds of such resale in the same manner and in the same order as hereinbefore indicated; and the said circuit court shall take such further proceedings in said cause as may be necessary or proper, in order to a final decree, in conformity with the opinion and directions hereinbefore expressed and given: and all of which is ordered to be certified to the said circuit court of Carroll county.

Decree reversed.

135 *Brown v. Taylor's Committee.

July Term, 1879, Wytheville.

Bonds—Ownership.*—The mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority express or implied, from the owner to collect the same.

The facts are sufficiently stated in the opinion of Christian, J.

Jos. Stras, Jr., and S. W. Williams, for the appellant.

S. C. Graham, for the appellee.

CHRISTIAN, J. The record in this case presents a single question. The facts are few and simple and may be stated as follows: W. W. Brown purchased of D. H. Gillespie in April, 1860, a tract of land, and after paying a certain amount in cash, executed his bond for \$540, due and payable on the 1st day of September, 1861 that being the balance of the purchase money. This bond was assigned by Gillespie to S. S. Taylor for value. Taylor left the State of Virginia in the early part of the year 1860, and left the bond in the hands of S. L. Graham, who executed and delivered the following paper: "S. S. Taylor left in my hands a note on Wm. W. Brown for \$540, executed to D. H. Gillespie, due the 1st day of September, 1861; which I will hold subject to the order of
136 *S. S. Taylor," Signed S. L. Graham, and dated April 20th, 1860.

The record further shows, that on the 29th Dec., 1862, Brown paid over to Graham the sum of \$440 in Confederate money, which was received by Graham, credited on the bond, and deposited by him in the Northwestern Bank to the credit of Taylor. Taylor afterwards became a lunatic. His committee, the sheriff of Tazewell county, filed his bill in the circuit court of said county, in which he set forth the above facts, and also alleged the insolvency of Graham, and insisted that the payment of \$440 in Confederate money was without authority; that Graham was the mere custodian of the bond, and had no authority to collect the same, and that Brown paid the same at his peril, and was still bound to the plaintiff for the whole amount of said bond; and the bill prayed that the credit on said bond might be cancelled and annulled, and that Brown might be required to pay said bond, principal and interest, to the plaintiff, the committee of Taylor.

*Bonds.—This case was cited and approved in *Dally's Ex'or v. Warren et al.*, 80 Va. 523.

Brown and Graham were made parties defendant to this bill. Both answered the bill, and their depositions were taken and read in the cause. And the cause coming on to be heard on the bill and answers and depositions of witnesses, before the circuit court of Tazewell, that court, "being of opinion that the defendant, S. L. Graham, had no power or authority to receive the sum of \$440 of W. W. Brown, as alleged to have been paid by said Brown to him, and credited on the bond filed, with the answer of defendant, Graham," adjudged, ordered and decreed, "that the said credit be annulled, and that the complainant recover of the defendant (Brown) the full amount of said bond, to wit, the sum of \$540, with interest from the 10th April, 1865 (the court abating the interest from the maturity of said bond to the 10th April, 1865, the plaintiff consenting to said abatement); and it appearing to
137 the *court that the sum is a lien upon the land of said Brown, it was further ordered, that unless said Brown should pay and satisfy the decree before the—day of October, 1878, then the said land should be sold by commissioners appointed for that purpose, according to the terms specified in said decree.

To this decree, an appeal was allowed by one of the judges of this court.

The court is of opinion that there is no error in the decree of the circuit court.

Graham was neither the attorney nor the general agent of Taylor. He had only a special authority as special agent, constituted by the very terms of the paper executed by him, and that was simply "to hold the bond subject to the order" of Taylor. As between Taylor and Graham, there can be no question as to the special agency and special authority conferred. As to third parties, it is true, that this special authority might not be known, yet in order to relieve Brown of the payment of this debt, it must be held that the mere possession of the bond carried with it the authority to collect it. It is upon this theory, and this alone, that the appellant can succeed here. Therefore the only question we have to determine is, Did the mere possession of the bond in the hands of Graham authorize him to receive the money of Brown, and does the payment by Brown discharge him from liability pro tanto? We think not. We do not mean to say that there may not be circumstances connected with its mere possession which will show apparent authority to collect and justify payment; but no such circumstances relied upon are sufficient to take the case out of the general doctrines herein asserted. The possession of certain kinds of commercial paper, such as negotiable notes and bills of exchange, payable to order, and which pass from hand to hand by delivery, and are used as money in the multifarious transactions of trade and commerce, carries
138 with it the *authority to collect by the holder. This grows out of the necessities of commerce and the usages of trade. But the mere possession of a bond or other documentary evidence of debt, is not such an evidence of property as will justify a pay-

ment to the holder without an authority, express or implied, from the true owner. To hold otherwise, would produce mischiefs without remedy. Bonds and other documentary evidence of debt, are often pledged as collaterals or held as security. They are often lost or stolen. It will not do, therefore, to say that a party having possession of such a paper, no matter how obtained, or for what purpose held, may collect it without authority, either express or implied, from the true owner. Indeed, at common law, the property in these choses in action could not pass even where they were actually assigned and delivered. Under our law, assignments are permitted, and sometimes a transfer without assignment is held to pass the right of property. But to such transfer two things are necessary: 1. Consideration; and 2. The act of transfer. It is not a mere delivery of possession, without intent to pass the property, that constitutes the transfer. There must be an intent to transfer, and if there is no such intent, the holder has no right of property. He has no right to sell, nor has he a right to receive payment from the debtor, unless by authority express or implied.

Every consideration that applies the principle of caveat emptor to the case of sales of property by one having possession without title, has additional force in the case of bonds and other choses in action; and accordingly the courts have uniformly decided that as to them the rule caveat emptor applies. See opinion of Tucker, P., in *Wilkinson & Co. v. Holloway*, 7 Leigh, 277.

The court has approved the doctrine of caveat emptor in a very recent case, and one which was much stronger than the one at bar. It was held in *Hess, &c. v. Rader and wife*, 26 Gratt. 746, and *Lloyd v. Erwin's adm'r*, 29 *Gratt. 598, that the payment of a bond given for the purchase of land, made by a commissioner of a chancery court, and paid by the purchaser to the commissioner named in the decree, was a void payment, because the commissioner had not given the bond required by the court, and was therefore without authority to collect the bond of the purchaser in his hands.

Upon the principles herein declared, and in accordance with the decisions of this court, it is plain that there is no error in the decree of the circuit court of Taxewell county, and that the same be affirmed.

Anderson and Rurks, J's, concurred in the opinion of Christian J.

STAPLES, J., concurred in the result, but not in all the reasoning.

Decree affirmed.

140 *St. John's Ex'ors v. Alderson.

July Term, 1879, Wytheville.

1. **New Trial—Newly Discovered Evidence.**—To obtain a new trial on the ground of newly discovered

***New Trial—Newly Discovered Evidence.**—The holding in the first headnote was approved in *Bacciga-*

testimony. It must be shown, 1st. That the testimony has been discovered since the former trial; 2d. That the new testimony could not have been obtained with reasonable diligence on the former trial; 3d. That it is material to the issue; 4th. It must go to the merits of the case, and not to impeach the character of a former witness; 5th. It must not be merely cumulative.

2. **Cumulative Evidence.**—In determining whether or not evidence is cumulative, the courts must see if the kind and character of the facts offered, and those adduced on the former trial are the same, and not whether they tend to produce the same effect. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative.

The case is stated by Judge Christian, in his opinion.

White and Buchanan, for the appellants.

C. F. Trigg and Campbell & Trigg, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The bill in this case is filed by the appellee, George W. Alderson, to enjoin all further proceedings on a judgment rendered in the county court of Washington

141 county against *him and others, who were his sureties, in favor of the appellants, who are the executors of Berry St. John. The bill alleges that in the trial in the county court it was proved that the debt claimed in the suit at law was paid to Heiskell, sheriff of Washington county; but it was held that the said sheriff had no authority to receive the money at the time it was paid; that in said suit at law it became necessary for the said Alderson, in order to protect himself against a judgment for the said sum of money paid to Heiskell, to prove that Heiskell had paid over the same to Berry St. John; that St. John being dead, Alderson could not testify as a witness on his own behalf; that he relied in that suit upon the evidence of a witness who was a grandson of Berry St. John, who had voluntarily stated before the trial that he had heard St. John say that the Alderson debt had been paid, and made the same statement on the witness stand, but afterwards was recalled,

lupo v. The Commonwealth, 33 Gratt. 807, citing *Read's case*, 22 Gratt. 924; *Tompson's case*, 8 Gratt. 687; 3 *Whart. Am. Cr. Law* 3161; *St. John's ex'or v. Alderson*, 33 Gratt. 140. The leading case is also cited and followed in *Wynne v. Newman's Adm'or etc.*, 75 Va. 817. See also 4 *Min. Inst. (2nd Ed.)* 841 *et seq.*; *Nichols' Case*, 91 Va. 753; 14 *Ency. of Pl. and Pr.* 791.

†**Cumulative Evidence.**—As to what is cumulative evidence, the principal case was cited and followed in *Wynne v. Newman's Adm'or, etc.*, *sup.*; and cited and approved in *Preston v. Otey*, 88 Va. 491. See also *Whitehurst v. Com.*, 79 Va. 556; *Norfolk v. Johnakin*, 94 Va. 290; *Nichols' Case*, 91 Va. 753 and see 14 *Ency. of Pl. & Pr.* 816.

In *Grogan v. Chesapeake, etc.*, R. Co., 30 W. Va., 421, the principal case is cited upon the question of cumulative evidence.

at his own instance, to explain and correct his evidence.

The bill further alleges that after the trial and judgment in the suit at law, he had discovered evidence not only material but absolutely conclusive of his case; that of this evidence he had no knowledge, and only accidentally discovered the same since the trial. The bill further sets forth the character of the newly discovered evidence, and gives the names of the witnesses, and the facts he expects to prove by each of them.

To this bill the executors of Berry St. John were made parties, and an injunction was awarded accordingly, restraining all further proceedings upon said judgment.

The executors answered the bill. They do not deny that the debt had been paid to Heiskell the sheriff (for the receipt of Heiskell for the debt is filed with the bill)—but deny that it was ever paid over to their testator. They insist that the issue made up in the suit at law was, whether the money paid to Heiskell (who had no authority to receive it), was ever paid over to their testa-

142 tor; that witnesses *had been introduced to show that it had been paid, and that their testator had admitted its payment; and that upon this issue of payment directly made and settled on, the county court held the debt had not been paid, and rendered judgment for the same. They further insist that the alleged after discovered evidence is merely cumulative, and is evidence of like import as that heard at the trial, and therefore furnishes no ground for a new trial.

The circuit court held that the plaintiff in the injunction suit (the defendant in the suit at law, and appellee here) was entitled to a new trial, and accordingly directed an issue to be tried on the law side of the court, whether the debt of \$261.20, with interest thereon from the 10th day of May, 1861, mentioned in the writing obligatory, commonly called a forthcoming bond, made by the plaintiff, George W. Alderson and James Fulcher and James L. Cole (his sureties), for the penalty of \$522.40, to Campbell St. John, for the benefit of Berry St. John, dated 10th May, 1861, was paid to Berry St. John in his lifetime; and it was further ordered that the said George W. Alderson be plaintiff in said issue.

Upon the trial of this issue the jury found the following verdict (which was certified to the chancery side of said circuit court): "We, the jury, find that the money was paid to Berry St. John." Upon the verdict thus certified, the circuit court, on the chancery side thereof, entered its decree, by which it was adjudged, ordered and decreed, "that the injunction heretofore awarded in this court is made perpetual, and that the plaintiff recover against the defendants his costs in this behalf expended, including his costs of the trial of the issue heretofore directed, to be paid out of their testator's assets; and the cause is stricken from the docket."

From this decree an appeal was awarded by one of the judges of this court.

The court is of opinion that there is no error in the decree of the circuit court.

143 *The single question we have to determine is, whether the after-discovered testimony relied on by the plaintiff in the injunction suit (the appellee here) was merely cumulative or was material, and such as was discovered since the former trial, and could not have been discovered by due diligence.

With respect to granting new trials on the ground of newly discovered testimony, there are certain principles of law which must be considered settled.

1. The testimony must have been discovered since the former trial; 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial; 3. It must be material to the issue; 4. It must go to the merits of the case, and not to impeach the character of a former witness; 5. It must not be merely cumulative. The first four requisites above named are clearly met in the case before us, and the only question we have to determine is, was the newly discovered evidence merely cumulative? As to what constitutes cumulative evidence is a question of some nicety.

As was said by Judge Maury in *Guyot v. Butts*, 4 Wend. R. 579, "I find no case in which a very distinct definition is given of cumulative evidence. The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative. But we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled. The kind and character of the facts make the description. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative."

144 *It is said by Mr. Hilliard in his valuable work on new trials—"Although the rule that a new trial will not be granted on account of newly discovered cumulative evidence, is a rule that will be relaxed with great caution; yet it is said that the court ought not to shut their eyes to injustice on account of facility of abuse in cases of this sort; and it is sometimes held that they will not refuse a new trial on the ground of newly discovered evidence, for the reason that such evidence is cumulative merely, if it is sufficient to render clear that which was before a doubtful case, or in a nicely balanced case, or if it is conclusive, or of such a character as *prima facie* to raise a strong probability that it will be decisive of the case." See Hilliard on New Trials, § 17, p. 504, and cases there cited.

Without adopting in full these views of the learned author, it is sufficient to say, that the case before us comes within the rule so clearly stated by Judge Maury (*supra*). The kind and character of the facts offered as newly discovered evidence make the true distinction. The facts offered may tend to prove

the same issue, and yet be so dissimilar in kind as to afford no pretence for saying they are merely cumulative. Now, in the case before us, the issue on the trial at law, was whether the money paid by Alderson to Heiskell, sheriff, was paid over to St. John. Certainly there was evidence tending to show an admission by St. John, that the debt was paid.

But in the newly discovered evidence offered, a witness is produced to prove, and who does prove, that he saw St. John receive this money from Heiskell, sheriff, on account of the Alderson debt. This evidence, it is true, tends to prove the issue of payment, but is dissimilar in kind, and if true, is conclusively of the case. It cannot be said to be merely cumulative. It makes certain that which was uncertain.

It enables a jury to reach a conclusion which meets the demands of justice.

145 *It produces a different result upon the second trial, which is consonant with right and truth, and prevents the payment for the second time of a debt already discharged. Evidence producing these results, and especially being dissimilar in kind to that offered on the first trial, cannot be said to be merely cumulative.

The court is therefore of opinion that there is no error in the decree of the circuit court, and that the same be affirmed.

Decree affirmed.

146 *Stuart v. Valley R. R. Co.

September Term, 1879, Staunton.

1. Stock Subscription—Motion for Judgment—Sufficiency of Notice.—The V. R. R. Co. gave notice to S that it would move the court for a judgment against him for the sum of \$300, with interest on \$150, part thereof, from the 1st of October, 1871 and on \$150, the residue thereof, from the 3rd of March, 1873, till paid, it being for the first and second quotas of 30 per cent. on five shares of stock of said company called for by the board of directors of said company—**HOLD:** That the notice sufficiently alleges and describes a contract of subscription by S.

2. Same—Jurisdiction—Amount in Controversy.—S denies that he was a stockholder in the company; and the controversy involved the validity of his subscription for the whole of said five share, which was \$500—**HOLD:** That though the judgment against S for the \$300 and interest was less than \$500, yet the subject in controversy was the validity of the subscription for the five shares, and the court of appeals has jurisdiction to hear the case upon appeal.

3. Same—Evidence.—To make a subscription to the stock of a contemplated railroad company, it is not necessary that the subscription shall be made upon the books of subscription opened by the commissioners named in the charter; and a subscription paper, by which the signers bind themselves to pay for the shares of stock in said company op-

posite to their names, is competent evidence against a subscriber of the paper; the plaintiff Co. stating that it intended to show that the amount so subscribed was duly entered on the stock lists and stock ledger of the company.

4. Same—Same—Corporate Records.—A stock ledger and a shareholders' list, kept by the company and a memorandum made by an agent appointed by the company to collect quotas due from subscribers, including that of S, with the figure 5 **147** opposite thereto, showing the number of names subscribed, which stock ledger and shareholders' list were shown to have been subsequently compiled therefrom and from many original subscription lists similar to that mentioned in § 8, are competent evidence for the plaintiff Co. and it is not competent for S then to propose to prove that before the said ledger list and memoranda were in existence, S had, by withdrawal of his proposal to subscribe, accepted and acted upon by the plaintiff, ceased to occupy any relation of contract or subscription to the plaintiff.

5. Same—Same—Same—Release.—S, to prove that he never became legal subscriber to the capital stock of the plaintiff Co.; that his proposal to become a subscriber was revoked by him with the consent of those to whom it was made previous to the organization of the plaintiff Co. in June, 1871, and that the company, upon its organization, refused to receive it as a subscription, or treat S as a subscriber to its stock—offered, in connection with oral evidence to be introduced, the records of the company in relation to its organization; in which records, in two statements of lists of subscribers the name of S does not appear—**HOLD:** The said records are competent evidence.

6. Same—Validity.—A subscription to the stock of a railroad company may be valid, though the subscription is not made on the books of the commissioners named in the charter, though two per cent. on each share of stock is not paid at the time of subscription, and though the subscription was made before the railroad company was organized, and before the commissioners named in the charter of the company had opened books of subscription to the capital stock of the company.

7. Same—Contracts.—The subscription of S, upon the paper referred to in § 8, did not of itself constitute a contract of subscription by S to the stock of the plaintiff Co. for five shares of said stock at \$100 per share; whether a contract or not depended on its acceptance, and the conduct of the parties.

8. Same—Release—Evidence.—Though a contract of subscription could be released only by the stockholders of the Co. or by the action of the board of directors duly authorized to do so by the stockholders, yet such release may be proved, not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the Co. as binding upon it, and that the subscriber was not regarded by himself or by the Co. as a stockholder thereof.

†**Corporations—Contracts—Evidence.**—The leading case was cited, and its principle rendering the corporate records, etc., admissible was sustained in *Lewis' Adm'r v. Glenn*, 84 Va. 984. See also *Vanderwerken v. Glenn*, 85 Va. 15, citing the leading case. And in *Kelly v. Board of Public Works*, 75 Va. 271, it was held that now a corporation may bind itself in any way that a natural person may bind himself, citing, among other authorities, the leading case See also 1 Min. Inst. (2nd Ed.) 584.

***Jurisdiction—Amount in Controversy.**—The holding on this subject in the principal case was held not applicable in *Campbell v. Smith*, 32 Gratt. 288, a case governed by the general rule.

148 *p. Same—Same—Same.—Though S may have executed and delivered the subscription paper referred to in § 8, and it came into the custody of the Co., and has been entered on its stock lists and ledger, and though there may be no evidence from the records of said company, or of any order or resolution of said company releasing said subscription, yet it may be shown by other evidence that S was not a stockholder of the company.

The case is fully stated in the opinion of the court delivered by Judge Moncure.

Thos. D. Ranson, for the appellant.

Sheffey & Bumbgardner, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error and supersedeas to a judgment of the circuit court of Augusta county, rendered on the 7th day of June, 1876, on a motion made in said court by the Valley Railroad Company against Alexander H. H. Stuart. The motion was founded on a notice from the plaintiff to the defendant, that the former would "move said court for a judgment against the latter for the sum of \$300, with interest on \$150, part thereof, from the 1st day of October, 1871, and on \$150, the residue thereof, from the 3d day of November, 1873, till paid; being the amount of the 1st and 2d quotas of 30 per cent. on five shares of stock in said company called for by the orders of the board of directors of said company." Legal service of the said notice having been duly proved, and the motion having been docketed, on the 6th day of March, 1874, the defendant plead nil debit to the motion, to which plea the plaintiff replied generally, and issue was thereon joined, which was the only issue in the case. On the same day the defendant appeared in the said court, and made oath that he had substantial matters of defence to the motion, consisting in

this:

149 "1st. That the alleged subscription upon which said proceeding is had was a mere executory proposal, without consideration, to become a subscriber to the stock of the plaintiff, and that he never did become in fact a subscriber to the stock of the plaintiff.

"2. That said alleged subscription is without legal validity; was taken by persons and in a manner not authorized by law; was never completed according to law, and that defendant never became liable to statutory proceeding by motion for quotas thereon.

"3d. That said proposal to subscribe was formally revoked by defendant, with the consent of the parties to whom it was made, before the legal organization of the company, here plaintiff, and when he had the right so to revoke it.

"4th. That the company, plaintiff upon its legal organization, accepted and acted upon the said revocation of the defendant's proposal, and distinctly refused to receive such proposal as a legal subscription, or to treat defendant as a subscriber to its stock, as he believes will appear from their records.

"And the defendant calls for the production upon the trial of a letter addressed by him to

Jed. Hotchkiss, the Secretary of the Valley Railroad Company, recalling his said proposal to subscribe, as a writing material to his defence and in its possession.

"And he also calls for the production of the records of the plaintiff, and particularly of the minutes of the proceedings had at its legal organization in June, 1871, showing what persons were admitted to be and received and treated as subscribers to its stock."

On a subsequent day, to wit: On the 6th day of November, 1875, an affidavit of Thomas D. Ranson, counsel for the plaintiff in the said motion of "The Valley Railroad Company v. A. H. H. Stuart, for 1st and 2d

150 quotas on five shares of stock, and in another motion of same v. *same, for subsequent quotas on same, appears to have been taken and filed by the defendant in the said cases, which affidavit is as follows: "This day appeared Thomas D. Ranson, and made oath that there are, as he verily believes, books and writings in the possession of the plaintiff in said motion, containing material evidence for the said defendant, as follows:

"1st. The proceedings of the stockholders of the Valley Railroad Company, at meetings held on the morning and evening of the 13th of June, 1871, recorded in the minute book of said plaintiff.

"2d. The certificate of N. K. Trout, M. G. Harman, and George Baylor, the commissioners named in the charter of said plaintiff, showing the subscriptions made to the capital stock of the company, according to the charter; which certificate bears date June 8th, 1871, and which is also reported in the minute book of said company, or the original of which is in its possession.

"3d. The proceedings of the stockholders of the Valley Railroad Company, at meetings held on the 28th of June, 1871, recorded in said minute book.

"4th. The proceedings of the stockholders of said company, at a meeting held on the 30th of August, 1870, recorded in said minute book.

"5th. The proceedings of the directors of the Valley Railroad Company, at a meeting held on the 31st of August, 1870, recorded in said minute book.

"This affidavit is made for the purpose of procuring a summons to require the production of such parts of said minute book as contain the proceedings aforesaid."

On the 17th day of January, 1876, the deposition of Alex. H. H. Stuart, taken to be read as evidence in behalf of the defendant in the said two motions, was filed among the papers of the same. In that depo-

151 sition, being *asked to state any fact within his recollection connected with his alleged subscription to the capital stock of the Valley Railroad Company, for quotas claimed on which these two motions are pending, the witness answered, among other things, as follows, to wit:

"To the best of my recollection, the facts connected with my subscription to the Valley railroad are as follows: When the books were originally opened, it was understood

that it was necessary to have a given amount subscribed to avoid a forfeiture of the charter. To prevent the forfeiture, many gentlemen became subscribers for large amounts, and I, on behalf of my brother G. B. Stuart and myself, constituting the firm of G. B. Stuart & Co., subscribed for 40 shares.

"Subsequently Maj. Jed. Hotchkiss, Secretary of the V. R. R. Company, notified G. B. Stuart & Co. that there was some illegality in their subscription, and that, if they desired to hold the stock, they must resubscribe and pay \$2 per share; but that if they desired to withdraw, they could do so. The notice was in print and in writing and is hereto annexed, marked S and C. Thereupon G. B. Stuart & Co. declined to renew their subscription.

"At a later period (precise date not recollected) I, in my individual capacity, subscribed for five shares, but for reasons which were satisfactory to me, I became distrustful of the enterprise and regretted that I had subscribed. Shortly afterwards I received a note from Mr. Hotchkiss, secretary of the company, that there was an informality which vitiated the subscription, and requesting me to notify him whether I was willing or not to resubscribe. To the best of my recollection, he added, that if I did not wish to hold the stock, it would make no difference and there was a gentleman (I think he named one of the Messrs. Harman) who would take my stock. I immediately replied in writing, that I declined to renew my subscription.

From that time I heard nothing more
152 of it *until a short time before the notice was issued against me. I have never paid, or been called on to pay, the \$2 per share, nor was I in any way treated as a subscriber," &c. &c. Exhibit S and C, referred to in the said deposition, was returned therewith, and is to the effect mentioned therein.

On the 7th day of June, 1876, the said issue was tried by a jury, and a verdict and judgment was rendered for the plaintiff for the principal and interest claimed in the notice, and judgment was also given for the plaintiffs' costs.

On the trial of the motion seven bills of exception were taken by the defendant to rulings of the circuit court against him.

To the said judgment of the circuit court the defendant applied to this court for a writ of error and supersedeas, which was accordingly awarded by a judge of this court; the errors assigned in the petition therefor being the several rulings of the said circuit court in said bills of exceptions mentioned.

The first question arising in this case is presented by a motion made by the defendant in error here, the plaintiff in the court below, to dismiss the writ of error and supersedeas for want of jurisdiction.

The objection taken to the jurisdiction is, that the matter in controversy in this case is merely pecuniary, and is less in value or amount than five hundred dollars.

It is true that the matter in controversy in the case, is merely pecuniary.

But is it true, that the said matter is less

in value or amount than five hundred dollars?

The court is of opinion that such is not the truth. The controversy in the case is not confined to the sums of money and interest for which the judgment was recovered, being the amount of the first and second quotas of thirty per cent. on five shares of stock in

153 the Valley Railroad *Company called for by the orders of the board of directors of said company, but involved the validity of the subscription by the said plaintiff in error, for the whole of the said five shares, the amount of which was \$500. This appears from the express language of the notice upon the subsequent proceedings in the case. Many cases are referred to on this subject by the counsel on both sides in their printed arguments in this case, but it is unnecessary to repeat or comment on them here, as the constitution and the statute law of the state on the subject are sufficiently plain. See the constitution, article VI, sec. 2, Code of 1873, page 84; and the statute laws, Code, pages 1136, 1137, § 3.

The other questions arising in the case are presented by the assignments of error in the petition founded on the several rulings of the said circuit court in said bills of exceptions mentioned, which are seven in number, and will now be considered in the order in which they were taken.

1. The first of said exceptions was, to the opinion of said court overruling the motion of the defendant for quashing the notice of this motion as insufficient in law, in that it fails sufficiently to allege and describe a contract of subscription by the defendant, the said court being of the opinion that the said notice is sufficient.

This court is of opinion that there is no error in the said ruling of the said circuit court, and that this is sufficiently manifest from the record itself, without assigning any other reason or referring to any other authority.

2. It is stated in the second of said bill, that after the jury were sworn to try the issue joined upon this motion, the plaintiff, to sustain the said issue on his part, offered to give in evidence to the jury a paper writing in these words and figures following, to wit:

154 *"Subscription to the stock of the Valley Railroad Company.

"Whereas, the county of Augusta, in her corporate capacity, has declined to subscribe the sum of \$300,000 to the Valley railroad, and whereas, it appears evident that unless the said amount of subscription be obtained from some reliable source, the construction of the road will have to be abandoned: Therefore, we, the subscribers, citizens of Augusta county, hereby promise and bind ourselves, our heirs, &c., to take the number of shares opposite our names of the stock of the Valley Railroad Company, at \$100 per share, and pay 30 per cent. of the sum as soon as called upon after the 1st day of October, 1870, and the remainder in instalments of one and two years. Witness our hands, August, 1870."

Then follow the names of subscribers with the number of shares subscribed for by them

respectively, in which list of names is included that of "Alex. H. H. Stuart," with the number of "five shares" opposite his name. Then follows the following:

"Endorsement."

"Office Valley Railroad Company,
Staunton, Va., August 13th, 1870.

"Dear Sir—If \$200,000 of reliable private subscription can be obtained to the stock of Valley Railroad Company on the terms of the enclosed subscription paper, it will insure the construction of the road. You are respectfully and earnestly requested to subscribe yourself and get others to subscribe as much as possible, and return the paper to this office before the 1st day of September proximo. The success of this subscription is of the utmost importance.

"By order of the Board.

"Jed. Hotchkiss, Secretary."

155 *Whereupon, the defendant, by counsel, excepted to the introduction of said paper as evidence before the jury, upon the ground that it is not the best and the proper evidence of a subscription by the defendant to the capital stock of the plaintiff as a charter company, and that it is incumbent on said plaintiff, in support of the motion, to show that defendant became a subscriber upon the books of subscription opened by the commissioners named in its charter.

But the plaintiff's counsel having stated that he intended to show that the amount so subscribed was duly entered in the stock lists and stock ledger of the company, the court decided that the evidence so offered by the plaintiff was admissible as evidence of a subscription by the defendant to said stock, and the same was accordingly admitted to the jury.

To which opinion of the court the defendant excepted, &c.

This court is of opinion that there is no error in the judgment of the circuit court in this respect. The evidence so offered by the plaintiff was admissible evidence of a subscription by the defendant for five shares of the stock of said company, taken in connection with evidence intended to be introduced by the plaintiff to show that the amount so subscribed was duly entered in the stock lists and stock ledger of the company.

3. It is stated in the third bill of exceptions that upon the trial of the issue joined in this motion, the plaintiff, to maintain said issue on its part, offered to give in evidence to the jury a stock ledger and a shareholders' list kept by the plaintiff, and a memorandum book, containing entries made by William H. Tams, deceased, each including, among others, the name of the defendant and the figure 5 opposite thereto, showing the number of shares subscribed; which memorandum book was shown to have been prepared by said Tams, as a sub-agent of Col. W.

156 *Allan, who was appointed by a resolution of date August 1st, 1871, a committee to collect quotas due from subscribers in said company, and the said stock ledger and shareholders' lists were shown to have been subsequently complied therefrom and

from many original subscription lists similar to that set forth in bill of exceptions No. 2; said Tams' memorandum book, containing lists of subscribers to said stock and the amounts subscribed by them, respectively, including defendant's, together with the original subscription lists, having been placed in the hands of Sheffey & Bumgardner, as counsel for plaintiff, subsequently to August 1st, 1871, for collection of quotas thereon, and under whose direction said office stock lists were duly made out, and the entries in the stock ledger were made by the clerk of the company.

Whereupon the defendant, by counsel, offered to prove that before said ledger, list and memoranda were in existence, the said defendant, by withdrawal of his proposal to subscribe—accepted and acted upon by the plaintiff—ceased to occupy any relation of contract or subscription to the plaintiff, and insisted that the same was not admissible in evidence against him.

But the court, being of opinion that the said memorandum lists, taken in connection with the said original subscription lists, tended to prove that the plaintiff relied on said subscriptions, and acted upon them; and not being of opinion that they should be excluded from the jury upon a mere intimation of rebutting evidence by the defendant, overruled the said objection, and admitted the said ledger, list and memoranda to go in evidence before the jury.

To which opinion of the court the defendant excepted, &c.

This court is of opinion that there is no error in the judgment of the circuit court in this respect. The said ledger, list and memoranda, taken in connection with the

157 *said original subscription list, certainly tended to prove that the plaintiff relied on said subscription, and acted upon them, and they certainly should not have been excluded from the jury upon a mere intimation of rebutting evidence by the defendant. The circuit court, therefore, did not err in overruling the said objection and admitting the said ledger, list and memoranda to go in evidence before the jury; which evidence would have been considered by the jury in connection with any legal rebutting evidence that might have been introduced by the defendant.

4. It is stated in the fourth bill of exceptions, that upon the trial of this motion, the defendant, to maintain the issue on his part, offered to give in evidence to the jury the written statement of an absent witness, G. C. Jackson, which statement was, by consent of counsel before the jury were sworn, agreed to be received in lieu of the oral testimony under oath, subject to proper exceptions as to the substance thereof, which statement is in the words and figures following, to wit:

"Statement of G. C. Jackson.

"I hereby state that George E. Price and myself were appointed commissioners to solicit subscriptions in the two wards of the city of Staunton, for the Valley Railroad Company, by a meeting held some time dur-

ing the summer of 1871. I was instructed to renew the old subscriptions and to solicit new subscriptions. In accordance with my instructions I approached Dr. William McChesney and urged upon him the importance of renewing his subscription, and also of making some additional subscription. He declined to make any additional subscription, and told me that he had instructed Mr. W. A. Burke, a director in the road, to have his name stricken from the roll of subscribers, and he did not feel bound by the old subscription list and would not pay it. I also had a conversation with Col. Baldwin about
 158 the time, in which he declined *to renew his subscription, and denied the validity of the old subscription. A written report was made to the company by us as commissioners, to the best of my recollection. I do not remember any subscription by A. H. H. Stuart or the payment of any per centum by him or Dr. McChesney.

"Geo. C. Jackson."

"N. B.—I also know that either Mr. Price or myself interviewed Mr. Stuart, and he declined to renew his subscription.

"Geo. C. Jackson."

To the admission of which testimony the plaintiff excepted, upon the ground that the same was irrelevant and hearsay testimony; and upon the further ground that there was no evidence to prove that said Jackson was appointed by the plaintiff to act as commissioner, or was clothed with power to relieve any subscriber to the stock of the company from his obligations as such subscriber; and the court decided to exclude the same from going to the jury.

To which opinion of the court the defendant excepted, &c.

This court is of opinion that the circuit court did not err in excluding the said testimony, which was inadmissible upon the grounds above stated.

5. It is stated in the fifth bill of exceptions, that after the jury was sworn to try the issue joined in this cause, the defendant, to maintain the said issue on his part, offered to give in evidence to the jury certain extracts from the minutes of the proceedings of said plaintiff, called for by the affidavit filed and summons issued thereon, as tending in connection with oral testimony to be offered, to show that the defendant never became a legal subscriber to the capital stock of

159 the plaintiff; that his *proposal to become a subscriber was revoked by him with the consent of those to whom it was made previous to the legal organization of the plaintiff in June, 1871, and that the plaintiff, upon its legal organization, refused to receive it as a subscription or treat the defendant as a subscriber to its stock, said extract produced by the plaintiff being as follows, to-wit:

First.

Valley Railroad meeting, Tuesday, June 13, 1871:

Pursuant to the notice of the commissioners appointed to receive subscription to the stock of the Valley Railroad Company, a meeting was held in the courthouse, on Tuesday last.

On motion of Col. M. G. Harman, Major William M. Tate was called to the chair.

On motion of Judge H. W. Sheffey, the editors present were requested to act as secretaries. Judge Sheffey explained the object of the meeting to be the legal organization of the company, which, from some informality, had not been legally organized; and moved the appointment of a committee of five to ascertain and report to the meeting the amount of stock absolutely and unconditionally subscribed, so as to properly and legally organize the company; which was carried; and the chairman appointed the following committee: Judge H. W. Sheffey, Col. M. G. Harman and Major H. M. Bell, of Augusta, and Col. William Allan, of Rockbridge, who retired to perform the duty assigned them. During the retirement of the committee, in response to calls, speeches were made by D. A. Anderson, state senator of Rockbridge; Ex-Governor Letcher and Hon. A. H. H. Stuart—the speeches of the two former being brief, and that of the latter of greater length. These gentlemen set forth, in a favorable manner, the importance of the Valley railroad, and the necessity of raising the required subscriptions to
 160 insure its construction. *The committee then returned, and reported \$100,000 of stock subscribed unconditionally, and the percentage on it paid to the commissioners, being more than was required to legally organize the company.

Gov. Letcher moved an adjournment until 7:30 P. M., for the purpose of considering the subscription and ascertaining if the organization of the company or the subscription would be valid.

Gov. Letcher gave way for Col. Allan, who moved that a committee be appointed to prepare business for the meeting to-night; carried. The motion for adjournment was then insisted on, and carried.

Evening Session.

The meeting met in the evening pursuant to adjournment. The chairman who presided in the morning being absent, on motion of Col. William Allan, Major N. K. Trout was called to the chair.

Col. M. G. Harman read a dispatch received from Botetourt, assuring the meeting that that county would subscribe \$25,000.

Col. Allan stated the amount which each county was expected to raise to make up the required subscription of \$220,000, assigning to Botetourt \$25,000; to Augusta, \$75,000; to Rockbridge, \$100,000, and to Roanoke, \$20,000.

On motion of Judge Sheffey, it was resolved as the sense of the meeting that the friends of the railroad in the counties interested should renew their efforts to secure the subscriptions required.

Mr. Charles A. Davidson, of Rockbridge, desired to know how much could certainly be depended upon from Augusta. Mr. William A. Anderson, of Rockbridge, stated that Rockbridge county would vote an additional subscription of \$100,000, if it could be assured that that would insure the construction
 161 of the road. Col. Harman *expressed

the belief that \$75,000 could be raised in Augusta county, if the proper efforts were made. To effect that purpose, he moved that the chair appoint three men in each township in the county and in each ward in Staunton to canvas for subscription; this motion being adopted, in accordance therewith, the chair appointed the following:

(Here follow the names of the men so appointed.)

On motion, the meeting adjourned.

N. K. Trout, Chairman.

J. D. Morrison,
W. H. H. Lynn,
S. M. Yost,
R. Mauzy,

Secretaries.

Commissioners' Notice.

It appearing to the undersigned commissioners, at the place first named in the charter of the Valley Railroad Company, that enough of the capital stock of said company has been subscribed to incorporate the subscribers, notice is hereby given thereof, and a general meeting of said subscribers is hereby called to assemble at the office of the Valley Railroad Company, in the city of Staunton, on Wednesday, the 28th day of June, 1871, for the purpose prescribed by the law for the permanent organization of said company.

(Here follow the names of the three commissioners.)

The foregoing is a correct copy of the proceedings of the Valley Railroad Company, from its first meeting to the 8th of June, 1871, taken from the original record book of the company.

Wm. H. Garber,

Clerk of the V. R. R. Company.
April 21st, 1874.

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*Second.

Staunton, June 8th, 1871.

The undersigned, commissioners, report that, in pursuance of public notice through the newspapers, they this 8th day of June, 1871, opened the books of subscription to the capital stock of the Valley Railroad Company, according to its charter; whereupon the following subscriptions then and since were taken and received by us, and that the payment of two dollars on each share has been duly made—that is to say:

(Here follow the names of the individual subscribers, and the number of shares taken by them respectively), amounting in all to.....

51 shares.

In this list of subscribers, the name of A. H. H. Stuart does not appear.

Robert Garret, for Baltimore and Ohio Railroad Company. 1,000 shares.

City of Staunton, by William

J. Nelson, agent, as authorized by the ordinance of said city,

1,000 shares.

Total, two thousand and fifty-one shares, 2,051 shares.

Nicho. K. Trout,
M. G. Harman,
George Baylor,

Commissioners.

June 28th, 1871.

Third.

Staunton, June 28th, 1871.

At a meeting this day, held, according to a notice published by the commissioners, to receive subscriptions to the stock of the Valley railroad, for the purposes set forth *in said notice, Hon. David Fultz was called to the chair and George E. Price appointed secretary.

The commissioners made a report, as recorded in preceding pages, announcing the subscription, by various parties, of two thousand and fifty-one shares of stock.

Major H. M. Bell moved that the names of the subscribers be called, to ascertain if a quorum be present; which being done, a majority of the stock was announced as being represented, either in person or by proxy.

Col. M. G. Harman moved the appointment of a committee to examine proxies. Whereupon, Col. William Allan, B. Christian and G. W. Hansbrough were appointed such committee, who made the following report.

The undersigned committee on proxies respectfully report that they have examined the proxies and find 1,000 shares subscribed by the city of Staunton to be represented by George Price, P. H. Trout and Wm. H. Tams, appointed as proxies, by an order of said city council, June 6, 1871, and two shares of Major E. M. McMahon to be represented by Major H. M. Bell.

(Signed) W. Allan,

B. Christian.

G. W. Hansbrough.

It appearing from the report of the commissioners for receiving subscriptions of the stock to the Valley Railroad Company, that the amount of stock duly subscribed, on which two dollars per share have been paid to the commissioners, consist of the following:

(Here follow the names of the stockholders and the number of their shares respectively as aforesaid.) In this list the name of A. H. H. Stuart does not occur.

Making in all two thousand and fifty-one shares of stock duly subscribed; and from the report of the committee on

164 *proxies and the call of the roll of stockholders, that there are represented in person or by proxy, 1,051 shares

in this meeting, it is therefore ordered to be entered of record on the minutes of this meeting, that the said subscribers, having in all respects conformed to the provisions of the charter of the Valley Railroad Company, and of the laws in such cases provided, will now proceed as a body politic and corporate to act under the charter of said Valley Railroad Company.

After debate in favor of the above by Messrs. Christian, Allan, Hansbrough and others, opposed by Messrs. Sheffey, Tams, Bumgardner and others, the resolution and preamble was adopted.

Upon motion of Col. Harman, it was.

resolved that J. D. Craig, Samuel H. Bell and John R. Grove be added to the committee to receive additional subscriptions.

Mr. Tams offered the following:

Resolved, That the Chair appoint a committee of three whose duty it shall be to prepare and report to an adjourned meeting of the stockholders to be held on Saturday next a code of by-laws adapted to the organization of the Valley Railroad Company.

Adopted.

The chair appointed Wm. H. Tams, H. W. Sheffey and Wm. Allan, committee.

Mr. Sheffey offered the following resolution, which was adopted:

Resolved, That the President and Board of Directors be authorized to ratify and accept the subscriptions heretofore made or hereafter made to the stock of the Valley Railroad Company, by the towns and counties in the Valley, upon the terms and conditions upon which such subscriptions were or are to be made.

Whereupon on motion of Mr. Tams, the meeting adjourned to meet on Saturday, next, July 1st, at 11 o'clock.

David Fultz.

Geo. E. Price, Secretary.

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*But the court having heard all the oral evidence offered by the defendant, and none of it tending to prove that either the Board of Directors or the stockholders of the Valley Railroad Company had, by their recorded or unrecorded resolutions or actions ordered or authorized the release of the defendant's liability under his contract of subscription, and it being shown by the evidence in respect of the proceedings in June, 1871, in connection with what was called the reorganization of the same, having been formerly organized as far back as 1866 with a President and Board of Directors regularly appointed and acting, M. G. Harman having been the president of the company, until August 30th, 1870, when General Robert E. Lee was appointed president, and after his death Robert Garret was appointed and acted as president; that said proceedings in June, 1871, were had out of abundant caution and to obviate any possible objections to the regularity of the original and formal organization; and the court being of opinion that there being no evidence to prove that the defendant had at any time been excluded from any meeting of the stockholders of said company, or had been refused the privileges of a stockholder by said company; that said extracts tendered as evidence, the first being an account of a public meeting at which the defendant himself took a prominent part, would only tend to mislead the jury, excluded the said extract from going to the jury.

To which opinion of the court, excluding the same, the defendant excepted. &c.

This court is of opinion that the circuit court erred in excluding said extracts from going to the jury; that they tended to prove and were offered, and were admissible evidence to prove that the defendant was not a stockholder in the Valley Railroad Company, and is not liable for the money and interest

recovered against him by the judgment aforesaid, or any part thereof, and 166 that they *would not have tended to mislead the jury if they had been admitted as evidence, as they ought to have been, on the trial of the issue.

6. It is stated in the sixth bill of exceptions that upon the trial of the issue joined upon this motion, the counsel for defendant moved the court to instruct the jury as follows, viz:

1st. The jury are instructed that unless they shall believe from the evidence that there was a subscription by defendant, taken according to the statutes regulating the taking of subscriptions to the stock of chartered companies, they must find for the defendant.

2d. The jury are instructed that unless a payment of 2 per centum upon each share of stock subscribed was made upon the subscription, they must find for the defendant.

3d. If the jury believe from the evidence that the paper produced by the plaintiff, upon which the name of the defendant appears as a subscriber for five shares of the capital stock of the plaintiff was signed before the Valley Railroad Company was organized, and before the commissioners named in the charter of the Valley Railroad Company had opened books for subscription to the capital stock of the plaintiff, then there is no binding obligation on the defendant to take said shares, unless he subsequently reaffirmed said subscription after the books of the commissioners were opened, or after the company was organized.

But the court, being of opinion, as to the first instruction, that it was merely abstract, and indicated no facts to be found by the jury under the statute; and as to the second mentioned, the evidence showing that the plaintiff accepted and relied on the defendant's subscription and his express promise to pay 30 per cent., on request, after October 1, 1870, that the defendant could not evade his said liability by showing a technical non-compliance by himself with the provisions of the statute referred to; and as to the third mentioned, that it was calcu-

167 lated to mislead *the jury in two particulars—first, that as organized in August, 1870, the Valley railroad was legally incompetent to accept subscriptions of stock procured by its agents, and in the manner shown by the evidence in this case—a proposition the court was not prepared to affirm; and, second, that no subscription of the stock, coupled with an express agreement to pay the amount subscribed, is valid, unless made on the commissioners' books—refused to give the said instructions, or either of them, to the jury.

To which opinion of the court the defendant excepted.

This court is of opinion that the circuit court did not err in refusing to give the said instructions or either of them to the jury, and that the reasons assigned by the said court for such refusal are well founded.

7. It is stated in the 7th and last bill of exceptions, that upon the trial of the issue joined upon this motion, the counsel for the

plaintiff moved the court to instruct the jury as follows, to wit:

1st. The jury are instructed that the paper in the words and figures following, to wit:

Subscription to the stock of the Valley Railroad Company (see bill of exception No. 2, ante, for subscription paper and endorsement here referred to) is a contract of subscription by the defendant to the stock of the Valley Railroad Company for five shares of said stock at \$100 per share.

2d. That the said contract of subscription could be released only by the stockholders of the company, or by the action of the board of directors, duly authorized so to do by the stockholders, and such release can be proved only by the records of the company.

3. That if the jury shall believe from the evidence, that the defendant executed and delivered the paper set forth in the first instruction, and that it came into the custody of the Valley Railroad Company, and has been entered on its stock lists, and

168 stock ledger, there being no *evidence from the records of said company of any order or resolution of said company releasing said subscription, the jury must find for the plaintiff.

Which said instructions and each of them were accordingly given by the court to the jury.

To which opinion of the court the defendant excepted.

This court is of opinion that the circuit court erred in giving said instructions to the jury. 1st. The paper referred to in the 1st of said instructions did not, in itself, constitute a contract of subscription by the defendant to the stock of the Valley Railroad Company for five shares of said stock at \$100 per share. Whether a contract or not depended on its acceptance and the conduct of the parties. 2d. Though a contract of subscription could be released only by the stockholders of the company, or by the board of directors duly authorized so to do by the stockholders, yet such release can be proved not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof—and 3d. Though the defendant may have executed and delivered the paper set fourth in the first instruction, and that it came into the custody of the Valley Railroad Company, and has been entered on its stock lists and ledger; and though there may be no evidence from the records of said company, or of any order or resolution of said company releasing said subscription, yet it may have appeared from the evidence before the jury that the defendant was not a stockholder of the said company, or it may not have appeared from the said evidence that he was such a stockholder when said motion was made or notice thereof given.

The court is therefore of opinion that the judgment aforesaid is erroneous on the grounds aforesaid stated in the 5th and 7th

169 bills of exception, and for those errors it *be reversed and annulled; and the case be remanded to the said circuit court for a new trial to be had therein in conformity with the foregoing opinion.

CHRISTIAN, J., dissented.

The judgment was as follows:

This cause was this day heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel; and the court, having maturely considered the same, is of opinion, for reasons stated in writing and filed with the record, that the rulings of the said circuit court set forth in the fifth and seventh bills of exceptions in the record contained, are erroneous. Therefore, it is considered and ordered that, for reasons aforesaid, the said judgment be reversed and annulled; and that the plaintiff in error recover of the defendant in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here. And it is further considered and ordered that the case be remanded to the said circuit court for a new trial to be had therein; on which new trial the extracts mentioned and set forth in the said fifth bill of exception, if again offered to be given in evidence to the jury, be accordingly admitted as such evidence; and the instructions to the jury asked for, as mentioned in the said 7th bill of exceptions, if again asked for, on the same evidence substantially as on the former trial, be not given. Judgment reversed.

170 *Linn & als. Trustees, v. Carson's Adm'r and als.

September Term, 1879, Staunton.

1. *Notes—Effect of Void Judgment.*—Though a judgment upon a note rendered by a court not having jurisdiction of the case is void, the note is still a valid security.

2. *Equity—Ancillary Bills.*—An amended bill, which is not repugnant to the original bill, presenting no new case, and is only ancillary to the original bill in presenting the case made by it more fully and accurately with additional averments, to the end that there may be a decision on the merits, and complete justice done between the parties, is not demurrable as inconsistent with the original bill.

3. *Church Property—Liens.**—The act, ch. 76, §§ 12, 13, Code of 1878, does not prohibit the sale of church property for the payment of debts incurred in the purchase thereof or building thereon, or to reimburse a party who has advanced money, or made himself liable for any such debts at the instance of the trustees of the church, and the discipline of the church authorizing parties so advancing money on account of such property to raise said

**Church Property—Liens.*—The principal case was cited, and its holding that trustees of a church building, for the use of a congregation of members of the Methodist church, making advances for repairing the building have a lien, under the discipline of the church, on the building for such advances, which may be enforced in equity, was approved in *Hoskinson et al. v. Pusey et al.*, 33 Gratt. 442. But compare *Clark v. Oliver*, 91 Va. 429.

sums of money by mortgage or sale, a court of equity will, at the suit of a party so liable or so advancing money, subject the lot and buildings to sale for the purpose of satisfying such claim.

In September, 1870, Joseph S. Carson instituted a suit in equity in the circuit court of Frederick county against John Linn and others, trustees of the Methodist Episcopal church of Winchester, Silas Billings, Robert Barr and others. In his bill he stated that the Methodist Episcopal church of Winchester owned in 1858 a large building and lot, it being then the place of worship of the congregation at that time, and that they sold the same, on the 1st of January, 1859, to

171 Sidney P. York and George La Monte, taking from them, as evidence of a part of the unpaid purchase money, a bond for \$1,864.28, payable in nine months, with interest, and secured by a deed of trust upon the property so sold.

After the sale of this property, the said congregation, through their proper trustees, being desirous of building a house of worship elsewhere, procured the plaintiff's signature to two negotiable notes—the first for \$1,450.00, and the second for \$900; and these notes were discounted at the Bank of the Valley, at Winchester, and the proceeds thereof were applied to the use of said church in the erection of their new building, situated at the corner of Market and Cork streets, in said town. At the time referred to, plaintiff was one of the trustees and treasurer of the church, and signed the notes as treasurer. These notes were renewed from time to time, until, on the 4th of April, 1862, the note for \$900 was protested, and on the 25th of the same month the note for \$1,450 was also protested. Since the close of the war the assets of the bank have gone into the hands of a receiver in a chancery cause instituted by the Merchants National Bank, of Baltimore, in the circuit court of the United States for the district of Virginia, and judgments have been rendered in said court against the plaintiff for the amount of said notes, with interest from the day they were protested, and costs. These judgments are now liens upon plaintiff's land, and execution may issue at any moment upon the same to be levied of his personal estate.

Plaintiff further says that when he signed the said notes the trustees of the church authorized him to retain, as his indemnity, the bond of York and La Monte; that he had retained the same, and then filed it with his bill; that a sale of the property under the trust had been made by the trustees to Silas Billings, and the trustees have delivered to John Linn a large portion of the bonds received for the deferred payments; that

Linn is one of the present trustees
172 *of the church, and has undertaken to receive and control these funds as agent of the trustees, although the funds should have been paid over to the plaintiff to be applied to the discharge of said two notes; and that Linn had transferred \$500 of these funds to one Robert Barr, to pay some debt of the church to him. He prays for an injunction against Linn and the other trus-

tees, to restrain them from parting with said funds, and Billings from paying over any of the purchase money; that the fund may be applied to satisfy the said judgments, and if it is not sufficient for that purpose, that the property of said church may be subjected to the payment of said debts, and for general relief. The injunction was granted.

The cause came on to be heard on the 24th of November, 1870, upon the bill taken for confessed as to all the defendants except Barton, the trustee who sold under the York and La Monte deed of trust, who filed his answer, and the court decreed that Linn and the other trustees and also the defendant Barr should deliver to the general receiver of the court all the bonds referred to in the plaintiff's bill or in the answer of the defendant Barton, which may be in their possession or under their control, and the said general receiver was directed to collect the same and lend it out, and the defendant Billings was directed to pay the amount of said bonds to the said receiver as the same shall become due.

And a commissioner was directed to settle the account of Barton, acting trustee in the deed of trust, aforesaid, and that the commissioner should report the total amount of the debt for which the plaintiff is bound, and which was contracted for and on behalf of said Methodist Episcopal church, and how much thereof will still remain unsatisfied after crediting thereon the balance of the fund which shall be collected by the general receiver from the defendant Billings. And if there should be any of said debt still unsatisfied after such credit, then the
173 commissioner was *further instructed to ascertain and report what personal and real estate is now held by said trustees of the said church, together with the gross and rental value thereof; and also any liens existing on the same.

The plaintiff, Joseph S. Carson, having died, in June, 1871, Lewis N. Huck, his administrator, filed an amended and supplemental bill in the cause. He sets out that in June, 1853, the Methodist Episcopal church in Winchester purchased a lot on the corner of Cork and Market streets in said town; that a deed therefor was made to the trustees of said church, and a deed of trust executed thereon by the trustees to secure the deferred payments of the purchase money. Joseph S. Carson, Abram Nulton and five others named were the trustees, and Carson was the treasurer. That steps were taken at once to build a church on said lot; and the sums of money raised by subscription or otherwise not being adequate to meet the current expenses for labor and materials as the work advanced, said congregation, through said trustees, determined to borrow from the bank from time to time, as their necessities required, upon negotiable notes made and endorsed by said treasurer and different members of the board. The bill sets out the different notes made, which were increased from time to time until they amounted to the two notes mentioned by Carson in his bill, of \$1,450 and \$900.

The bill further states, that the said Methodist church, through said Nulton, trustee, on the 6th of May, 1854, purchased a house and lot fronting on Cork street, and immediately in rear of said church lot, now occupied by the sexton of said church, from D. W. Barton, special commissioner in a suit then pending in the county court of Frederick; said property was purchased at the price of \$900; and in payment thereof the said church through said trustees assumed the payment of the bank debts due by the estates of John and Abraham Miller, deceased, viz: one
 174 for \$600 due at the office of *discount and deposit of the Farmers Bank at Winchester, and the other for \$300 due at the Bank of the Valley; the said note for \$600 drawn by said Abraham Nulton, trustee, and endorsed by said Joseph S. Carson, and S. R. Atwell, was renewed from time to time until July 3d, 1862, when it was protested; and said note for \$300 drawn by said Nulton, trustee, and endorsed by said Carson, was also renewed from time to time until the 20th of March, 1862, when it was protested.

He refers to the suit mentioned in the original bill as pending in the United States court, and states that judgments were rendered in said court against Carson upon the three notes of \$1,450, \$900 and \$300. And he states that a judgment had been rendered in the county court of Frederick county against Nulton, the maker thereof, on the note for \$600.

He states that the said church is further indebted to said Carson for payments made by him at the instance of the trustees, which, on the 1st of January, 1859, amounted to \$481.78, exclusive of interest; and this sum was afterwards increased by payments of discounts in bank on the aforesaid notes, and interest on other debts of said church, until it amounted to \$959.13, exclusive of interest, a part of which was advanced to pay off the notes given by the trustees on the 18th of June, 1853, for the purchase of the lot at the corner of Cork and Market streets.

The prayer of the bill is that an account may be taken of the amount, principal and interest, due to the said J. S. Carson, treasurer, for money advanced by him to said church, and that said judgments, as well as the money advanced, may be paid off and discharged out of funds belonging to said church, if sufficient; and if not sufficient, that the real property belonging to said church be subjected to such payment, and for general relief.

At the July term of the court, Linn and the other trustees of the church demurred to the bills, and also answered.
 175 *They deny all the allegations in the bill out and out, and then proceed to notice the allegations separately. They also deny the allegations of the amended bill.

At the same term of the court, the court made a decree, directing the commissioner to execute the order of reference made at the November term, 1870, and in addition to the subjects therein referred to him, he is directed

to state, settle and adjust the accounts of J. S. Carson as treasurer of the Methodist Episcopal church of Winchester, ascertaining and reporting what amount, if any, is due from said church to said Carson, and also the total amount of the debts, if any, for which he is bound and which were contracted on behalf of said church.

Robert Barr having died, his administrator filed an answer, in which he says that his decedent was the builder of the Methodist Episcopal church on Market street, and that the obligation of Silas Billings, which was transferred to him by John Linn, was so transferred and received by him in payment for work and labor performed by him on said property, under and by virtue of a previous engagement, and by virtue of an act of assembly approved the 5th of January, 1854, whereby the proceeds of sale of the property purchased by Billings was directed to be applied to the payment of expenses incurred in building the new church on Market street.

In June, 1873, the commissioner returned his report. He reported the debts for which Carson was bound, and which were contracted for on behalf of the Methodist Episcopal church in Winchester, at \$5,525.83. The fund collected by the general receiver from Billings he reports at \$1,463.70; and deducting from it \$250 for payment of the costs of the suit, leaves \$1,213.75 to be applied to the payment of the debts for which the estate of Carson is bound; which will leave \$4,312.04 of those debts unsatisfied.

The amount of the Billings' bonds
 176 transferred by Linn *to Barr and Miller, was \$1,648.81. The property held by the trustees for the church, all of which was real estate, was valued at \$12,000, and the annual rental at \$200.

The defendants excepted to the report so far as it found any debt due by the church. The plaintiff excepted to it so far as it stated that the amount reported as due from the said church to said Joseph S. Carson, deceased, treasurer, includes in any form the two protested negotiable notes, one for \$300 and the other for \$600, A. Nulton, trustee, drawer and Joseph S. Carson endorser in each case; said error being disclosed on the face of the report.

The commissioner afterwards made a supplemental statement, which, after allowing some payments which had been made to Carson, and bringing the account down to December 1st, 1875, makes the amount of Carson's claims \$5,862.48. The York fund, Billings' purchase, bond held by Barr, \$808, with interest \$275.39; amount, \$1,083.39. Bond held by Miller, \$571, interest, \$194.61; amount, \$765. Amount in hands of receiver, principal and interest, \$1,599.70. After deducting \$250 for costs, leaves for distribution between Carson's and Barr's estate, \$3,198.70. To Carson's estate, \$2,696.74; to Barr's estate, \$498.36. The balance due Carson after this credit, \$3,165.74, and the balance due Barr, \$585.03. The amount due on the purchase of the sexton's house; the total of the two notes of \$600 and \$300 with interest to December 1st, 1875, \$1,634.06.

The cause came on to be heard on the 23d day of November, 1875, when the court overruled the demurrer of the defendant trustees to the original and amended bills, and sustained the plaintiff's exception to the commissioners' report; but that the said report, no further exceptions having been filed thereto, be approved and confirmed, except so far as it is affected by the allowance of said

177 exception, *and so far as it has been modified by the supplemental statement of the commissioner, which, not being excepted to, is also approved and confirmed. And it was decreed that Barr's administrator and Miller's administrator should deliver to the general receiver of this court the said unpaid bonds of Silas Billings now held by them respectively, which the said receiver was directed to collect, and of the proceeds thereof and the moneys already collected of Billings, after reserving \$253.60 for costs, he should make a rateable distribution between the said several claims due by the said church to the estates of Carson and Barr respectively, according to the scheme of distribution in the said supplemental statement, by paying to the plaintiff Huck, administrator of Carson, \$2,696.74, and to Barr's administrator the sum of \$498.36, leaving due to Carson's estate as of the 1st of December, 1875, \$3,165.44, and to Barr's estate as of the same date, \$585.03. And holding that the building and lot of the said church at the corner of Cork and Market streets is primarily liable to pay the said balances, but subject to the lien of the debt due to Miller's administrator due by the bond of said Nulton and secured by a deed of trust, amounting to \$765.61, with interest on \$571 from December 1st, 1875, it was decreed that unless the trustees of said church, or some one for them or for the said church, should pay the said sums of money with interest to Miller's executor, Carson's administrator and Barr's administrator, within ninety days from the rising of the court at its then present term, four commissioners named, after advertising, &c., should sell the said church building and lot at public auction on the terms, &c.

And it appearing to the court that the sexton's house and lot is primarily liable to the payment of the two negotiable notes of \$600 and \$300, of which Nulton was the maker and Carson the endorser, for the indemnity of the estate of Carson and of Nulton, 178 it was further decreed *that unless the said trustees or some one for them or for the said church, shall pay the said sum of \$1,634.66, with interest on \$902.20 from December 1st, 1875, as appears by said supplemental statement, to the assignees, of these notes within ninety days from the rising of the court, the same commissioners, after advertising, &c., should proceed to sell in the same way and upon the same terms the said sexton's house and lot, &c. From this decree Linn and the other trustees of the church applied for an appeal; which was allowed.

Holmes Conrad, for the appellants.

Byrd & Huck, Wm. L. Clark and R. Parker, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The objects of this suit were, first, to sell the sexton's house and lot to reimburse Carson for the purchase money thereof, which he had paid; second, to assert Carson's right to the application of the old church fund to the satisfaction of liabilities which he had incurred to raise money for the erection of the new church, and to effect the sale of said property to reimburse him for his advancements on the cost of its erection, and to relieve him from liabilities therefor, which the old church fund was inadequate to. The amount of his advances, and liabilities, is ascertained by the report of the master commissioner to be on the first of December, 1875, including interest, \$5,862.48, to which report there being no exception, it was confirmed by the court below, and will be taken to be correct. It was excepted to by the defendants, but it appears from the certificate of the judge that the exception was afterwards withdrawn.

Robert W. Barr held the bond of the 179 church, ascertained *by said commissioner's report to amount, with interest on the said 1st of December, 1875, to \$1,083.39, the consideration of which was work and labor and materials furnished for the new church building. The court held that this debt was chargeable pro rata with Carson's on the old church fund, which had been raised for the building of the new church. In that ruling of the court there was no error. After the application of the old church fund to these debts, the balance due Carson was \$3,165.74, as of the 1st of December, 1875, and Barr, of the same date, \$585.03, chargeable on the same property. Another bond was held by G. S. Miller, the consideration of which was purchase money for the lot on which the church was built, and which was secured by a deed of trust thereon, amounting on the said 1st of December, 1875, to \$765.61. The court held that said debt was not chargeable on the old church fund, but was entitled to priority of satisfaction over Carson and Barr's debts, out of the proceeds of the sale of the new church and the lot on which it stood. We perceive no error in this ruling of the court, if the said property is subject to sale for the satisfaction of said debts. And the court decreed the sale of said property, to satisfy said debts, unless they were paid, with interest, &c., within ninety days from the rising of the court at its then present term.

The court also decreed the sale of the said sexton's house and lot, for the payment of the two protested notes, one for \$600, and the other for \$300; of each of which Abraham Nulton was the maker, and Joseph S. Carson endorser. The said house and lot were purchased by the trustees for the church, and the said Nulton and Carson as trustees made and endorsed said notes, which were discounted in bank and the proceeds applied by them, by agreement with the vendor, to the

satisfaction of his notes in bank, which were taken up by them and delivered to him in satisfaction of the purchase money of said sexton's house and lot, for which no conveyance has yet been made by the vendor to the church, and if it had been made, it is hardly probable, could, under the limitations of the statute, have vested title in the church. The vendor retains the legal title, and he has received the purchase money. He is not entitled to both land and money. The church has paid nothing. And the trustees, who have paid the purchase money, have a right to be reimbursed by the sale of the house and lot. There is no error in the decree directing the sale.

Upon the authority of *Isaacs v. Nulton*, recently decided by this court and not yet reported, the president delivering the opinion, in which the whole court was unanimous, the judgments of the Federal courts set out by the plaintiff in his original bill, for which he alleged he was liable, are void judgments, and could not be enforced against him. But the securities upon which those judgments were founded were also stated, and were alleged to have been given by him, as treasurer and trustee, for and on behalf of the Methodist Episcopal church at Winchester, and for its benefit, and although the judgments were void, the securities upon which they were founded were still a subsisting liability on him, against which the church was bound to indemnify him.

We think it was competent for the court to give his administrator, in whose name the suit was received after his decease, leave to file an amended bill, to set out with more fulness, and greater particularity, those securities, and an account of advances which he had made for the church, and to correct any mistakes which may have been made by the original bill in the description of those securities, and the grounds of his liability therefor, and to such reimbursement from the church for the moneys he had advanced for it, and to relieve his estate from those liabilities, and to place them upon the church for whose benefit he, as its officer and

agent, had incurred *them with its approbation. We do not regard the amended bill as repugnant to the original bill, or as presenting a new case, but as ancillary to the original bill, in the presentation of the case made by it more fully and accurately, with additional averments, to the end that there might be a decision of the cause upon its merits, and the attainment of complete justice between the parties. We are of opinion, therefore, that the court did not err in overruling the demurrer to the amended bill. And if there were defects in the original bill which were reached by the demurrer to it, they were cured by the amended bill, unless it can be maintained that the church property was inalienable, or not liable to be incumbered by mortgage, or otherwise, to satisfy the claims of the plaintiff for the advances he made for it, or to indemnify and save him harmless for the liabilities he had incurred on its behalf; and that is the question which we will now consider. And that

involves the question whether the court erred in decreeing the sale of the lot purchased by the trustees for the erection of a church, with the house which they erected thereon, to satisfy the balance of the purchase money for the lot, secured by a deed of trust thereon, and the balance due for the advances made, and the liabilities incurred by Joseph S. Carson for the erection of said house, and the balance due Barr's estate for work and labor and materials furnished by him for the same?

The Methodist Episcopal church at Winchester, though not a corporation, and incapable of incorporation under the constitution of the state, was an association of individuals, recognized by the constitution as a body capable of taking and holding land, under such limitations as might be prescribed by law, and entitled to be secured in the enjoyment of its property.

By the law, it is authorized to have a board of trustees, who may sue and be sued, in whom the title to its land or other property may be vested. But it is limited in

the *right of holding land only as a place of public worship, or as a burial place, or a residence for a minister or bishop, or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business. And it is added, "the land shall be held for such use or benefit, and for such purpose, and not otherwise." That would restrict it to the sacred and religious purposes mentioned, and not for merchandising, manufacturing or other secular uses. But it is not a restriction on the mortgaging for sale of the land for debt. To sell the land would not be to hold it for other purposes; and it might be held for the sacred purposes mentioned, whilst at the same time it was encumbered by mortgage or otherwise for debt contracted in its acquisition. The title is authorized to be vested in the trustees of the church or religious society; but they are restricted as to the quantity of land they may take and hold "at any one time." These words—at any one time—seem to imply that they may alienate the lands they hold at one time, and then buy other lands, so that they do not, at any time, exceed the limitation. There is certainly nothing in these provisions of the statute which restricts or inhibits the alienation. There are limitations upon the acquisition of lands, but none, it seems, upon the alienation of any they have acquired. And the 13th section of this 76th chapter expressly authorizes the circuit court of the county wherein the lands lie, upon the application of any member of the congregation, in a proper case, to decree the sale. The authority given in that particular case does not exclude the authority of a court of equity in other cases in the exercise of its general jurisdiction to decree a sale. It may be regarded rather as predicated of the amenability of church property to the general jurisdiction of courts of equity, just as the property of other individuals or association of individuals is,

and that this section was designed
183 *only to give the jurisdiction upon the application of any member of a religious society to effect a sale for the benefit of the society, and for direction to the court in the disposition of the proceeds of the sale.

The Methodist Episcopal church at Winchester, an association of individuals, had adopted the book of discipline of the Methodist Episcopal church as the law of their society. In chap. 3, § 2 of said book of discipline, p. 264, it is provided that if the trustees, or any of them, have advanced money, or are, or shall be, responsible for any sum or sums of money on account of the said premises (that is, for houses of worship or dwellings for the preachers) which they are obliged to pay, they are authorized to raise the said sum or sums of money by a mortgage or sale of the premises. The decree in favor of Joseph S. Carson is for advances and liabilities incurred in the erection of a house of worship for the society upon a lot which the trustees had purchased for that purpose. These advances were made and liabilities incurred for the benefit of the society, and with the approval. And it must be considered that they were made and incurred upon the faith of the assurance contained in the book of discipline just referred to, which he relied on for his security. It was in fact a contract between him and that society that if he would advance the money he advanced, and assume the responsibilities he did, to raise the money to complete the church building, so as to provide for them a place of worship, the property should be mortgaged, or sold, if necessary to reimburse and indemnify him.

And why may not this contract be enforced by a court of equity, just as it might if it had been made with an individual or any other unincorporated association of individuals? There being no inhibition or restriction at common law of such alienations or incumbrances of their property by churches or religious societies—and we have seen that

there are none by statute—an affirmative answer *(speaking for myself only) would seem to be, logically, the conclusion, unless there is something opposed to it, either expressly or by implication, in the constitution and government of the church or religious society in which the question arises. Upon such a question, it would seem that the law of the church must govern, its authority being unaffected by the law of the state. But the court does not feel called on to decide that question, or to intimate an opinion on it, except as it arises in this case under the provision in the book of discipline of the Methodist Episcopal church—regarding the general question as one of great importance, affecting all the churches in this commonwealth, which should not be decided except upon the fullest deliberation.

It is true that the section of the book of discipline referred to provides the mode of procedure by which the sale may be effected by the society itself, and Carson did not proceed in that way, but resorted to a court of equity. How else could he have enforced the obligation of the society, which it was bound

in good faith to fulfil—when under its new organization, through its new board of trustees, it refused, though receiving the benefit of his advances, and though he had incurred heavy liabilities—the fruits of which it was enjoying—to fulfil its obligations to him? His right to sue the trustee is expressly given by the statute. Upon the whole we are of opinion to affirm the decree of the circuit court.

Decree affirmed.

185 *McComb v. Lobdell & als.

September Term, 1879, Staunton.

1. *Equity—Res Judicata.*—Upon a bill by L against M and others setting up a contract of partnership between them, it appears that in a previous suit the matters alleged in that bill were sufficient to put in issue the fact of such a contract as is alleged in this case, and in that case it was held that the contract was not valid—**HOLD:** The decree in the first suit is a conclusive bar to the second.
2. *Same—Supplemental Bills.*—A supplemental bill sets up a new contract of partnership entirely different from that set up in the original bill. The supplemental bill is demurrable.
3. *Sufficiency of Proof.*—The case stated in the supplemental bill, not sustained by the proofs in the cause.

This was a suit in equity in the circuit court of Shenandoah county, but afterwards transferred to the circuit court of Augusta county, brought in September, 1871, by George G. Lobdell against Joseph Martson and Henry S. McComb, setting up a partnership, and seeking a settlement of the partnership transactions between the plaintiff and the defendants. McComb answered denying the existence of the partnership. The cause came on to be heard on the 5th of December, 1878, when the court held that the partnership as set out in the supplemental bill of the plaintiff was satisfactorily proved, recommended to the commissioner the report previously made by him, and directed him to take the account of the partnership transactions. And thereupon McComb ap-
186 plied to one of the *judges of this court for an appeal; which was awarded. The evidence is very voluminous, but the view taken of it by this court is given in the opinion of Judge Anderson.

R. T. Barton and William J. Robertson, for the appellant.

Moses Walton and J. R. Tucker, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The complainant, George G. Lobdell, and Charles Bush of the state of Delaware, and J. P. Rinker, Samuel M. Lantz and Joseph

**Res Judicata.*—A judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. *Corprew v. Corprew*, 84 Va. 602, citing the leading case.

See also *Tilson v. Davis, adm'r et al.*, ante, 92 and note.

Marston, of Virginia were, in 1854, the owners of Caroline furnace in the county of Shenandoah, Virginia, and of Union forge, and of the lands and personal property belonging to them respectively, which they were operating in partnership, under the name and style of Marston, Bush & Co.—the two former owning two-fifths in the furnace and one-third in the forge, and the latter owning one-fifth each in the furnace and one-fifth of two-thirds each in the forge property. Lobdell and Bush afterwards purchased Rinker's one-fifth interest in the furnace property and partnership, which gave to them each three-tenths in the same.

The said Lobdell & Bush were also partners in carrying on a large foundry and machine shops in Wilmington, Delaware, under the name and style of Bush & Lobdell. And their establishment there seems to have afforded a market for most of the pig iron made at the Caroline furnace, though it supplied them with a very inconsiderable portion of the pig iron they consumed.

Charles Bush, one of the partners, died on the 5th of October, 1855, leaving a widow, and four children, one of whom was the wife of Henry S. McComb, the appellant, **187** *who also resided at Wilmington, in Delaware. And he and William Bush (not the son of Charles Bush, deceased), qualified as administrators of said estate, and the former, on the 19th of May, 1856, qualified as administrator of said decedent in Virginia.

After the death of Charles Bush, the furnace was continued in operation. The bill in this case alleges, that the terms of said partnership, and its operations, are more fully described in an original bill filed in this court, and still pending, in which McComb and wife are plaintiffs, and complainant and wife and als. are defendants; which he makes an exhibit with his bill. He further avers, that "the question of the continuance of said partnership after the death of Charles Bush, was submitted for the consideration and determination of this court by said bill, and it was determined in the negative, by a decree rendered in said cause, on the 28th of March, 1872." And yet he "represents that said H. S. McComb, professing to act for himself, and on behalf of the estate and widow and heirs at law of Charles Bush, deceased, of whom his wife was one, and with the concurrence of Joseph Marston, the other surviving partner, entered into a verbal agreement, to operate said Caroline furnace and carry on the business appertaining to the same, in the name of the old firm of Marston, Bush & Co., the said McComb, representing and controlling the interest previously owned by Charles Bush, deceased.

The contract as alleged, is a contract of the widow and heirs of Charles Bush, deceased. The bill avers that it was entered into on their behalf by McComb, and for himself. How for himself? It could only be in the interest of his wife, who was one of the heirs. He had no authority as administrator. The partnership effects did not come into his hands in the capacity of adminis-

trator; but were held by the surviving partners. It was their business to retain the partnership property, pay the debts,

188 *and wind up the concern, and to pay over to the administrator whatever might be due his intestate, upon the settlement of the partnership concern. The bill does not represent him as acting in his capacity as administrator. It is essentially a contract, as alleged, of the widow and heirs, entered into on their behalf by McComb, he being interested in right of his wife, through whom alone he could act, to operate said Caroline furnace, and to carry on the business appertaining to the same, in the name of the old firm of Marston, Bush & Co. It was in substance a contract, as alleged, by the widow and heirs of Charles Bush, deceased, with the surviving partners, that they should continue the business under the old firm name, said McComb representing and controlling on their behalf the interests previously owned by Charles Bush, deceased.

Now this bill affirms, as we have seen, that the question whether there was a continuance of said partnership, after the death of Charles Bush, was submitted for the consideration and determination of this court in that other suit, and that it was determined in the negative by the decree of the court rendered in that cause. It would seem then to appear on the face of the bill, that the question as to the continuance of the partnership by the widow and heirs had been adjudicated and determined in another suit between the same parties. And if so, the bill was demurrable on that ground.

And when we turn to the bill itself, which the complainant has brought into this record, and made an exhibit with this bill, it would seem that the same matter was substantially put in issue in that suit. It alleges that "the business was still carried on by the survivors, without any new contract of partnership." Again it avers that "the business has been carried on since by said Marston & Lobdell, but without any new contract with the heirs of said Charles Bush, deceased,

189 or his administrator, and your *orators desire the court to determine whether the administrator and heirs at law of said Charles Bush, deceased, are to be considered as partners, or whether the survivors are to be charged with rent for the share belonging to the estate of said Bush, deceased.

The defendant McComb in this suit filed a demurrer to the plaintiff's bill, which was overruled by the court, and the defendant then filed his answer. Whether the demurrer ought to have been sustained on the ground already stated depends upon the fact whether the matter admitted by the bill to have been decided in the former suit, was an adjudication of the question arising upon the contract alleged in this case. Whether it be so or not, the matters alleged in the former bill were sufficient to put in issue the fact of such a contract as is alleged in this case, and it is not perceived why the whole matter in controversy in this suit might not have been decided in that.

But the bill afterwards admits, that the

contract alleged to have been made was not valid or binding on those on whose behalf it was made, for want of authority by McComb, who professed to act on their behalf. It consequently appears upon the face of the bill that the only contract upon which it seeks to establish the existence of a partnership was no contract at all. And it is sought to hold McComb himself bound by a contract, which he did not make on behalf of himself, because he was mistaken as to his authority, or made a misrepresentation as to his authority to enter into the contract on behalf of those on behalf of whom he made it. We do not think this position can be maintained on reason or authority, and consequently are of opinion, that upon this ground the demurrer ought to have been sustained. But upon the merits.

The defendant McComb emphatically and unqualifiedly denies the allegation of 190 the bill, that he had ever made *the contract alleged. His language is, "Respondent denies that so far as he knows, the widow, heirs, or that he, as administrator of Charles Bush, deceased, after the death of the said Charles Bush, ever formed or expressed to George G. Lobdell, or to Joseph Marston, or to any other person or persons whomsoever, any intention or expectation of renewing or continuing in any way any new partnership, or continuance of the old partnership of Marston, Bush & Co. under that name, or any other; or that this respondent, on behalf of said widow and heirs, or for himself as administrator, or on his own account, ever entered into any agreement, understanding, contract or arrangement, written or verbal, to operate said Caroline furnace, and to carry on the business appertaining to the same, in the name of the old firm of Marston, Bush & Co. or in any other name, to and with said George G. Lobdell and Joseph Marston, or either of them, or any other person or persons whatsoever."

This answer, so far as it negatives the contract alleged in the bill, is fully sustained by the deposition of the complainant himself, given in the other suit, and which the defendant, McComb, exhibited in this suit, upon the issue made by the bill and answer, to contradict the allegation of the bill. So that, upon the merits, the contract alleged in the bill was disproved by the plaintiff's own deposition, which had been given in the other suit.

But the plaintiff, being advised of this, sought to sustain his cause by shifting his ground, and making a new case. He had to make a new case, for he never could succeed in the case made by his bill. It had nothing to stand on. Its very foundation—the contract which it alleged was proven by himself never to have had any existence. He thereupon, more than three years after the institution of the suit, and after the cause had been before a master, depositions taken, and report made upon the issues made upon the original bill and answer, and exceptions taken 191 thereto, filed his supplemental bill, in which he alleges and sets out an entirely new contract of partner-

ship, in the following language, viz: "That the said Henry S. McComb, on the 19th day of May, 1856, for himself and one David P. Bush (the said McComb professing and assuming to have the necessary authority from David P. Bush) verbally agreed to form and enter into, and did form and enter into, a co-partnership with your orator and the said Joseph Marston, for the purpose of manufacturing iron at Caroline furnace, in said county; that the interest of said Henry S. McComb and David P. Bush (the said McComb professing and assuming to act for said David P. Bush) in said concern was two-fifths, that of your orator two-fifths, and that of the said Joseph Marston one-fifth, and that the said partners were to share in the profits or losses in that proportion." He then adds: "Your orator has since discovered and avers and charges that the said Henry S. McComb had no authority from the said David P. Bush to make and enter into said agreement of co-partnership for and on behalf of said David P. Bush; that the said David P. Bush was not a partner in said concern, and never had any interest therein." The bill thus assumes that McComb, by reason of said agreement and want of authority to act for said David P. Bush, and by reason of his subsequent conduct and acts in relation to the business of said co-partnership as set forth in the original bill, is to be regarded as having acted for himself alone, having an interest in said co-partnership of two-fifths, and being entitled to two-fifths of the profits or liable for two-fifths of the losses of said business. The complainant, after repudiating himself the contract as alleged—that is, a contract between the survivors and McComb and David P. Bush—insists upon it as a contract with McComb alone, and so rests his case.

The defendant, McComb, objected to the filing of this bill as a supplemental 192 bill in this cause, upon the ground *that it contradicted the original bill and is repugnant to it; but his objections were overruled.

The defendant then demurred to the supplemental bill, and set out the grounds upon which it was insufficient in law as follows:

"First. Because it contradicts the statements of the original bill, and introduces a completely new case.

"Second. Because it alleges that the contract of partnership was on behalf of D. P. Bush, the said McComb representing the said D. P. Bush, and that said McComb was not the authorized agent of D. P. Bush. This then being the contract set up in the bill, complainant is not entitled to enforce his remedy thereupon in a court of chancery.

"Third. Because it alleges an agreement on behalf of H. S. McComb to form a partnership: which agreement the said H. S. McComb did not carry out. Upon such a breach of contract, complainant had his remedy at law, and is not entitled to sue thereon in chancery.

"Fourth. Because said D. P. Bush was not made a party to the suit."

Without entering upon a discussion of

these several grounds of demurrer, we are of opinion that they present substantially good grounds for sustaining it, and that the court erred in overruling the demurrer.

But waiving that, we will consider the case as it now stands, on the supplemental bill, upon its merits. The answer of McComb denies in the whole, and in every part, comprehensively and specially, positively and unequivocally, the allegations of the bill touching the contract. Let us first briefly consider the contract itself, as alleged. The statement is that it was a verbal contract made between H. S. McComb, for himself and David P. Bush, and George D. Lobdell and Joseph Marston (who were survivors of the old firm of Marston, Bush & Co.), on the 19th of May, 1856, in the state of Virginia,

193 to form and enter into a *partnership for the purpose of manufacturing iron at Caroline furnace, in the county of Shenandoah, Virginia. It does not stipulate what shall be the input of each partner, except that McComb's and Bush's interest in the concern was two-fifths, Lobdell's two-fifths, and Joseph Marston's one-fifth. Now, that might have been a sufficient stipulation as to Lobdell and Marston, for it describes the exact interest which they had in the firm of Marston, Bush & Co.; but not so as to McComb and D. P. Bush. Even excluding Ellen, the widow of Charles Bush, McComb's wife and David P. Bush had severally only an interest each for one-fourth of two-fifths, and McComb had nothing only in right of his wife. It could not with truth be said that their interest was two-fifths in the concern. In this case it will be observed that it is not pretended that McComb professed to act for the widow and heirs or in the capacity of administrator, but only for himself and David P. Bush; and yet there is no stipulation alleged on the part of McComb that he will pay in anything for himself or David P. Bush to the capital of the concern.

But with whom was the contract made? Lobdell was not present. He was absent in a distant state. Nor does it appear that Marston participated in making such a contract. Nor is there a particle of testimony to show that any one was present and witnessed the making of the alleged contract. Nor is there any evidence in fact of the making of such a contract. We have seen that it could not have been made with Lobdell on the 19th of May, 1856, as the bill alleges, because Lobdell was in Wilmington, Delaware, and McComb was at that time in Shenandoah county, Virginia, which is clearly inferrible from testimony of Lobdell. John J. Stoneburner testifies, for the complainant, that McComb was at Caroline furnace in May, 1856, and directed Marston and himself to take an inventory of the property on hand real and personal, to take a

194 list of balances from the books, and to transfer *them all to a new set of books, and, as soon as it was done, to send a list or statement of all to Delaware. As soon as that was completed, Marston could go ahead with the furnace; that he and David Bush had taken, or would take,

the interest of Charles Bush in Caroline furnace; that the business should be carried on under the same firm name, but a new set of books should be opened. On cross-examination he said, "Mr. McComb told me that he and David Bush would take the place of Charles Bush." That does not prove the contract alleged in the bill. It does not prove a contract at all. It was only a remark, not to either of the surviving partners, but to a clerk, that he and David Bush would take Charles Bush's interest in the concern. That might have been his expectation or intention then, but does not prove that he and David ever did so. It does not prove that he made a contract for himself and David Bush that they would go into the concern and take each of them one-fifth interest in it. Stoneburner testifies that McComb was there only three days, and he never knew of his ever being there afterwards. If he made the contract alleged it must have been made during those three days. He clearly had not made a contract at the time he made the remark to the witness, for he only spoke of what he and David would do. And there is not an item of evidence that, whilst he was there, he ever approached Joseph Marston on the subject of a contract, much less that he had made a contract with him. If he had made a contract upon so grave a matter, there would have been some direct proof of it. He and Marston could hardly have made a contract then without the clerk being informed of it—being a witness to it. And it is most improbable that they would have made a contract of partnership without reducing it to writing. And the fact that McComb never visited the place again raises a strong presumption that he never made such a contract of partnership, and that he

195 was not interested as a partner. *The instructions which he gave Marston and Stoneburner about making an inventory of the partnership effects, writing up the old books and opening a new set of books, were very proper instructions, and were entirely consistent with his position, that he was not and never has been a partner. He was the administrator of Charles Bush in this state, and was then, most probably, not informed as to what were his exact relations in that capacity to the partnership property, as he afterwards learned from the instructions of his judicious counsel. But he doubtless knew that his wife and her mother and brothers had a large interest in the concern, and doubtless felt a commendable desire to protect their interests.

There is no proof that McComb made the contract of partnership alleged by the bill, or indeed any other contract of partnership, in May, 1756, whilst he was on a visit to Caroline furnace in Shenandoah, Va.; nor is there any evidence tending to prove it. Prior to his visit to Caroline furnace, the interest of Charles Bush's widow and heirs in the firm was only three-tenths. It was during that visit that he purchased for them and Lobdell the one-fifth interest of Lantz, which he afterwards conveyed by deed to George G. Lobdell: one-half in his own

right, the other half in trust for the widow and heirs of Charles Bush. It seems that this deed was not made until the 28th of Oct., 1856. If McComb and David Bush, or McComb alone, had entered into the alleged contract of partnership 19th May, 1856, and had agreed that they would take two-fifths interest in the new concern (though the old firm at that time, by executed contract, had only a three-tenths interest in the concern), why did he not have the moiety of the Lantz interest conveyed to himself, instead of to Lobdell, in trust for the widow and heirs of Charles Bush, if it were not that the said Lobdell, as surviving partner, still retained for the heirs the entire interest which their ancestor Charles Bush, had in the co-partnership?

196 *George Lobdell testifies, that McComb went to Virginia in May (he thinks), 1856. He negotiated sale of Bush and Lobdell's interest in Union forge, &c., and purchased Samuel M. Lantz's interest in Caroline furnace, and his interest in the assets of the firm of Marston, Bush & Co., which sale and purchase were assented to by all the adult parties in interest, and was also confirmed by the court of Shenandoah county as to the infant heirs of Charles Bush. If he entered into a new partnership with the surviving partners, he had no interest in the assets of the firm, even after the purchase of Lantz's interest, but one-fourth of two-fifths, which he had in right of his wife, and David Bush had only a like interest, which must have been well known to Lobdell. And yet he consents by his alleged contract to give each of them one-fifth interest in the concern.

To proceed with his testimony: He says, at the same time (when he was in Virginia) H. S. McComb made arrangements for the future prosecution of the business at Caroline furnace, ordered an inventory made of the personal property, and a list of debts due to and by the firm of Marston, Bush & Co. This, as we have before remarked, was not at all incompatible with the relation which he sustained to the company, though having no interest as a partner. But the witness says further, agreeing for himself and David Bush to take the interest which had formerly belonged to Charles Bush, and to continue the business under the firm name of Marston, Bush & Co., as had been done heretofore. He does not assert that he agreed for himself and David Bush to take such interest. He could not swear to that, because he did not know it of his own knowledge; for he was not present. So he mentioned it merely by way of recital; and it is all evidently founded upon information, which he received from Stoneburner, and relates to the time and place and remark made to him by McComb, which we have already *considered. That is evidently the source and origin and only foundation of this testimony of Lobdell; and it was an ingenious attempt of his, to fix a liability on McComb for the debts of Marston, Bush & Co. That concern was owing him a large debt of \$32,999.93; had been owing it a long

time; and he was very much interested in getting McComb into the concern, to help to pay it, and probably to share other liabilities. He as far back as July, 1861, had endeavored to hold the old firm liable for it; evidently upon the ground that it was contracted during the continuance of the partnership; for he thought or professed to think, that there was some provision made in the articles of co-partnership of the old firm, which were lost or mislaid, which authorized the continuance of the firm after the death of one of the partners, and he claimed the right to hold the widow and heirs of Charles Bush liable for such proportion of the large debt he held against the firm, as Charles Bush would have been liable for if he was living. But this was determined against him; and upon the settlement, he fell indebted to the widow and heirs of Charles Bush in the sum of \$20,859.69, and executed his bond to the widow, Ellen Bush, in the sum of \$13,096.46, conditioned for the payment of \$6,953.23, with interest, which was her portion of it; and like bonds to each of the four heirs, for their respective portions of the said debt. To Henry S. McComb, in right of his wife Elizabeth, he gave his obligation in the sum of \$6,953.22, conditioned for the payment of \$3,476.61, his proportion, with lawful interest payable semiannually, and to David P. Bush he gave a like bond for same amount.

Now, how was this large debt contracted by Lobdell, against the firm of Marston, Bush & Co.? Bush & Lobdell, both the old firm and the new, purchased the iron made at Caroline furnace, and both the old and new made advances to Marston, Bush &

198 Co., in excess of the *iron received from them, and for such advances as were made, prior to the 1st of July, 1856, the administrators of Charles Bush settled with Lobdell, the surviving partner of the old Wilmington firm; but refused to settle with Lobdell, for advances made subsequent to that time, because of the dissolution of the firm by Charles Bush's death; which lopped off from his account the large sum before mentioned. But how did it become a debt due to Lobdell individually? Why was the excess of advances made by the new firm of Lobdell & Co. charged up to Lobdell individually? If McComb and David Bush had had two-fifths interest in Marston, Bush & Co., it is not probable that he (Lobdell) would have consented to be responsible for the excess of advances, thrown from their shoulders, and cast on him individually. And if he had paid Marston, Bush & Co.'s drafts, because, as he intimates, he had the money, and Bush & Lobdell did not always have it just at hand, if they had been alike interested with him as partners, in sustaining the credit of the Virginia concern, he would have had all the drafts of Marston, Bush & Co. entered on the books of Bush & Lobdell, and if paid with his money, debited to the Wilmington firm and credited to him. And the fact that he did not, but allowed the whole excess of advances to Marston, Bush & Co., to be entered upon the books of the Wilmington firm on settlement, we think, is irreconcil-

able with his present pretention, that McComb or McComb and David Bush were co-partners of his in the Virginia firm.

And it is equally irreconcilable with that pretension, that he would have secured to McComb in July, 1861, by mortgage on his estate, the payment of the sum before mentioned, and a like sum to David P. Bush, if they were as members of the firm of Marston, Bush & Co. bound to him for their proportions—two-fifths—of the large debt of \$32,999.93, which he held against that firm, without even a suggestion that what he was
199 owing them *should be settled in that way; or even without an intimation that they, or either of them, were owing him any part of the debt he held against Marston, Bush & Co. as members of that firm. If they were members of that firm, they were most unquestionably responsible to him for their proportions of this large debt. Yet living together in the same town, it is most remarkable that Lobdell never sought payment from them in any way, or ever suggested to them or either of them that they were owing him a portion of this debt, or to any other person, so far as it appears in record, from 1861 to 1871, a period of ten years, when within that period, it also appears, he was at times very much straitened for money.

Verily the conduct of the complainant Lobdell has been utterly irreconcilable with his present pretensions and the claims he sets up in this suit.

He goes on further in his deposition to say, that on McComb's return from Caroline furnace to Wilmington he stated what had been done, which met with the approbation of himself and David Bush. If he meant to include in what he says McComb communicated had been done, that he had agreed for himself and David Bush to take the interest he before mentioned in the firm of Marston & Bush, then he proves that Bush had sanctioned and confirmed the agreement, and was equally liable with McComb. But that would be inconsistent with the case made by his bill, and would prove him out of court. And if it does not prove that, it proves nothing against McComb touching the alleged contract. His testimony on that subject is all hearsay, and is most probably a mere repetition, with some amplification, of what he had heard from Stoneburner; for it goes beyond what was testified by Stoneburner, who never testified to any sort of agreement.

It is useless to pursue this investigation further. The conduct of complainant
200 is entirely incompatible with *his pretensions in this suit, either in his original or supplemental bill; and the interest which McComb is shown to have taken in the affairs of Marston, Bush & Co., and in the writing up of the books of that old concern, and having an accurate inventory of its effects, and in having a new set of books for its continued operations, without a new contract, and the interest which he manifested in its success by his letters and instructions, are all reconcilable with his not being, and never having been, a member of the Virginia firm, when we consider the relations in which he

stood to that Virginia concern, as administrator of Charles Bush's estate in Virginia, and as a member of his family, by marriage with his only daughter, who together with her mother and brothers had a large interest in the Virginia partnership property, and the relation which he sustained to Lobdell and to Marston, Bush & Co., by his connection with the Wilmington concern, in the one of other of which relations his said letters were written.

Against this overwhelming weight of evidence and circumstances, and the positive denial of the answer, we have the testimony of William Bush, that he "understood from Henry S. McComb, that he was interested in the firm of Marston, Bush & Co., as it was reorganized after the death of Charles Bush." Upon re-examination his recollection seems to have brightened and his testimony strengthened, and he says, "I have a distinct recollection that Mr. McComb told me that he and David P. Bush had taken the interest that formerly belonged to Charles Bush in the firm of Marston, Bush & Co." He does not give the time or place, further than to say, that he thinks it was within a year of the formation of the new firm of Bush & Lobdell; he does not say whether before or after. But he stands alone; and his testimony cannot prevail over the sworn answer of the defendant. It is unsupported by the circumstances which support the an-

201 swer, but is in *conflict with the decided weight of evidence in the cause. The most charitable view of his testimony is, that he is mistaken.

The defendant moved to withdraw the deposition of George G. Lobdell from the cause after the filing of the supplemental bill. His deposition was given in another cause, and was filed in this case by the defendant to be read upon the issues made by the original bill. But his motion was overruled by the court. Waiving the decision of that question, which we have not deemed necessary in this case, we have considered the deposition of George G. Lobdell aforesaid.

The deposition of Henry S. McComb was excepted to by the plaintiff, which exception was sustained by the court, and the deposition was excluded, which ruling of the court is one of the errors assigned. We have not deemed it necessary to decide that question either, and have not considered said deposition in our decision. Upon the whole, the court is of opinion, to reverse the decrees of the circuit court, and to dismiss both bills, original and supplemental, as to the appellant. Henry S. McComb, with costs.

The decree was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decrees are erroneous. Therefore, it is decreed and ordered that the appellee, George G. Lobdell, pay to the appellant his costs by him about his appeal and supersedeas aforesaid

here expended. And this court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it is decreed and ordered that this cause be dismissed, and that the appellant *recover against the appellee, George G. Lobdell, his costs by him about his defence in the said circuit court expended.

Which is ordered to be certified to the said circuit court of Augusta county.

The appellee, George G. Lobdell, having submitted a motion on the 27th ultimo, to set aside the decree pronounced on the 25th ultimo, and grant a rehearing thereof, and the court having maturely considered the said motion and the arguments of counsel thereon, it is ordered that the same be overruled.

But for reasons appearing to the court it is decreed and ordered that the said decree of the 25th day of September last be and hereby is modified, so as to dismiss the plaintiff's original and supplemental bills only as to the defendant Henry S. McComb; and the cause is remanded to the said circuit court of Augusta county for such proceedings therein between the plaintiff and the administrator of Joseph Marston, deceased, as may be deemed necessary and proper to a settlement of the partnership accounts between them as the surviving partners of the old firm of Marston, Bush & Co.

Which is ordered to be certified to the circuit court of Augusta county.

Decree reversed.

203 *Grubbs's Adm'r v. Sult.

[34 Am. Rep. 765.]

September Term, 1879, Staunton.

Absent, Moncure, P.*

1. Breach of Promise of Marriage—Action against Administrator.—An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under our statute (Code 1873, ch. 126, § 19), in a case where no special damages are alleged and proved. In such a case, the maxim, *actio personalis moritur cum persona* applies.

*The case was argued at Wytheville when he was not present.

†Breach of Promise to Marry—Survival of Action.—In *Burton, etc., v. Mill et al.*, 78 Va. 492, Richardson, J., in delivering the opinion of the court, said: "Whatever doubt (referring to 1 Min. Inst. [4th Ed.] 278) may have existed, however, has been removed by the decision of this court. In the recent case of *Grubb's v. Sult*, 32 Gratt. 203; in which case it was for the first time decided by this court, that an action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under our statute (Code 1873, ch. 126, § 19), in a case where no special damages are alleged and proved." So the principal case was directly followed in *Flint v. Gilpin*, 30 W. Va. 741; and is cited in support of the maxim *actio personalis moritur cum persona* in *Kuhn v. Broomfield*, 34 W. Va. 260, an action for malpractice.

2. Same—Same—Special Damages—Queere.—Can such an action be maintained against the personal representative of the promisor where special damages are alleged and proved?

This case was argued at Wytheville, but decided at Staunton. It was an action of assumpsit, brought in the circuit court of Wythe county by Nancy Sult against Francis Grubb, administrator of Isaiah F. Grubb, deceased, for an alleged breach of promise of marriage, made by the decedent to the plaintiff in his lifetime. No special damages are alleged in the declaration. The defendant demurred to the declaration, and to each count, but the court overruled the demurrer. He then pleaded non assumpsit, and non assumpsit within one year. To the latter plea the plaintiff demurred, and the court sustained the demurrer. Issue having been joined on the plea of non assumpsit, the jury rendered a verdict for the plaintiff, and assessed her damages at \$600; for which judgment *was entered, and the defendant applied for and obtained a writ of supersedeas to this court.

G. J. Holbrook and R. C. Kent, for the appellant.

J. H. Gilmore and C. B. Thomas, for the appellee.

STAPLES, J. The only question to be decided in this case is, Whether an action for a breach of promise of marriage lies against the personal representative of the promisor.

The counsel for the defendant in error insist that at common law the personal representative may sue or be sued upon all contracts of the deceased, especially where the breach has been incurred in the lifetime of the parties, and that a contract founded on a promise of marriage is no exception to the rule. They further insist that if they are mistaken in this view, and the action is not maintainable according to the rules of common law, it is plainly provided for by statute.

These two propositions may be considered in the order in which they are stated. At common law, if an injury was done either to the person or the property of another, for which damages could only be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done. In other words, where the declaration imputed a tort to the person or property of another, and the plea must have been not guilty, the maxim was *actio personalis moritur cum persona*. According to the earlier authorities, this maxim of the common law is only to be understood of a tort, and had no application to causes of action arising upon contract, especially if broken in the lifetime of the decedent.

The proposition that the personal representative is liable upon every contract of the deceased was, however, always to be understood as not applying to those cases in which *the damage consisted in the personal suffering of the deceased, or in a personal wrong done by him, unless, indeed, some injury to the personal estate could be stated on the record. So that when-

ever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, *actio personalis moritur cum persona* prevails. 2 Williams on executors, bottom pages 786-7-790; 4 Minor Inst., Part I, pages 793-4; Broom's Legal Maxims, side pages 907-8-9-10; Wharton's Legal Maxims, page 19.

One of the earliest cases on this subject is that of *Chamberlain v. Williamson*, 2 Maule & Sel. 408, in which it was held that an administrator cannot maintain an action for a breach of promise to the plaintiff's intestate where no special damage is alleged. This case has always been recognized as a leading one. Lord Ellenborough took time to examine the decisions, and afterwards delivered a carefully prepared opinion. He said "the action was novel in its kind, and not an instance had been cited or suggested in the argument of its having been maintained, nor had he been able to discover any by his own researches or inquiries; and yet frequent occasions must have arisen for bringing such actions." He further said, "executors and administrators are the representatives of the temporal property—that is, the debts and goods—of the deceased; but not of their wrongs, except where these wrongs operate to the temporal injury of the personal estate." Where the damage done to the personal estate can be stated on the record, that involves a different question. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage consists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased, all such as arise out of the unskillfulness of medical practitioners, the imprisonment of the party

206 party brought on by the *negligence of his attorney—all these would be breaches of the implied promise by the persons employed to exhibit a proper skill and attention. He was not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case.

This opinion of Lord Ellenborough was delivered more than sixty years ago. The researches of counsel have not produced a case during all the intervening period controverting the opinion or the conclusion in *Chamberlain v. Williamson*. On the other hand, we have the opinions of all the commentators and text-writers, and the decisions of several courts of the highest respectability and standing, fully sustaining the case of *Chamberlain v. Williamson*. One of these is *Stellins v. Palmer*, 1 Pick. R. 71, in which it was expressly held that an action for breach of promise of marriage does not survive against the administrator of the promisor where no special damage is alleged. The supreme court of Massachusetts, after quoting the language of Lord Mansfield in *Hambly v. Trott*, Cowp. R. 376, goes on to say: "The distinction seems to be between causes of action which affect the estate, and those which affect the person only; the former

survives for or against the executor, and the latter die with the person. According to these distinctions an action for the breach of promise of marriage would not survive, for it is a contract merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling, in substance, deceit and fraud than a mere common breach of promise. The damages may be, and frequently are, vindictive, and if they could be proved against the executor, might render the estate insolvent, to the loss and injury of creditors. For these and other reasons, it has been settled in England that such an action does not survive for an executor. If this was rightly settled, it is decisive, for the law is unquestionably the same which ever party may die."

207 *The case of *Smith v. Sherman*, 4 Cush. R. 408, involved identically the same question, and was decided the same way, Chief Justice Shaw delivering the unanimous opinion of the court.

In *Latimore et al., ex'ors of Rogers, v. Simmon*, 13 Serg. & Rawle, 183, substantially the same question was involved, and the same conclusion reached, as in the Massachusetts decisions. In that case, however, the action had been brought in the lifetime of the contracting parties. The defendant having died during the pendency of the action, the question was, whether it survived against his executors?

Tilghman, C. J., in delivering the opinion of the court, said: "The counsel for the plaintiff rely on the contract in this case, and on some general dicta that all actions founded on contract survive. The position is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon, who, by unskillful treatment, injures the health of a patient. Here is a breach of an implied contract, and yet it will hardly be contended that in case of death the cause of action would survive. It seems reasonable, therefore, to confine the survivor of action to cases in which actual property is affected, even though there be an express contract. A promise of marriage is undoubtedly a contract, though one of a singular nature. By its breach, the feelings of the injured party may be deeply wounded, but it is not perceived that his property is in any manner affected. I speak now of the case as stated on this record."

After this array of authorities—English and American—after the failure of counsel to produce a single case, or even the dictum of one author or writer to the contrary, it would seem the height of rashness to insist that an action of this sort can be maintained at common law against an executor or administrator without averring and

208 proving *some special damage sustained. Whether upon such an averment the action can be maintained has not been fully determined. Nor is it necessary now to decide the point, as the question does not arise upon this record.

It only remains to inquire whether the rule of the common law has been changed by statute.

The provision relied on by the defendant in error is contained in the 19th section, chap. 126, Code of 1873: "A personal representative may sue or be sued upon any judgment for or against or on any contract of or with his deceased."

The learned counsel did not claim that this enactment had altered the common law rule. On the contrary, he was inclined to consider it merely declaratory of the common law. He insisted, however, that its terms are broad enough to cover any contract of the deceased, and the courts are bound so to construe it.

It will be universally conceded, that, in the interpretation of statutes, the leading idea is to find out the intention of the legislature. In ascertaining that intention, we must, of course, look at the terms used. As a general rule, where they are explicit, the courts are not at liberty to say that the legislature intended something different from what the language expresses. This general rule is, however, subject to the qualification that if the court is satisfied, the literal meaning of the words would extend the act to cases the legislature never designed to include, it will restrain their operation within narrower limits so as to carry out what was the manifest intention. *Brewer v. Blougher*, 14 Peters R. 178.

It must be borne in mind that this provision has been substantially in force since 1785. The only difference between the act of 1785 and the present law is, that the former declares that executors or administrators might sue or be sued "on all personal contracts of the deceased," whereas the word "personal" was omitted at the
209 *revisal of 1849. Whether this change be material or not, it has no effect upon the present question.

Although nearly a hundred years have passed since this statute was passed, no case has been found in which it has been held to apply to actions for breach of promise of marriage against the personal representative of the promisor. Certainly our reports furnish no such case. It is safe to say the profession generally have not entertained any such idea. These considerations, although by no means conclusive, are certainly entitled to some weight in the interpretation of the statute.

Although a breach of promise to marry is a violation of contract, it is yet essentially a tort to the person, and comes so fully within the reason and influence of the principal governing actions *ex delicto*, it is impossible to distinguish between them.

In all other cases of breach of contract, as a general rule, the damages are limited to the direct pecuniary loss resulting from the breach, and no regard is had to the motives or feelings of the parties. But in the action for breach of promise of marriage, though in form *ex contractu*, this rule does not prevail. It being impossible to fix any rule or measure of damages, it is permissible to

take into consideration all the circumstances of the case, the loss of comfort, the injury to the feelings, affections and wounded pride of the plaintiff. The jury being the proper judges of damages, having unlimited discretion over the subject, the court will not interfere with their verdict unless there be some reason to impute either undue prejudice, passion or corruption. *Field on Damages*, §§ 534, 5 and 6; *Sedg. on the Measure of Damages*, side page 210, top. 248.

If, under the statute, the action survives against the personal representative of the promisor, it must also survive in favor of the personal representative of the promisee. In

such case it might become a grave
210 question whether the latter would not be guilty of a devastavit in failing to sue for the benefit of creditors and distributees. It would certainly be the first instance on record of an action prosecuted by one personal representative against another for the recovery of mere vindictive damages as assets for the benefit of creditors.

In the case of *Dillard v. Collins*, 25 Gratt. 343, this court held that a right of action, which is merely personal and dies with the party, is not transferred to an assignee in bankruptcy; that the assignee in many respects stands in the same relation towards the bankrupt's estate as that of an executor towards the personal estate of the testator. The distinction was there taken between rights of action for torts to the person, which do not survive, and rights of action for injuries to property, which do survive. The former, it was said, do not pass to the assignee. But if the proposition now contended for be correct, a right of action founded on a breach of promise of marriage would pass to the assignee in bankruptcy, and be the subject of a suit against a personal representative for the benefit of the bankrupt's creditors.

As was said by Lord Mansfield in *Hambly v. Trott*, Cowp. R. 376, all public and private wrongs die with the offender. And this was pre-eminently a wise rule of the common law, founded on considerations of the soundest public policy. In actions based upon torts to the person, such, for example, as slander and breach of promise of marriage, the motives and feelings of the parties are often involved, everything relating to their character and conduct is the subject of investigation. Sometimes the chastity of the plaintiff is assailed with every circumstance of aggravation; and, on the other hand, the bad faith of the defendant is made the occasion of the severest animadversion. In this class of cases, not unfrequently the most private and sacred family relations are unveiled and exposed to public gaze and criticism.

211 The common law wisely proceeded upon the maxim that with the death of either party these investigations should cease, and when the injured party is dead, no pecuniary damages can compensate for violated faith, wounded pride and outraged feelings, and that the courts should never become the arenas for unseemly controver-

sies involving the reputation and the feelings of those who are in their graves.

The legislatures and the courts have wisely adhered to this rule through all the innovations of modern times. There may be exceptional cases—cases of undoubted hardship; but the rule is found to be generally wise and salutary in its operation.

The learned counsel for the defendant in error has depicted in eloquent and forcible language the injury often resulting from breach of promise of marriage, loss of position and health, and not unfrequently pecuniary ruin; and for these injuries it is said the party aggrieved ought not to be deprived of compensation by the death of the offender. The argument of the learned counsel applies with much greater force to cases of slander and libel, malicious prosecution and false imprisonment, which often involve loss of character, station and health, as also loss of fortune.

In all this class of injuries it may be said the injured party should not be denied redress because the offender may die, and in many cases this would be perfectly true. But no one seriously thinks of changing the law on the subject; because all understand that such a change would be productive of far greater mischief than benefit.

In the state of New York they have a statute substantially the same as ours, which was the subject of consideration in *Wade v. Kalbfleisch*, 58 New York R. 282. It was there held that an action for a breach of promise of marriage is not an action upon a contract within the meaning of the statute, and cannot be revived against the personal representatives of the promisor. *Church, C.*

J., in delivering the opinion of the
212 court, said: "The wrongs *for which this statute authorizes an action to be brought by or against executors are such as affect property or property rights and interests; or, in other words, such as affect the estate. Executors represent property only. They can take only such rights of action as affect property, and cannot recover for injuries for personal wrongs. Although, in form, it resembles an action on contract, in substance it falls within the definition of the exception as an action in the case for personal injuries."

These views of the highest court of the state of New York, in the construction of a statute like our own, upon a question of this sort, are deservedly entitled to great respect. Upon a doubtful question they would be decisive of the case.

In considering this question, we have not deemed it necessary to inquire whether our statute was designed to provide for cases not reached by the common law, or is simply declaratory of that law. Because in either aspect, cases of breach of promise of marriage are not embraced by its provisions.

It was asked in the argument what possible use or benefit is there in the statute. This court is not called on to hunt up imaginary cases for the application of the statute. All we have to do is to decide upon its operation and effect as the question comes

before us. Every one familiar with the doctrines of the common law knows that difficulties constantly occur in determining whether the action survives to the personal representatives, or to the heir upon a covenant real. For example, it has been held that if the covenant has been broken in the lifetime of the testator, right of action passes to the executor; otherwise, however, if the substantial damage has taken place since his death. And so at common law no liability attached to the executor where the contract was personal to the testator unless a breach was incurred in his lifetime. *Williams on Executors*, 802, 5 and 6; 2 *Lomax on Executors*, top 430, mar. 254.

213 *Whether the statute in these and kindred cases was intended to give a right of action to the personal representative without regard to the time of the breach of contract, or was intended to remove all doubts and uncertainties as to the right of action, or was simply and purely affirmative of the common law, we repeat, it does not concern us now to decide. And these examples are simply given to show there was good reason for such an enactment without applying it to cases of breach of promise of marriage.

We are, therefore, of opinion that the circuit court erred in overruling the demurrer to the declaration, and in sustaining plaintiff's demurrer to the defendant's plea of the statute of limitations, and as a necessary consequence, it erred in refusing to set aside the verdict and grant the defendant a new trial. The judgment must therefore be reversed, the verdict set aside, and a new trial awarded. This court, proceeding to enter such judgment as the circuit court ought to have entered, sustains the demurrer to the declaration. It cannot, however, enter a final judgment in the case, because the plaintiff may be able to state on the record some special damage, as to which this court expresses no opinion. She ought to have leave to amend her declaration. And the cause is remanded to the circuit court that the case may be further proceeded in in conformity with the views herein expressed.

CHRISTIAN and BURKS, J's, concurred in the opinion of Staples, J.

ANDERSON, J., though he had some doubt on the question, waived it, and concurred in the judgment.

The judgment was as follows:

This cause, which is pending in this court at its place of session at Wytheville, having been heard but not determined

214 *at said place of session: This day came here the parties by counsel; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in overruling the defendant's demurrer to the declaration, and in sustaining the plaintiff's demurrer to defendant's plea of the statute of limitations; and, as a necessary consequence, it erred in refusing to set

aside the verdict and grant the defendant a new trial. It is, therefore, considered by the court that the judgment of the said circuit court be reversed and annulled; and that the defendant in error pay to the plaintiff in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here.

And this court, proceeding to render such judgment as the said circuit court ought to have rendered, it is considered that the demurrer to the declaration and each count thereof be sustained; and as the defendant in error may be able to state on the record some special damage upon which said action may be sustained—as to the propriety of which this court expresses no opinion—leave is given her to amend her declaration, if she shall so desire.

And the cause is remanded to the said circuit court to be proceeded with accordingly.

And it is ordered that this judgment be entered in the order book here, and be forthwith certified to the clerk of this court at Wytheville, who shall enter the same in his order book and certify it to the said circuit court of Wythe county.

Judgment reversed.

215 *Siron v. Ruleman's Ex'or & als.*

September Term, 1879. Staunton.

R died in 1864, leaving a widow and seven children—four sons and three daughters. By his will, after providing for his widow, he gave to his daughter H and each of his four sons a specific parcel of land, to Henry one-half of a tract called Bull Pasture; and he provided that each of his sons should pay a sum named towards paying testator's debts. The charge on Henry's land was \$1,000, payable in two and five years. He then said, after his debts were paid his daughters P and S, to have an equal portion with the balance. The whole of the Bull Pasture tract was under a deed of trust to secure a debt due by the testator to B, and the one-half not given to Henry was sold to pay that debt. Henry paid to the executor two small sums, amounting to \$298.20, and sold the land to J, who sold it to Siron—they having notice of the charge; and Siron paid to the executor \$722.50 in 1863, in Confederate treasury notes and bank notes, it being understood that if the parties entitled would not receive the notes they were to be returned; but they were not returned, though the executor stated the parties refused to receive them. Upon a bill by the executor to subject the land to pay the charge of \$1,000, minus the two items amounting to \$298.20—HELD:

1. *Construction of Will.*—It was the intention of the testator, in the disposition of his property to observe the principle of equality among his children.
2. *Same.*—It was his intention to provide for his daughters P and S portions which, in his opinion would be equal to those given to his other children.
3. *Same—Charges against Land—Debts—Legacies.*—If the testator intended that the sums charged

upon the lands devised to the sons should be applied to the payment of his debts, including that due to B, and that the half of the Bull Pasture farm and the personal property not specifically bequeathed, so far as it was not needed for debts, should go to his daughters P and S, or be applied for their benefit, this property, having been applied to the payment of the debts, which the charges against the devisees were intended to pay, P and S will be turned over to the charges against said land.

4. *Same—Same—Same—Same.*—If the intention was to raise by these charges, a fund for the payment of the legacies to P and S, as well as the debts, they are, of course, entitled to whatever remains of the fund after the payment of debts; and as the debts are all paid, they are entitled to the aggregate amount.

5. *Same—Same—Same—Same.*—The charges on the land were not made simply for the payment of debts, nor were they in any sense contingent, but are absolute in their nature, and constitute an unconditional testamentary provision made by the father for his daughters.

6. *Wills—Charges against Land—Duty of Executor.*—It was competent for the executor of R and his duty to file his bill against Henry and his allies to enforce the charge upon the land, in default of the payment of said money in whole or in part, to collect the same and dispose of it according to the provisions of the testator's will.

7. *Same—Same—Same—Accepting Confederate Currency.*—It was the duty of the executor as soon as he received the said Confederate and bank notes, to apply to the legatees and ascertain from them whether they would accept the said notes; and if they refused to receive them, he should have returned them to Siron; and not having returned them, he is liable to Siron for their value as of the date at which he received them, or a reasonable time thereafter. And Siron should be allowed a credit for such value.

8. *Chancery Practice—Parties.*—In 1867 P and S and their husbands filed their bill in the circuit court of Pendleton against R's executor and his devisees and legatees to enforce the payment of their legacies. The executor answered, and in 1872, the suit was dismissed agreed. No decrees subjecting the land devised to Henry to the charge should be made until P and S were made parties in this cause, and enquiry made as to the adjustment made between them and the executor.

217 *This was a suit in equity in the circuit court of Highland county, brought in August, 1875, by Jacob Ruleman, surviving executor of Christian Ruleman, deceased, to subject certain land devised by the said Christian Ruleman to his son Henry, to the payment of a charge of \$1,000, put upon the land by the will of the testator. The will was admitted to probate in February, 1854. Henry Ruleman sold and conveyed the land to Harvey M. Jordan, and Jordan sold and conveyed it to Jonathan Siron. Jordan being dead, his administrator, and heirs, Henry Ruleman and Siron, were made defendants to the bill. Siron answered insisting that the charge was only for the payment of debts, and that it was not necessary for that purpose; and he avers that he paid to the plaintiff the sum of \$722.50.

*Res Judicata.—This case is cited in Wohlford v. Compton, 79 Va. 838.

The cause came on to be heard on the 17th of April, 1878, when the court held that the \$1,000 was a charge on the land sold to Henry Ruleman, and crediting it with two small sums, decreed that unless Henry Ruleman, or some one for him, should, within sixty days from the rising of the court, pay to the plaintiff \$1,773.73, with interest on \$840.38, part thereof, from the 1st of April, 1878, and the costs of this suit, commissioners named should sell the land in the manner and upon terms stated in the decree. And thereupon Siron applied to this court for an appeal; which was awarded. Christian Ruleman, the testator, lived in the county of Pendleton, and died early in the year 1854. The land devised to his son Henry was in the county of Highland. The will of Christian Ruleman, and the facts, are stated in the opinion of Burks, J.

Sheffey & Bumbgardner and Charles P. Jones, for the appellant.

David Fultz and L. H. Stephenson, for the appellees.

218 *BURKS, J., delivered the opinion of the court.

This case, among other matters, involves the construction of the will of Christian Ruleman, deceased. It would seem that the will was not written by the testator. This is to be inferred from the fact, that his signature thereto was written by some other person, and that he adopted it by making his mark. It was attested and proved by three subscribing witnesses. The scrivener, whoever he was, must have been quite illiterate. The instrument is very awkwardly and inartificially drawn. Whatever obscurity and ambiguity there may be about it, however, one thing seems clear: that it was the intention of the testator, in the disposition of his property, to observe the principle of equality. He had seven children—four sons and three daughters. After giving to his wife certain personal property absolutely, and two slaves, Simon and Patsey, during her life, and providing further that she should have her support out of the home place, he then devises lands to his daughter Helena, and his four sons, to each of them a separate parcel described by general metes and bounds, giving also to his son Christian a negro boy William, and at his wife's death the slave Simon to his son Conrad, and the slave Patsey to his daughter Helena. To each of the devisees to his sons he annexes a charge thus: * * * "Also out of his portion of the land Jacob pays three hundred dollars in five years after my death." * * * "Also Christian out of his portion is to pay three hundred dollars towards towards paying my debts to be paid in five years after my death." * * * "Henry Ruleman, my son, I will and bequeath to you one-half of my land lying on the Bull Paster river by pay—one thousand dollars towards my debts, the money, the half of the money must be paid in two years from this date, the balance 500 to be paid in *five years after my death."

219 * * * "Conrad Ruleman, my son, I will and bequeath that you must pay \$100

after my death towards paying my debts."

Then follows this clause, "After my debts are all paid my daughters, Phebe and Sophia, and eaqal portion with the balance, them and their heirs. Allso I will to my beloved wife one hundred dollars out of the Bull Pasture farm if not redeemed and soul." In the next (concluding) clause, he appoints Jacob and Conrad executors of the will.

It appears that the testator died possessed of other personal property besides that bequeathed to his wife; but of what description it was and what its precise value is not shown. It does not appear, nor has it been suggested in argument, that he owned any real estate except that mentioned in the will. This he devised in parcels to his four sons and his daughter Helena, as before stated, except the one moiety of the Bull Pasture farm, as to which he died intestate, unless it was devised by implication to his daughters, Phebe and Sophia. The whole of the Bull Pasture farm was under a deed of trust to secure the payment of a debt of the testator to General Boggs. It is not shown what was the amount of this debt, or of the other debts of the testator, but it appears that one half of the Bull Pasture farm was sold by the executor or suffered by him to be sold to satisfy the Bogga debt. The executor states that it was sold at the price of \$2,800, and that the proceeds of sale and the personal property of the testator were consumed in the payment of the debts of the testator, leaving a deficiency of \$15.00, which was paid by the executor out of his own means.

It seems to us, that construing the will in the light of the surrounding circumstances, so far as we have them, it was the intention of the testator to provide for his daughters, Phebe and Sophia, portions which, in his opinion, would be equal to those given to his other children. This *object he sought to effect by the charges aforesaid on the lands devised to his sons. These charges together amount to the sum of \$1,700. We do not know what was the value of the property devised and bequeathed to the several children. There is nothing in the record that enables us to fix the value, nor do we know what was the estimate of the testator, except that he must have considered and determined in his own mind that the sum raised in the manner prescribed would secure the desired equality.

In the view we take, it matters but little whether the testator intended, as he probably did, that the seventeen hundred dollars should be applied to the payment of his debts, including the debt due Boggs, and that the property—a moiety of the Bull Pasture farm and the personal property—not specifically devised and bequeathed, so far as it was not needed for debts, should go to his two daughters, Phebe and Sophia, or be applied for their benefit, or whether his intention was, as the learned counsel for the appellees contend, to raise by the charges a fund for the payment of the legacies to the daughters as well as the debts. The result in either case would be the same. If the former construction prevail, then the fund—the personal property and a

moiety of the Bull Pasture farm—having been taken to pay debts, which the charges against the devisees were intended to pay, the two daughters being thus disappointed will be turned over for reimbursement to the charges against said devisees. If the latter construction be the correct one, the daughters, of course, are entitled to whatever remains of the fund after the payment of debts, and as the debts are all paid, they are entitled to the aggregate amount chargeable by the testator against the lands devised.

One or the other of these constructions must, we think, be correct. Practically, in this case, it makes no difference which shall be adopted.

The learned counsel for the appellant insists that the *charges against the lands devised were made merely to pay the debts, and that the debts having been paid by the executor out of the property of the testator, the charges, therefore, cease. We cannot yield our assent to this proposition, for the reasons already stated. We do not think that these charges were in any sense contingent. They are, in our opinion, absolute in their nature, and constitute an unconditional testamentary provision, made by the father for his two daughters.

The court is therefore of opinion that the appellee, Henry Ruleman, took the land devised to him by the sixth clause of the testator's will, subject to a charge thereon of \$1,000 for the benefit of the testator's two daughters, Phebe and Sophia, and that Harvey M. Jordan, who purchased said land from the said Henry Ruleman, and the appellant Jonathan Siron, who purchased the same from the said Jordan, having had, severally, notice of said charge at the dates of their respective purchases, each of them acquired the said land subject to the charge thereon of so much of the said sum of \$1,000 as remained unpaid at the date of his purchase.

The court is further of opinion that it was competent for the said executor, and it was his duty to collect the said sum of money from the said Henry Ruleman, and dispose of the same according to the provisions of the testator's will, as hereinbefore construed; and to that end, it was competent for him to file his bill against said Henry Ruleman and his alienees, to enforce the charge against said land in default of the payment of said money, in whole or in part.

The court is further of opinion that the said Henry Ruleman, in part satisfaction of the charge against said land, paid to the said executor, on the 2d day of April, 1860, \$72.24, and on the 1st day of September, 1860, the further sum of \$225.96, leaving a balance

due the executor, on the 2d day of November, 1863, as agreed by the *parties, of \$722.50; and this balance was paid to the executor by the appellant on the day last named, partly in Confederate States treasury notes and partly in the notes of state banks, then greatly depreciated, and that the said notes were thus paid to and received by the executor upon the agreement and understanding between him and the appellant that if the legatees entitled should

refuse to accept said notes when tendered in payment of their legacies, the same should be returned by the executor to the appellant.

The court is further of opinion that it was the duty of the said executor, as soon as he received the said notes under the agreement and understanding aforesaid, to apply to said legatees and ascertain from them whether they would accept the said notes, and if they refused to receive them, he should have returned them to the appellant; and inasmuch as the said notes were never so returned, although they may have been rejected by said legatees, if and when tendered, and whether they perished on the hands of the executor or were converted to his own use, in either case he became liable to the appellant for their value as of the date at which he received them or a reasonable time thereafter, and in any decree which should have been rendered against the appellant, the latter should have been credited with such value when ascertained.

But the court is further of opinion, that it was improper to render any decree fixing definitely the amount for which the appellant is liable to account until further proceedings were had in the cause. From the documentary evidence in the record, it appears that Phebe and Sophia, the two daughters of the testator, in conjunction with their husbands, instituted a suit in equity in the circuit court of Pendleton county, West Virginia, against the executor aforesaid, and the other devisees and legatees under the testator's will, the object of which suit was to enforce the collection of the legacies claimed by the complainants.

*The record does not show when this suit was commenced. Jacob Ruleman, the executor, filed his answer to the bill. It seems to have been sworn to on the 8th day of April, 1867, and was probably filed about that time. The cause was pending until the 13th day of April, 1872, when a final order was entered therein in these words: "This suit is dismissed agreed." There is nothing to show the nature of the agreement beyond what the order imports. It at least implies an adjustment of some sort. *Hoover v. Mitchell & others*, 25 Gratt. 387. It may be, that some arrangement has been entered into by which all matters in controversy between the parties have been settled so as to relieve the charge which rests on the appellant's land, or the executor may have satisfied the claims of the complainants, and the present suit, while prosecuted nominally in his character of executor, may be really for his own benefit. If the latter suggestion should be well founded, the question would be presented whether the executor would be allowed to recover more than he has paid out. See *Burton v. Slaughter*, 26 Gratt. 914. It is worthy of notice, that the bill in this case was not filed until after the lapse of nearly twelve years from the date of the payment of the Confederate money and bank notes in 1863, and more than twelve months after the dismissal of the suit in West Virginia already referred to. In the answer of the executor

in the last named suit, it is stated that the complainant Sophia resides in one of the western states, and that the complainant Phebe resides in West Virginia and is deranged. Under these circumstances, we think, that before any decree should have been rendered subjecting the lands of the appellant, the nature, extent and effect of any adjustment of rights and claims which may have been entered into between the executor and the devisees and legatees should have been inquired into, and that Phebe and Sophia, the two daughters of the testator, should have been made parties to the cause.

224 *The court is therefore of opinion, that the decree appealed from should be reversed, and the cause remanded to the circuit court, with directions to require the complainant to amend his bill making additional parties, and for further proceedings in conformity with the views hereinbefore expressed, in order to a final decree.

MONCURE, P., dissented.

The decree was as follows:

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in a written opinion filed with the record, that the said decree is erroneous. Therefore it is decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against the appellee, Jacob Ruleman, executor of Christian Ruleman, deceased, his cost by him expended in the prosecution of his appeal aforesaid here, to be levied of the goods and chattels of his testator in his hands to be administered. And this cause is remanded to the said circuit court, with directions that the complainant be required to amend his bill making additional parties, and for further proceedings, in conformity with the written opinion aforesaid, in order to a final decree.

Which is ordered to be certified to the said circuit court of Highland county.

Decree reversed.

225 *Morrison v. Bausemer & Co. & als.

September Term, 1879. Staunton.1

M claimed to subject the proceeds of land under a deed of trust duly recorded. B claimed priority of M's deed under an unrecorded judgment rendered before the deed of trust was executed, on the ground that N, a trustee in M's deed, had notice of the judgment at the time of the execution of the deed—**Held:**

1. **Whether Notice to Agent, Notice to Principal.**—If an agent, before the commencement of his agency, received notice of an unrecorded lien on real estate of which his principal afterwards

***Knowledge of Agent.**—In *Johnson's ex'or v. Nat. Ex. Bank*, Richmond, 33 Gratt. 486 the principal case was cited and its controlling principle affirmed. See also 2 Min. Inst. (4th Ed.) 972; 1 Am. & Eng. Ency. of Law (3 Ed.) 1149; Chapman v. Chapman, 91 Va. 407; Arbuckle v. Gates & Brown, 95 Va. 813.

becomes a purchaser, such notice of the agent will not be imputable to the principal unless there be very strong evidence that at the time of the purchase, the agent remembered the fact that he had received such notice.

2. **Notice to Agent—Evidence.**—Though N, then a deputy clerk in the clerk's office where the judgment was recovered, made a copy of said judgment about twelve months before the execution of M's deed, this is not of itself sufficient evidence of his recollecting the fact when the deed was executed; and there being no other evidence of the fact, the deed of M has priority over the judgment of P.

In a suit in equity in the circuit court of Rockingham, in which certain judgment creditors of Samuel S. Coffman, Michael D. Coffman and Jason N. Bruffy, individually and as partners, were plaintiffs, and said Coffmans and Bruffy were defendants, a decree was made directing a commissioner to take an account of the debts of the said Coffmans, which were liens on a tract of land conveyed by *them by two deeds in trust, the first to secure to James W. Morrison a debt of \$12,000, and the second to secure all their debts equally.

The commissioner made his report, stating debts which, with their interest to September, 1872, amounted to \$65,577.70. Of these, two were by judgments reported to have priority over Morrison's deed of trust—one of them for \$5,391.30, and the other for between five and six thousand dollars.

By consent, there was a decree for the sale of the land, and it was sold on a credit of one, two, three, and four years, and brought \$25,223.75.

There was a decree for a further account of debts; and the commissioner reported a judgment of Bausemer & Co. against Washington Swink and Coffmans and Bruffy as having priority over Morrison's deed of trust. This was a judgment for \$660.10, with interest, rendered by the circuit court of Rockingham at the October term, 1868. This judgment was docketed in the county of Augusta, but was not docketed in Rockingham; and the ground on which it was claimed it had priority of the deed of trust was that A. M. Newman, one of the trustees in Morrison's deed, had notice of the judgment at the time of the execution of said deed. The evidence on this question will be seen in the opinion of Judge Moncure.

The cause came on to be heard on the 24th of June, 1878, when the court held that the judgment of Bausemer & Co. had priority of the deed of trust to secure Morrison, and that it must be first satisfied out of the purchase money of the land after the payment of the two judgments previously reported as having priority of Morrison's deed of trust. And Morrison, thereupon, applied to this court for an appeal; which was awarded.

J. S. Harnsberger and Jacob N. Liggett, for the appellant.

227 *John E. Roller, for the appellees.

MONCURE, P., delivered the opinion of the court.

The controversy in this case is among

creditors of the same debtors having liens on the same real estate of such debtors, and is concerning the order of priority of said liens respectively among themselves.

The said real estate consists of several hundred acres of land situate in the county of Rockingham, which was owned by the said debtors, to wit: S. A. Coffman and M. D. Coffman.

The said creditors claiming on the one side are, the appellant James W. Morrison, who claims a lien on the said real estate under a deed of trust dated the 16th day of September, 1870, and duly recorded on the same day in the clerk's office of the county court of said county, between the said S. A. Coffman and Fannie M. his wife, and the said M. D. Coffman, of the one part, and A. M. Newman and N. K. Trout, of the other part, whereby the said real estate was conveyed by the former to the latter in trust to secure the payment of a debt of twelve thousand dollars and interest thereon, due to the said Morrison and to be paid as mentioned in the said deed; and the appellees, Jacob N. Liggett and John T. Harris, who claim a lien on the said real estate under a deed of trust dated the 19th day of February, 1871, and duly recorded about the same time in the same clerk's office, between the grantors aforesaid, of the one part, and the said Liggett and Harris, of the other part, whereby the said real estate was conveyed by the former to the latter (subject to the deed of trust aforesaid), in trust to secure all creditors, sureties and endorsers of said grantors as mentioned in said last mentioned deed of trust.

And the said creditors claiming on the other side in the said controversy in this case are, the appellees Bausemer **228** * & Co., who claim a lien on the said real estate under and by virtue of a judgment of the circuit court of said county in their favor as plaintiffs against Washington Swink and S. A. Coffman, M. D. Coffman and J. N. Bruffy, late partners in trade under the firm of Coffman & Bruffy, rendered at the October term 1868 of said court, on which judgment a writ of fieri facias was issued on the 22d day of August, 1877, and returned "no property," September 3d, 1877.

The said judgment appears to have been never docketed in the said county of Rockingham.

If, therefore, the controversy in this case depended merely upon the rendition of the judgment without being afterwards docketed on the one side, and the execution of the deeds of trust afterwards duly recorded as aforesaid on the other, there could be no ground for controversy and no doubt about the priority of the lien under said trust deeds and each of them over the lien of the said judgment creditors on the said real estate in Rockingham county.

But the said judgment creditors contend that the said creditors claiming as purchasers under the said deeds of trust respectively, or rather under the said deed to A. M. Newman and N. K. Trout as trustees, were purchasers of the real estate thereby con-

veyed with notice of the judgment aforesaid, and that therefore their purchase was subject to a lien of the said judgment on the said real estate just as it would have been if the said judgment had been duly docketed in the clerk's office of the county court of said county. The Code declaring that "no judgment shall be a lien on real estate as against a purchaser for valuable consideration without notice, unless it be docketed," &c.; thus implying that a judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration, if he made the purchase with notice of such judgment, although the same was not docketed.

It is not pretended that the said **229** creditor, claiming under *the said deed of trust to Newman and Trout, trustees, had himself, at the time of the execution of said deed, or at any other time, personal notice or knowledge of the existence of the said judgment.

But it is contended by the counsel of the said judgment creditors, the said appellees, Bausemer & Co., that the said trustee, Newman, had such notice at that time, and that notice to him was, in legal effect, notice to the creditors secured by the said deed of trust.

It may, perhaps, be conceded, and will be for the purpose of this case, that notice to the trustees, or one of them, at the time of the execution of the deed of trust, was, in legal effect, notice to the creditor thereby secured, and that though such notice was received a year or more or any time before the execution of said deed, yet, if it was actually remembered by such trustee at the time of the execution of said deed, it will effect such creditor just as if it had been so received and was so remembered by him.

It is very clear, however, that if a trustee in a deed of trust to secure a debt have notice or knowledge of the existence of a judgment against the grantor in the deed of trust at a time anterior to the execution of the deed of trust, but have no remembrance of such existence at the time of such execution, the trust creditor will not be at all affected by such anterior notice or knowledge on the part of such trustee.

Now in this case, it appears that the trustee, Newman, about a year before the execution of the said deed of trust to him and Trout, had notice or knowledge of the existence of the said judgment. He was then writing in the clerk's office of the court in which said judgment was rendered, and as deputy or assistant of said clerk made a copy of said judgment, signing the clerk's name thereto; which copy was wanted by the judgment creditors for the purpose of having the same registered in the county of

Augusta, in which it is believed that **230** Washington Swink, the *principal debtor in the said judgment, owned some real estate. It does not appear that the said Newman ever saw or heard of the said judgment or copy after he made the latter.

It is to be presumed from the mere fact that the said Newman, as deputy or assistant clerk, made the copy as aforesaid about a year before the execution of the deed of

trust, remembered the said judgment at the time of the execution of said deed?

There is no evidence in the case that he did so remember the said fact at the time of the execution of said deed but the occurrence of the fact itself at the time it occurred.

The said Newman was examined as a witness in the case by the appellant, and his evidence strongly tends to show, that at the time of the execution of the said deed of trust he had no recollection of the said fact. Being asked on his examination by the appellants: "State whether or not in the fall of 1870, September, the date of the said deed of trust you had any knowledge or recollection of the Bausemer judgment, a copy of which Marked 'W. G. B.' is filed with the deposition of Wm. A. Burnett?" he answered: "At this time I can't say that I had any recollection one way or the other about it at that time." Being further asked: "State whether or not any liens upon the land conveyed by the deed of trust were taken up with the \$12,000 secured in the deed of trust to J. W. Morrison?" he answered: "There were." And: "State if you know why the two liens reported in report of October 3d, 1872, the one in favor of L. Sangster & Co., and the other in favor of Geo. H. Koontz, guardian, were not paid off?" he answered: "The lien in favor of L. Sangster & Co. was yet then in controversy in the court of appeals, and it was agreed between D. S. A. Coffman and J. W. Morrison, that it should not be paid out of those \$12,000. The judgment in favor of Geo. H. Koontz, guardian, had been rendered in the circuit court of Shenandoah county

231 *in August, 1870, and we had no knowledge of it at the time?" And: "Was there or not at the time that the \$12,000 was disbursed in the payment of liens upon the property conveyed in the trust any other lien which had priority over the deed of trust that you knew of?" he answered: "It was our purpose to discharge all the liens that we knew of with the \$12,000, except that of Sangster & Co." And being asked, on cross-examination, among other things, by the appellees Bausemer & Co.: "What position was held by you from 1869 to May 11th, 1870?" he answered: "I was writing in the clerk's office of the circuit court of Rockingham from July, 1869, to May, 1870, is my recollection now, for A. L. Lindsay, clerk of the court. I did nearly all the writing; he did very little.

And J. R. Jones, a commissioner in chancery, was also examined as a witness in the case by the appellees Bausemer & Co., and his evidence tends to show the same fact. Being asked on cross-examination, "Could you undertake to recollect or give the details of one in a hundred abstracts of judgments that have been before you in the various matters of account which have been before you since August 2d, 1875?" he answered: "A very large proportion I would not recollect; I would recollect very few unless my attention was specially called to them, as was the case here; I recollect this because my attention was especially called to it—to this abstract W. G. B."

Now let use look at the authorities referred to in the argument of this case and see if, according to them, the pleadings and the proofs in the case show that the appellant, by the deed of trust in his favor aforesaid, became a purchaser of the land thereby conveyed with notice of the judgment which had previously been obtained as aforesaid, by the appellees, Bausemer & Co. against Swink and Coffmans and Bruffy. *Le Neve v. Le Neve*, Leading Cases in Equity, edition of 1877, vol. II, part I, pp. 109, 227 and notes, English and American. Minor's **232** *Institutes*, edition of *1877, vol. II, pp. 887, 890, the cases there cited: *The Distilled Spirits*, 11 Wall. U. S. R. p. 356; *Hord's adm'r v. Colbert & als.*, 28 Gratt. 49; *Shurtz & als. v. Johnston & als.*, Id. 657; *Nash v. Nash & als.*, Id. 686.

Without repeating in detail the substance of what is shown by the said authorities, it clearly appears from them that, according to the pleadings and proofs in this case, the appellant, claiming a lien in the said land in Rockingham county under the deed of trust in his favor as aforesaid, cannot be regarded as a purchaser of the said land with notice of any lien thereon by reason of the judgment aforesaid in favor of the appellees, Bausemer & Co., or with any notice of the said judgment, actual or constructive. The authorities referred to clearly show that if an agent, before the commencement of his agency, receive notice of an unrecorded lien on real estate of which his principal afterwards becomes a purchaser, such notice of the agent will not be imputable to the principal, unless there be very strong evidence that at the time of the purchase the agent remembered the fact that he had received such notice. Certainly there is no such evidence in this case, but the contrary.

The court is therefore of opinion that the decree appealed from, to wit: the decree of the 24th day of June, 1878, is erroneous, in decreeing that the judgment in favor of W. G. Bausemer & Co. against Washington Swink and Coffmans and Bruffy, in said decree mentioned, "is a lien upon the land in the bill and proceedings mentioned, having priority over the deed of trust to Newman and Trout, trustees, in which J. W. Morrison is secured, and said judgment must be first satisfied out of the proceeds of the land sold under decree on this cause after the payment of the two liens stated in Commissioner Newman's report of the 13th of October, 1872, as having priority over the Morrison deed of trust," and that the said decree ought to be reversed and annulled, and the cause be remanded to **233** *the said circuit court for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion.

The decree was as follows:

Upon appeal from and supersedeas to a decree of the circuit court of Rockingham county, pronounced on the 24th day of June, 1878, in a chancery cause then therein depending, in which the Baltimore Agricultural

Aid society was plaintiff and Samuel A. Coffman and others were defendants.

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that, according to the pleadings and proofs in this cause, the appellant, claiming a lien on the lands in Rockingham county under the deed of trust in his favor in the proceedings mentioned, cannot be regarded as a purchaser of said land, with notice of any lien thereon, by reason of the judgment in favor of the appellees, Bausemer & Co., in the said proceedings mentioned, or with any notice of the said judgment, actual or constructive; that the legal authorities bearing upon the case clearly show that if any agent, before the commencement of his agency, receive notice of an unrecorded lien on real estate of which his principal afterwards becomes a purchaser, such notice of the agent will not be imputable, to the principal, unless there be very strong evidence that at the time of the purchase the agent remembered the fact that he had received such notice; that there is certainly no such evidence in this cause, but the contrary; and that the decree appealed from, to wit: the decree of the 24th day of June, 1878, is erroneous in decreeing that the judgment in favor of W.

G. Bausemer & Co. against Washington *Swink and Coffmans and Bruffy, in said decree mentioned, "is a lien upon the land in the bill and proceedings mentioned, having priority over the deed of trust to Newman and Trout, trustees, in which J. W. Morrison is secured, and said judgment must be first satisfied out of the proceeds of the lands sold under decree in the cause after the payment of the two liens stated in Commissioner Newman's report of the 13th of October, 1872, as having priority over the Morrison deed of trust.

Therefore, it is decreed and ordered that the said decree be reversed and annulled, and that the said appellees, Bausemer & Co., pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And it is ordered that the cause be remanded to the said circuit court for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion.

Which is ordered to be certified to the said circuit court of Rockingham county.

Decree reversed.

235 *Garber's Adm'r v. Armentrout.

September Term, 1879, Staunton.

In June, 1859, G and R, his wife, in consideration of \$1,000, did sell and convey to A all their interest in and claim to any property, real and personal, of which C, the father of said R, may die possessed. This deed is duly executed, and the wife privily examined. After the death of C, in the lifetime of G, A is put in possession of R's share of her father's estate, real and personal; but upon the death of G, R files a bill against A to recover the property, on the ground that the deed was a

nullity as to her. In 1878 there is a decree in her favor; and then A brings assumpsit against G's adm'r to recover back the \$1,000 he had paid for the property.—HOLD:

1. **Deed Void as to Wife.**—The deed was properly held to be a nullity as to R.

2. **Same—Assumpsit.**—Assumpsit by A will lie to recover the purchase money.

3. **Same—Action for Purchase Money—Limitations.**—The cause of action of A did not arise until the decree setting aside the deed in favor of R; and the action having been brought immediately thereafter, the statute of limitations was no bar to it.

The case is fully stated in the opinion of the court delivered by Christian, J.

Sheffey & Bumbgardner, for the appellant.
David Fultz, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

236 *This is writ of error to a judgment of the circuit court of Augusta county.

The action was assumpsit brought by the appellee (Armentrout) against the personal representative of Isaac Garber, to recover the sum of \$1,000, which it is alleged was paid by Armentrout to Garber in his lifetime under a mistake, and for which Armentrout received no consideration.

The facts proved may be briefly stated as follows:

On the 10th of June, in the year 1859, a deed was executed by Garber and wife to Armentrout, as follows:

This deed, made this 10th day of June, in the year 1859, between Isaac Garber and Rebecca J., his wife, of the county of Augusta and state of Virginia, of the one part, and Albert P. Armentrout, of the same county and state aforesaid, of the other part.

Witnesseth: That, in consideration of the sum of one thousand dollars, to them in hand paid by the said Albert P. Armentrout, the receipt of which is hereby acknowledged, the said Isaac Garber and Rebecca Jane, his wife, do grant and convey unto the said Albert P. Armentrout all their interest in and claim to any property, real or personal, of which Chas. Armentrout, the father of said Rebecca J. Garber, may die possessor. As witness their signatures and seals this day and year above written.

ISAAC GARBER, [Seal.]
REBECCA JANE GARBER, [Seal.]

This deed was acknowledged before a notary public by Garber and wife—the wife's acknowledgment and privy examination being taken and made in the mode prescribed by law.

Charles Armentrout, the father of Mrs. Garber and of the grantee, Albert P. Armentrout, was living at the date of this deed, and did not depart this life until

***Failure of Consideration.**—This case is followed in *Newberry Land Co. v. Harman Newberry*, 96 Va. 111, and *Robinson v. Welty*, 40 W. Va. 395, in holding that assumpsit will lie for money paid under an agreement for a consideration that wholly fails.

237 March *1863, when he died intestate. The sum of \$1,000 was paid by Armentrout to Garber upon the delivery of the deed; and by him invested in a tract of land, which upon his death, in the year 1872, was devised, with all his estate, real and personal, to his wife, to be held by her until his youngest child arrived at age, when his estate was to be equally divided between his wife and children.

After the death of Charles Armentrout, the interest of Garber and wife in his personal estate was paid to Albert P. Armentrout, amounting to \$518.32, Confederate money. He was also put in possession of that portion of the real estate of Charles Armentrout to which Rebecca Garber was entitled as one of the heirs, and which it was supposed had been conveyed, by deed of June 10th, 1859, above referred to, to Albert P. Armentrout. He was in possession of this real estate, and had received the personal estate to which Garber and wife were entitled during the lifetime of Isaac Garber.

After his death—to wit: in the year 1876—his widow, Rebecca Jane, who was a daughter of Charles Armentrout, together with his other heirs, filed a bill in the circuit court of Augusta county, for partition of the real estate of Charles Armentrout. In that bill Mrs. Garber alleged that the deed executed by her husband and herself to Albert P. Armentrout, by which they conveyed to him their interest in the estate of her father, Charles Armentrout (who was then living), was, so far as she is concerned, a mere nullity; that at the time of the execution of that instrument, she was under the disabilities of coverture, and that it cannot operate against her as an estoppel; and that said paper writing passed no title, so far as she is concerned; and that she is entitled to her share of the real estate of her father of which he died seized and possessed and intestate.

It is not necessary to notice, in this opinion the proceedings in this chancery cause for partition of the real *estate of Charles Armentrout, except to remark that upon the answer of Albert P. Armentrout (the appellee here), and depositions of witnesses, and a full hearing of the whole case, the circuit court of Augusta held (and we think rightly held) "that the deed executed on the 10th day of June, 1859, by Isaac Garber and the plaintiff, Rebecca Jane Garber, then the wife of the said Isaac Garber, was wholly inoperative as a bar, either by grant or by estoppel, to the title of said Rebecca Jane Garber, derived by descent from her father, Charles Armentrout, deceased, (who died after the date of said deed), in and to an undivided share and interest of one-sixth of said land, as heir at law to her father;" and by decree of said court one-sixth of said land was accordingly assigned to Mrs. Garber, which was the same interest which Albert P. Armentrout claimed under the deed executed and delivered to him by Isaac Garber and wife. This decree was entered on the 28th November, 1877.

In May, 1878, the action of assumpsit, which is the subject of the writ of error before us, was brought by Albert P. Armentrout

against the administrator of Isaac Garber, the object of which, as before stated, was to recover back the \$1,000 which he had paid for the interest of Garber and wife in the estate of Charles Armentrout. A jury was waived and the matters both of law and fact were submitted to the court. The facts above detailed were proved, and the proceedings of the chancery cause and the decree in that cause were offered as evidence; and the circuit court, after giving credit to the defendant for the scale value of the Confederate money received by the plaintiff, and also after charging the plaintiff with certain rents and profits, entered a judgment for the balance—to wit: the sum of \$976.76—with interest thereon from the 3d day of June, 1872, till paid, and costs.

To this judgment a writ of error was awarded by one of the judges of this court.

239 *The court is of opinion that there is no error in this judgment of the circuit court.

The action of assumpsit is essentially an equitable action.

It always lies to recover money which the defendant *ex equo et bono* ought not to retain in his hands. It is a general rule that where one man has in his hands money which, according to the rules of equity and good conscience, belongs to and ought to be paid to another, an action will lie, for such money as money received by defendant to plaintiff's use.

It also lies for money paid under a mistake, or upon a consideration which happens to fail. It was said by Lord Mansfield, in *Moses v. McFerland*, 2 Burrow's R. 1012, that the action of assumpsit is a kind of equitable action, which he thought very beneficial. It lies for money which *ex equo et bono* the defendant ought to refund. See 2 Rob. Pract. (new.), 449, 450, and cases there cited; also 23 Eng. Com. Laws, R. 432.

Applying these acknowledged principles of law to the case before us, it is plain that the judgment of the circuit court is not erroneous. The \$1,000 paid by Armentrout to Garber under the mistaken belief that, at the death of Charles Armentrout, he (the defendant in error) would receive the interest of Mrs. Garber in her father's estate, was paid upon a consideration which failed. Mrs. Garber, after the death of her husband, having repudiated her contract with the defendant in error (Albert P. Armentrout), made when she was under disabilities of coverture, and in that being sustained and justified by the circuit court of Augusta, in the decree above referred to, and having received under the decree her share of the real estate of her father, which she had by her deed (afterwards annulled and set aside by said decree as inoperative and void) conveyed to the defendant in error, it is plain that the consideration of \$1,000 was paid under a mistake and has failed, and that the defendant in error

240 is entitled to recover *back the amount he paid under such mistake for property which he never received, and which, by a decree of a court of competent jurisdiction, has been transferred to his grantor.

It would be manifestly inequitable and unjust to permit Garber's estate to retain both the thousand dollars paid by Armentrout, and at the same time the real estate derived from Chas. Armentrout, which was the main if not only consideration for which the \$1,000 was paid. In all conscience and fair dealing, *ex equo et bono*, Garber's estate ought to refund the \$1,000 paid for what Armentrout never got; and Mrs. Garber, while it may be she had the right to repudiate her contract made when under the disabilities of coverture, cannot enjoy the benefits of her repudiation of her contract in the shape of the real estate she acquired by that course, and at the same time retain the \$1,000 paid by Armentrout for the very property which is decreed to her.

In an action of assumpsit, which is essentially an equitable action, Armentrout is entitled to recover back the money paid to Garber and wife, subject to the credits allowed by the circuit court.

The court is further of opinion that the statute of limitations was no bar to the plaintiff's action, and was properly disregarded by the circuit court. The whole question to be determined under the plea of the statute of limitations is, when did the cause of action arise?

It certainly did not arise during the lifetime of Isaac Garber, because during his life, Armentrout, the defendant in error, had received his portion of the personal estate of Charles Armentrout and was in possession of that portion of the real estate descended to Mrs. Garber. He doubtless then believed, as he had a right to believe, that his contract of purchase, evidenced by the deed from Garber and wife, would be faithfully carried out. A contrary purpose was never indicated until Mrs. Garber evinced

241 her *purpose to rescind the contract on her part, by filing her bill in 1876, claiming that her deed was a mere nullity on account of her disabilities of coverture. He resisted her pretensions in that bill, and it was not until November, 1877, that the circuit court decreed that her deed was wholly inoperative and void.

It was not until then that Armentrout was put in a position to assert his claim for the recovery of the purchase money he had paid. He promptly brought his action of assumpsit in May, 1878, within six months after the decree was rendered.

The court is therefore of opinion, that the plea of the statute of limitation was properly overruled by the circuit court.

And for the reasons stated, the court is of opinion, that there is no error in the judgment of the circuit court, and that the same be affirmed.

Judgment affirmed.

242 *Hartman & als. v. The Ins. Co. of Valley of Va. & als.

September Term. 1879. Staunton.

Absent, Moncure, P.

On a bill to have the assets of the Insurance Co. of the Valley of Va. administered, in the progress of

the cause the debts of the Co. are paid, and there are assets consisting of debts of stockholders not yet collected, to be divided among the stockholders. Some of these stockholders had paid in full for their stock before the war; others had paid in part before the war, and the balance in Confederate notes, and these two classes had received their certificates of stock; others, at the end of the war, had paid nothing on their stock. In ascertaining the amount of the fund to be received by each stockholder—**Held:**

1. Corporation—Distribution of Assets—Stock Subscriptions—Payments in Confederate Currency.—In the statement of account between the stockholder and the Co., the payments in Confederate money must be taken as valid payments without abatement.

2. Same—Same—Same—Same—Scaling Payments.—But in the account between the stockholders to ascertain what dividend each one shall be entitled to in the distribution of the assets, the payments of stock in Confederate money, whether in whole or in part, since the 1st of January, 1862, should be scaled as of the date of payment; and each stockholder is entitled to share in proportion to his input, ascertained as hereinbefore stated.

3. Same—Same—Dividends to Stockholders.—Preparatory to a division, accounts should be taken upon the foregoing principles; and the stockholders in arrear should not be required to pay until the accounts are taken and the dividend of each stockholder ascertained.

4. Same—Same—Same.—Each stockholder in **243** arrear should then be credited with his dividend, and be ordered to pay into the hands of the receiver the balance due on his stock to be divided among the other stockholders in the proportion of their respective dividends.

5. Same—Same—Equity Jurisdiction.—The court of equity, having all the parties before it, should enforce the payment of the moneys due from the several stockholders, and should not direct actions at law.

In August, 1871, William B. Isaacs & Co., and three other, execution creditors, for themselves and all other creditors of The Insurance Company of the Valley of Virginia, instituted their suit in equity in the county court of Frederick, which was afterwards removed to the circuit court of the county, against the said insurance company and William L. Brent, the secretary and treasurer of the company, praying the court to appoint a receiver to collect the debts due the company, sufficient to pay the claims of the plaintiffs, and such other claims as may be outstanding against the company, that the plaintiffs might be satisfied from the said assets so collected, and for general relief.

In September, 1871, the said insurance company instituted their suit in equity in the circuit court of Frederick county against the plaintiffs in the first suit and the stockholders and board of directors of the company, praying that the debtors to and the creditors of the company might be convened, that accounts might be taken of all the assets and liabilities of the company, their priorities adjudicated, and the assets properly distributed among the creditors and stockholders.

These causes were heard together, decrees were made directing accounts and a receiver was appointed, with directions to proceed forthwith to collect the debts and realize the assets of the company, and for this purpose to bring suits either at law or equity as might be necessary; and there were reports by the commissioner and receiver;

from which it appeared that the debts **244** of the company, *except a trifling amount, had been paid, prior to March, 1876. The only parties interested in the cause after this period, were the stockholders of the company, and it appeared from the report of the commissioner, that some of these had paid up the full amount of their stock, before the war, in good money, some had paid in part before the war, and the balance in Confederate money during the war; and both these classes had received their certificates of stock; others, at the end of the war, had paid nothing; and some owed the company for money borrowed; and for the amounts due from these stockholders, bond, negotiable notes and simple promissory notes were taken; and they of course had not received their certificates of stock.

The cause came on again to be heard the 27th of March, 1877, when the court made a decree, which, reciting that from the report of the receiver and the report of the chancery commissioner that all the debts of company, except a trifling amount, had been paid, and that the balance in the hands of the receiver or of his attorneys will be sufficient to pay the same, together with any costs and expenses which have been incurred in discharging his duties as such receiver, and that the remainder of the assets of the company should now be collected, and the surplus thereof left after the payment of all costs and expenses, and other costs and expenses which may be hereafter incurred by the said receiver in obeying the provisions of this decree, distributed ratably among all the stockholders, decreed that the receiver should proceed to collect, by execution or otherwise, the entire assets, consisting of judgments, bonds, notes or other obligations due the said insurance company, except that until the further order of the court he shall permit a stay of execution upon judgments against parties who are also holders of stock in said insurance company, to an amount of said judgments equal to twelve per cent. of the face value of the stock held

by said parties; and shall leave a similar amount in the hands of **245** *those stockholders who are debtors, and against whom judgments have not been obtained. From this decree Lewis P. Hartman and three others, in behalf of themselves and of other stockholders who have not paid their stock indebtedness, applied to this court for an appeal; which was awarded.

Richard Parker and Holmes Conrad, for the appellants.

Williams & Williams, and Wm. L. Clark, for appellees, for sustaining the decree.

Barton & Boyd and Dandridge and Pendleton, for appellees, for reversing the decree.

ANDERSON, J., delivered the opinion and decrees of the court.

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the argument of counsel, is of opinion as follows, to wit:

It appears from the decree of March, 1877, that all the debts of the company, except a trifling amount, have been paid, and that the balance in the hands of the receiver, or his attorney, will be sufficient to pay the same, together with any costs or expenses incurred by the special receiver in the discharge of his duties; consequently the further collection required to be made are for distribution amongst the stockholders as they may be severally entitled, which should have been ascertained before further collections were ordered to be made.

It also appears from the report of Master Commissioner L. N. Huck, filed October 15th, 1875, to which there was no exception, and which was subsequently confirmed

246 by *the court, that the available assets consists of certain notes and obligations given by the stockholders for their unpaid subscriptions of stock, and that there are no other available assets, and it would seem inequitable that those who are in arrear should be required to pay up in good money to create a fund for distribution upon terms of equality amongst those stockholders who paid their subscription in Confederate money, which was greatly depreciated. There are three classes of stockholders: 1st, those who have paid up their stock, in whole or in part, before the war in good money; 2d, those who have paid up, in whole or in part, during the war in Confederate money; 3d, those who, at the end of the war, had paid nothing.

Upon what principal shall the stockholders' accounts be settled, the amount of assets for distribution be ascertained, and division be made amongst them?

The court is of opinion that in the statement of the account of the stockholders with the company and ascertaining the assets, we cannot disregard payments that have been made in Confederate money.

These must stand, and the stockholder must be credited by his payments in Confederate money, without abatement. But in the statement of the account between the stockholders to ascertain what dividend each one shall be entitled to in the distribution of the assets, the payment of stock in Confederate money, whether in whole or in part of the shares, since the 1st of January, 1862, should be scaled as of the date of payment, and each stockholder shall receive his dividend of the assets in the proportion of his input thus ascertained.

The sum to be divided will be the aggregate of balances due from the stockholders severally, thus ascertained, including any funds in the hands of the court, in which each one will be entitled to share in propor-

tion to his input, ascertained as hereinbefore indicated.

By this mode of stating the account, each stockholder gets a dividend in the precise proportion of his actual input, rating the Confederate money at its value when paid.

The stockholders being parties to the suit—and if any of them are not they should be made parties—accounts should be ordered and taken preparatory to the division upon the principal hereinbefore declared, and the stockholders in arrear should not be required to pay until the accounts are taken and the dividend of each stockholder ascertained.

Each stockholder in arrear should then be credited with his dividend, and be ordered to pay into the hands of the receiver the balance due on his stock, to be divided amongst the other stockholders in the proportion of their respective dividends.

Upon this plan and mode of procedure, the whole matter in controversy can be finally adjusted in this suit more to the advantage of all parties concerned and in accordance with justice, than by the institution of separate actions at law against the stockholders, which is unnecessary and would not be proper or allowable under the circumstances, a court of equity being the proper forum for the adjudication and settlement of the matters in dispute between the parties.

The court is, therefore, of opinion and doth decree and order that the decree of the 27th day of March, 1877, and the decree on which it is founded, or which it revives and puts in operation, so far as they require a further collection of money from stockholders on stock account, or is in any other respect inconsistent with this opinion and order, be reversed and annulled, and that the appellees pay to the appellants their costs expended in the prosecution of their appeal here.

And this cause is remanded to the circuit court of Frederick county to be further proceeded with, in conformity with the principles herein declared, in order to final decree.

All of which is ordered to be certified to the said circuit court of Frederick county.

248 *And again, on the 10th of October, 1879, on motion, the decree pronounced in this cause during the present term on the 2d inst., requiring the appellees to pay the costs incurred by the appellants in the prosecution of their appeal here, is modified so as to except from the appellees so liable the appellees Conway Robinson, J. L. Bacon the Virginia State Insurance Company, Wm. L. Brent, secretary; Wm. Byrd, special receiver; The Insurance Company of the Valley of Virginia, Richard R. Brown; Hugh Sidwell's personal representative and Richard Sidwell's administrator—it appearing to the court that the reversal of the decree of the court below is not to their prejudice.

Which is ordered to be certified to the said circuit court of Frederick county.

Decree reversed.

249 *Hammen, Sheriff, & als. v. Minnick.

September Term 1879, Staunton.

1. Execution — Sheriff's Return — Amendment. — A sheriff cannot amend his return upon an execution after it has been filed, except by motion to the court, upon notice to the creditor.

2. Same—Same—Action on Official Bond—Evidence. — A deputy sheriff returns upon an execution—"levied upon a lot of wheat," &c., setting out the several species of property. Upon debt by the creditor against the sheriff and his sureties, upon his official bond for failing to make the money on the execution, they plead "conditions performed"—**Held:** The defendants may prove by the deputy, that he had at the time other executions of prior date, and taxes due the state and the county, all of which had been before levied on the same property, and the whole proceeds thereof were consumed in the payment of these executions and taxes; and that the debtor had no other property unincumbered out of which the plaintiff's execution could have been made.

This was an action of debt in the circuit court of Rockingham county, brought against Joseph A. Hammen, sheriff, and his sureties in his official bond, by Israel Minnick, to recover the amount of an execution which had gone into the hands of one of the deputies of Hammen, who had levied it on the property of the debtor, but had not paid over the money to the plaintiff.

There was a judgment in favor of the plaintiff; and the defendants thereupon obtained a writ of error and supersedeas from this court. The case is stated by Judge Anderson in his opinion.

250 *Yancey and Conrad, for the appellants.

Shands and Harnsberger, for the appellee.

ANDERSON, J., delivered the opinion of the court.

This is an action of debt on a sheriff's bond for a breach of the condition. It is alleged and shown that a writ of fieri facias was sued out of the clerk's office of the circuit court of Rockingham county, on the 10th of June, 1870, returnable on the first Monday in August following, for \$350, and interest and costs, on behalf of George Airey, for the use of Isaac Minnick, against one Peter Paul, which execution came into the hands of A. A. Hess, deputy for Joseph A. Hammen, sheriff of said county of Rockingham. The declaration assigns various breaches. That the writ was not returned by the first Monday in August, the return day, nor the money paid. That it was returned afterwards with an endorsement thereon, "Levied this fi. fa. July 30th 1870, upon a lot of wheat, and 15 head of hogs, four hundred bushels of oats, as the property of Peter Paul, and ten head of cattle and four head of horses," which return is signed "A. A. Hess, deputy for J. A. Hammen, S. R. C." "Credit by note of S. B. Good, of date of June 26th, 1873—amount, one hundred and sixty dollars." "The property levied on this fi. fa. was levied on prior to this execution. Returned no property found unincumbered upon which to levy."

Signed A. A. Hess, D. S. And the declaration alleges that the said last endorsement is false, fraudulent and evasive. It also alleges that the said A. A. Hess, deputy as aforesaid, allowed the said property levied on to remain in the possession of the debtor, and the same was wasted, destroyed or made away with without the leave or consent and against the will of the said plaintiff. The defendants

pleaded conditions performed, on which
251 issue was joined. No *proof was offered by the plaintiff on the trial in support of these allegations and assignments of breaches, or of any other breaches assigned, except the levy of July 30th, 1870; and that the property was sufficient to have satisfied his execution; by reason whereof the defendants had become liable for his debt, interest and costs, and had wholly neglected and refused to pay it.

The defendants then offered in evidence, to maintain the issue on their part, the subsequent endorsement made upon the execution, before recited, but which is without date, signed A. A. Hess, D. S.; to the introduction of which in evidence the plaintiff objected, and the court sustained the objection, and excluded it from the jury. The defendant then offered to prove by the said A. A. Hess, that at the time the said execution came into his hands, he had other and older executions in his hands against the same debtor, and had taxes due the county of Rockingham and state of Virginia in his hands against him, which were levied upon the same property named in the return endorsed upon the execution in favor of the plaintiff aforesaid, and that the proceeds from the sale of said property were applied to the payment of said older executions and taxes, and that said Peter Paul had no property unincumbered out of which the plaintiff's execution aforesaid could have been made. To the introduction of all which evidence the plaintiff, by his counsel, objected, and the court sustained the objection, and excluded said evidence from the jury; and to the said several rulings of the court the defendants excepted.

If the endorsement on the execution excluded from the jury by the court, is an amendment of or addition to a previous return made by the sheriff, and is not a part of the original return, but made by the deputy subsequently thereto, and after he had returned the execution to the office, it does not appear that it was lawfully made by the deputy, as it does not appear to have been made by the

252 deputy by leave *of the court on motion of which the plaintiff in the execution had notice. But however that may be, the court is of opinion, that it was competent for the defendants, in their defence under the pleadings in this cause, to prove that at the time the said execution introduced by the plaintiff in evidence came into the hands of his deputy, A. A. Hess, the said deputy had other and older executions in his hands against the said Peter Paul, the debtor, and also that he had taxes due the county of Rockingham and state of Virginia against the said Peter Paul, which were levied upon the same property named in the return of the

plaintiff's said execution, and that the proceeds from the sale of said property were applied to the payment of said older executions and taxes; and that said Paul had no property out of which the plaintiff's execution could be satisfied, such proof, in the opinion of the court, being entirely consistent with his return. When two or more executions of fieri facias are delivered to the sheriff, that which is first delivered shall be first levied and satisfied, as required by the statute. Such proof would tend to show that the defendant; J. A. Hammen, had been guilty of no breach of the condition of the bond declared on by the plaintiff, by the failure of the deputy sheriff to satisfy the plaintiff's execution out of the proceeds of the sale of the property levied on, and tended to support the plea of conditions performed.

The court is of opinion therefore, that the court below erred in refusing to allow the defendants to prove by A. A. Hess the facts which they offered to prove by him, as set out in the bill of exceptions, and that for this cause the judgment must be reversed with costs, and the cause remanded.

The judgment was as follows:

253 This day came again the parties by their counsel, and *the court, having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in excluding from the jury the parol evidence offered by the defendants, the plaintiffs in error here, which the court is of opinion was admissible under the pleadings, and not inconsistent with the return made by the sheriff on the execution. It is therefore considered that the said judgment of the said circuit court be reversed and annulled; that the plaintiffs in error recover against the defendants in error their costs by them expended in the prosecution of their writ of error and supersedeas aforesaid here. And the cause is remanded to the said circuit court of Rockingham county, with instructions to grant the plaintiffs in error a new trial, and if upon said new trial they should again offer the parol evidence which was excluded at the former trial, that the same be allowed to be given to the jury.

Which is ordered to be certified to the said circuit court of Rockingham county.

Judgment reversed.

254 *Gentry v. Allen & als.

September Term. 1879, Staunton.

A having recovered a judgment against N. M and J. upon a bond on which they were sureties of C. deceased, files his bill against them to subject the lands of N to pay the judgment; and he makes G. who had a deed of trust on the land, a party defendant—**HOLD:**

1. Judgments—Right to Question.—G cannot question the validity of the judgment against N. except upon grounds that would avoid it between A and N, or on the ground that there was fraud

and collusion between A and N in procuring the judgment.

2. **Decree—Co-Sureties*—Contribution.**—It is error to decree against N's land alone for the whole amount of the judgment, until an enquiry had been made as to whether there were lands held by M and J, which might be subjected to satisfy their portion of the judgment.

3. **Same—Same—Same.**—The rule stated in *Horton v. Bond*, 28 Gratt. 815, should be followed, viz: The court should order a sale of the lands of each of the sureties, or so much thereof as may be necessary to pay his proportionate part of the said judgment; and if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the land of the others should be subjected proportionately for the part unpaid; and so on proportionately, upon the further default of any party, until the lands of all have been sold. If the sale of all be necessary for the complete satisfaction of the judgment.

This was a creditor's suit in the circuit court of Rockingham *county brought by William Allen against Samuel C. Naylor, Wm. S. Miller, S. B. Jennings, H. B. C. Gentry and the assignee in bankruptcy of Naylor, to subject the lands of Naylor to satisfy a judgment for \$483.34, with interest and costs, which the plaintiff had recovered against said Naylor, Miller and Jennings upon a bond in which they were the sureties of Joseph H. Conrad, deceased. The judgment was recovered in August, 1866, and was docketed in November of that year.

In February, 1871, Naylor conveyed the two tracts of land sought to be subjected to satisfy the said judgment, in trust, to secure a debt of \$2,850, then held by H. B. C. Gentry.

In January, 1875, the bill was taken for confessed as to all the defendants, and a commissioner was directed to ascertain and report the liens on the land of the defendant Naylor.

After this reference Gentry and Naylor filed their separate answers. Gentry, whilst he admits that the judgment of the plaintiff was rendered, does not admit its correctness or validity as against Naylor; but so far as he, Gentry, is informed and believes, Naylor has a good defence in equity to said judgment, of which he proposes to avail himself. And he insists that the plaintiff is not entitled to have more than one-third of his debt proved before the commissioner against this real estate of Naylor; the other sureties, Jennings and Miller, or their real estate, being

bound for the other two-thirds, and being good for it.

Naylor, in his answer, averred that the bond in which the plaintiff's judgment was recovered was not his deed. That he could not write, and refused to make his mark to the bond unless certain other parties signed the same, viz: T. K. Miller and Jacob Bear; and they did not sign the writing. He also avers that he had no knowledge of the institution of the suit in which the judgment
256 was obtained *until long after it was rendered. He intended to resist any action upon it, and had notified the plaintiff that he was not bound for the debt, and plaintiff knew that he intended to resist it. He insists that there are assets of Conrad's estate which may be liable for the debt; and that Miller and Jennings are equally liable for said judgment, if it be enforceable.

A number of witnesses were examined in relation to the execution of the bond, and their testimony was conflicting. This court was of opinion that the averments in Naylor's answer on that subject were not sustained by the proofs.

In February, 1876, the commissioner made his report. He stated the judgment of the plaintiff, after crediting it with certain payments made by Wm. S. Miller, at \$556.64, with interest on the principal of the judgment from January 20th, 1876. And this judgment is the only lien which the commissioner reports. To this report Gentry filed three exceptions: The first two were as to the validity of the judgment upon the grounds stated in the answers; and that Gentry, or his trustee, was a purchaser for value without notice. The third was that these lands of Naylor were liable for but one-third of the judgment; the lands of Miller and Jennings being liable for the other two-thirds.

The cause came on to be heard on the 11th of March, 1876, when the court overruled the exceptions, decreed against Naylor for the sum of \$556.64, with legal interest on \$483.34 from the 20th of January, 1876, held that this judgment lien was superior to that of the trust deed of Gentry, and decreed that unless the defendants, &c., should pay the same within forty-five days, a commissioner named should sell the said lands, or so much as should be necessary to satisfy this decree, in the mode and on terms directed in the decree. Gentry thereupon applied to a judge of this court for an appeal; which was allowed.

257 *John E. Roller, for the appellant.
Wm. B. Compton, for the appellee.

STAPLES, J. This is a controversy between the appellee, a judgment creditor, and the appellant, a trust creditor of the same common debtor. The appellee's judgment is sought to be impeached upon the ground that the bond upon which it is founded was signed by the debtor merely as surety, upon a condition which was never complied with; and this was well known to the appellee at the time he received the bond. If this be a valid defence, it ought to have been made in the action at law upon the bond. The evidence

*Co-sureties.—In *Stovall v. Border Grange Bank*, 78 Va. 196, Lacy, J. in delivering the opinion of the court said: "This case (*Horton et al. v. Bond*, 28 Gratt. 815) was cited approvingly in *Gentry v. Allen*, 32 Gratt. 254, and the court in that case said: The decree of the circuit court is erroneous in decreeing against the property of only one of the sureties. All three of these were made parties to the bill, and no satisfactory reason is given for the failure to decree against each his due proportion of the appellee's judgment. And so say we in this case." See also *Hall v. James et al.*, 75 Va. 111; *National Bank v. Bates*, 20 W. Va. 222; *Bank v. Parsons*, 42 W. Va. 154.

shows that Naylor, the debtor, was not only served with process, but he was apprized of the pendency of the action, and had the fullest opportunity of defending it. No rule of law is better settled than that a court of equity will not relieve against a judgment on the ground of its being contrary to equity unless the defendant was ignorant of the ground of defence, or was prevented from availing himself of it by fraud or accident, unmixed with fault or negligence on his part. *Richmond Enq. Co. v. Robinson et als.*, 24 Gratt. 548.

The learned counsel for the appellant does not seriously maintain that the judgment debtor can be heard in a court of equity to assail the judgment upon any of the grounds suggested; but he claims that the appellant, who is a creditor having a lien on the same property, stands upon higher ground, and that he ought not to be precluded by the neglect of his debtor from showing that the appellee's judgment was unjustly recovered.

The appellant, in seeking to subject the property of his debtor to the payment of the amount due him, must of course do so in subordination to all valid liens thereon

created by act of the debtor himself, or
258 acquired by operation *of law. In

the absence of fraud or collusion, a judgment for money conclusively establishes the relation of debtor and creditor; not only as respects the parties themselves, but all other persons. It is not meant to assert there may not be cases in which the act of the debtor in confessing judgment, or in permitting it to go by default, for what he plainly does not owe, may not amount to such gross negligence as would be of itself conclusive of fraud, and entitle a creditor to relief against the judgment. The rule is, however, settled that unless there is good reason to impute fraud or collusion, a judgment is conclusive of the existence and amount of the debt, and cannot be impeached collaterally either by parties or strangers. *Bigelow on Estoppel*, 81-2; *Freeman on Judgments*, §§ 163-512; *Christmas v. Russell*, 5 Wall. U. S. R. 290; *Mattingby v. Nye*, 8 Wall. U. S. R. 370; *Stovall v. Banks*, 10 Wall. U. S. R. 583; *Johnson v. Gill*, 27 Gratt. 587, 596-7.

Applying these principles to the case before us, there is no sort of difficulty as to the result.

There is no evidence in the record even tending to convict the appellee of fraud or collusion in obtaining the judgment and the bond upon which it is founded. No such charge is set forth in the pleadings. The testimony offered to show that the bond was delivered as an escrow is met by opposing testimony equally satisfactory. It appears also that Naylor, the debtor, instructed the appellee to institute suit on the bond; that suit was accordingly brought, and process duly served upon all the sureties; that Naylor, after the judgment, actually paid a part of the interest and costs without objection. The idea cannot for a moment be entertained that upon such a state of facts a court of equity can interpose and give final relief

against a judgment, or even award a new trial of the action at law. If it be conceded that a judgment may be invalidated at the instance of a creditor upon the ground

259 *that no debt is due, the testimony ought to be of the most satisfactory character and decisive of the result upon a future trial. Nothing of the kind appears in the present case.

Upon the merits, therefore, the decree of the circuit court is plainly right. It is, however, erroneous in decreeing against the property of only one of the sureties. All three of these were made parties to the bill, and no satisfactory reason is given for the failure to decree against each his due proportion of the appellee's judgment. The learned counsel for the appellee says this point was not made in the court below. This is a mistake of the learned counsel. The assertion was made both in the answer of the appellant, and in the exception to the commissioner's report; and on both occasions it was insisted that the other sureties had property, and ought to be proceeded against for their share of the debt. But even though the objection had not been formally made, it was the appellee's duty to take his decree against all the sureties, or give some satisfactory reason for his omission. It is claimed that Miller, one of the sureties, has already paid his portion, and that Jennings, the other surety, is insolvent. In the first place, it is not clearly shown that he is insolvent; he may have had real estate upon which the judgment still constitutes a lien. But if Jennings is insolvent, as asserted, then it is apparent that Miller has not paid all that he is liable to pay. Instead of one-third, his portion would be one-half the judgment; and it is not pretended he has paid that amount. The principles decided by this court in *Horton et als. v. Bond*, 28 Gratt. 815, 826, and in all that class of cases, leave no room for doubt as to the proper course to be pursued here.

In that case this court held (Judge Burks delivering the opinion), that the circuit court ought to have ordered a sale of the lands of each of the sureties, or so much thereof as might be necessary to pay his pro-
260 portionate *part of the judgment; and if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the land of the others would be subjected proportionately for the part unpaid, and so on proportionately, upon further default of any party, until the lands of all have been sold, if the sale of all be necessary for the satisfaction of said judgment.

The principle being that all the sureties being before the court, the entire burden should not be thrown upon one of them; but each should be required to bear his just share of the debt. If one or more should be insolvent the others must contribute proportionately.

So much of the decree of the circuit court as is in conflict with the said opinion is therefore reversed; and the cause remanded to

that court, to be proceeded with in conformity with the views herein expressed.

The decree was as follows:

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for the reasons stated in writing and filed with the record, that there is no error in the decree of the circuit court refusing to set aside and vacate the judgment recovered by the appellee, Allen, against Samuel C. Naylor, S. B. Jennings and William S. Miller, sureties of J. H. Conrad, at the August term of the county court of Rockingham, 1866. The court is further of opinion that the said circuit court did err in subjecting the property of said Samuel C. Naylor to the satisfaction of the appellee's judgment without first ascertaining how much of said judgment is properly charged thereon, and without also ascertaining whether there is any estate of the other sureties, S. B. Jennings and William S. Miller, subject to the lien of said judgment and properly chargeable therewith;

261 *the principle being that the entire burden of the debt should not be thrown upon one of the sureties, but each should be required to bear his just share of the same.

It is therefore decreed and ordered that so much of said decree as is in conflict with this decree be reversed and annulled, and in all other respects affirmed, and that the appellee, William Allen, do pay to the appellant his costs by him expended in the prosecution of his appeal and supersedeas here. It is further decreed and ordered that the cause be remanded to the said circuit court to be there proceeded with in conformity with the opinion of this court in Horton and als. v. Bond, 28 Gratt. 815, 826.

Which is ordered to be certified to the said circuit court of Rockingham county.
Decree reversed.

262 *Lingle & als. v. Cook's Adm'rs.

September Term, 1870. Staunton.

I. C died in 1860, without wife or children, leaving a large estate, which, by his will, he gave to his brothers and sisters, and the children of each as were dead. The legatees were about forty in number, and were scattered, some in Virginia and further south and others in the western states. At the July term, 1860, of the county court of R, the will was admitted to probate, and his nephew R was appointed and qualified as administrator c. t. a., and executed his bond with sureties. At the same term the court set aside the order appointing R administrator, and appointed R, C and A, who qualified and executed their bond with other sureties. In August, 1860, on their motion, the administrators were ordered to give a new bond, with other sureties; which was done. Upon a bill filed by some of the legatees against the administrators and the sureties in the several bonds and others for an account of their administration, &c.

—HELD:

1. Administrators—Rescinding—Appointing Order—Judicial Discretion—Devastavit—Liability of Sure-

ties on Bond.*—During the same term of a court the orders of the court remain in its breast, and may be revoked, annulled or amended at its pleasure, if the act be not done or obtained by fraudulent means. The court, therefore, had the power to rescind the order appointing R the administrator of C, and the office then being vacant, to appoint R, C and A administrators. And the sureties of R in the first bond are not responsible for the *devastavit* of the administrators.

2. Same—Obligations under New Bond.—The new bond executed in August, 1860, by the administrators, by the express provisions of the statute, relates back to the time of the qualification of the said administrators, and binds the

263 obligors therein for the faithful discharge of the duties of the office of said administrators from that time as effectually as if the said new bond had then been executed.

3. Same—New Bond—Discharge of Sureties.—By the execution of the new bond of August, 1860, the sureties in the former bond and their representatives were, by the said statute, forthwith discharged, except as to any matter for which suit was then depending on the former bond against any such sureties or their representatives; in which case such suit might be prosecuted to judgment or decree.

4. Same—Same—Rights of Sureties on Old Bond.—As to every such matter, the new bond, without any express provisions therein to that effect, will bind the obligors therein to indemnify the sureties in the former bond against all loss or damage in consequence of executing the former bond. Code of 1849, ch. 182, § 12; Code of 1872, ch. 128, § 19.

II. During the war the administrators sold to H \$20,000 of the bonds and notes of the estate for Confederate treasury notes, at the rate of two dollars of the latter for one of the former—HELD:

1. Same—Sales—Breach of Trust.—If payment of the debts of the testator or legacies given by his will required a sale of the bonds or notes due to him, then such a sale, fairly made on reasonable terms, would not have been a breach of trust by the personal representative, but would have been a due execution of such trust; for which, of course, neither they nor a purchaser from them would be made responsible.

2. Same—Same—Same—Bona Fide Purchasers.—If such payment did not require such a sale, but the purchaser was wholly ignorant and had no reason to believe that it did not, and in fact believed that it did, then certainly the purchaser, being, in such case a *bona fide* purchaser for value without notice, could not be made responsible, even though the personal representatives should be responsible by reason of their guilty knowledge, or other breach of trust in the transaction.

3. Same—Liability.—If a personal representative

*Setting Aside a Decree or Order During Term.—See *Hetty v. High*, 20 Va. 384; 2 Bacl. Ch. Pr. § 237.

†Executors and Administrators.—The rule that a personal representative, acting fairly and honestly within his powers, is not responsible for the consequence of his act, even though it results in the loss of the trust subject, was followed in *Douglass v. Stephenson's Ex'or et al.*, 75 Va. 749, citing the principal case. See also *Cooper et al. v. Cooper's Ex'or et al.*, 77 Va. 208; *Turpin et al. v. The Chesterfield C. & I. M. Co.*, 82 Va. 78; *Jones' Adm'r v. Jones' Ex'or*, 86 Va. 845; 1 Min. Inst. (4th Ed.) 478.

acts fairly and honestly within the scope of his powers, then he is not responsible for the consequences of his act, even though it result unexpectedly to the loss of the trust subject, or any part of it.

264 Same—Same—Bona Fide Purchasers.—Though such personal representative act unfairly and dishonestly *in making a sale, which, fairly and honestly made, would be within the scope of his power and duty, a *bona fide* purchaser for value from him would have a perfect title against the testator's estate.

5. Same—Same.—Under all the circumstances the administrators held to have properly and honestly make the sale.

III. Application of Payments.—Where a debtor owes various debts to the same creditor, and makes a payment, the application of the payment may be made by himself at the time he makes it; and if he fail then to make it, the application may be made by the creditor. And if he fails to make it, the court before which the transaction comes may direct it to be made according as may, in the judgment of the court, appear to be equitable and just under all the circumstances of the case.

IV. Administrators Investing in Confederate Bonds.—A large amount of Confederate States treasury notes having come into the hands of the administrators in the course of the execution of their duty, and they being unable, by reason of the war then existing and the number and scattered location of the legatees, to distribute the entire fund remaining in their hands after the payment of the debts of their testator, they were justified in investing these notes in Confederate bonds, and are entitled to be credited for the same in their administration account.

This was a suit in equity in the circuit court of Rockingham county, brought by some of the legatees of John Cook, deceased, against his administrators and their sureties and others for a settlement of the accounts of the administrators, and a distribution of the estate.

The case is stated by Judge Moncure in his opinion.

The case was argued by Yancey & Mauck, J. N. Liggett and Charles T. O'Ferrall, for the appellants, and Moses Walton, Sheffey & Bumgardner, J. S. Harnsberger and George E. Sipe, for the appellees.

MONCURE, P., delivered the opinion of the court.

265 In 1860, John Cook, of the county of Rockingham, *died, leaving a large estate, real and personal, worth more than a hundred thousand dollars, but neither a wife nor any issue. He left a will, however, dated in 1859, whereby he gave his estate, after the payment of his debts, first to the children then living of his nephew Robert B. Cook, to the extent of the sum of \$2,500; and, second, to all his brothers and sisters who might be living at his death, and all the children of his brothers and sisters, except Clarissa Mauck and John Lingle and their children, who were excluded by the will, as to the residue of his estate, which was to be divided among the said residuary devisees and legatees, share and share alike,

so that each of his brothers and sisters living at his death was to have only a child's part, or an equal share with each of his brothers' and sisters' children as aforesaid, except as aforesaid, subject however to certain provisos set out in the will, but which need not be here repeated.

On the 16th day of July, 1860, the said will was duly proved and admitted to probate in the county court of said county; and on the same day an order was made by the said court granting administration on the estate of said testator with his will annexed to his nephew and legatee, the said Robert B. Cook, who thereupon gave bond with security, according to law, as such administrator.

On the next day, to wit: the 17th day of July, 1860, and at the same term of the court at which the said will was admitted to probate and the said Robert B. Cook was appointed and qualified as administrator as aforesaid, another order was made by the same court revoking and annulling the order made on the previous day appointing Robert B. Cook as aforesaid, and appointing the said Robert B. Cook, Joseph H. Conrad, and George W. Miller, administrators with the will annexed of the said John Cook, who thereupon qualified as such according to law, by giving bond with security and taking the oath prescribed by law. This order was

266 made by consent of the *said Robert B. Cook, and on the motion of the said Robert B. Cook, Joseph H. Conrad, and George W. Miller.

On the 20th day of August, 1860, on the motion of the said Cook, Conrad and Miller, administrators aforesaid, it was ordered by the same court that they give a new bond as such administrators, which they thereupon accordingly did, with an increased number of sureties.

The estate of the testator, consisting of land and slaves of great value, and choses in action of great number and to a large amount, and the devisees and legatees being very numerous, forty-one in number, residing in different parts of this state and in other states, and many of them and their residences being unknown to the administrators, the administration of the estate, of course, was attended with much trouble and difficulty, and required much time for its accomplishment. Of course very little progress could be made in the work before the war came on, in the spring of 1861, which, necessarily, obstructed and interposed difficulties in the way of the administrators during the existence of the war, a period of about four years, and for a long time thereafter; the testator's estate not having been fully administered, and being in fact chiefly unadministered.

In 1866, the suit of Lingle & others v. Cook's adm'rs & others, was brought in the circuit court of said county, by certain of the legatees and devisees of said John Cook, against his administrators and others, for the purpose of having a settlement of the administration account of his estate, and a distribution of the same among his devisees and legatees according to his will.

And in the next year, 1867, the suit of

Eddins & others v. Cook's adm'rs & others, was brought in the same court, by certain of the said devisees and legatees against the said administrators and others, for the same purpose.

These two suits having the same objects, were consolidated by an order made therein on the 28th day of October, *1869, and various proceedings were had therein from time to time, in court and before a commissioner, until the 3d day of October, 1874, when a decree was made therein settling the principles involved. From which decree, Henry Lingle and others, devisees and legatees as aforesaid, and plaintiffs in the said suits, applied to a judge of this court for an appeal; which was accordingly allowed; and that is the case which this court has now to decide.

There are various assignments of error in the petition for this appeal, which will be considered and disposed of in the order in which they are made.

1. The first assignment of error is as follows: "The sureties on the first bond, 16th July, 1860, ought to be held responsible for the devastavit of the administrator. There never were such proceedings towards removing the first administrator as were required by statute at the time. See Virginia Code, 1860, chap. 132, § 11. Robert B. Cook, one of the legatees was appointed administrator c. t. a. of John Cook, deceased, on the 16th day of July, 1860, after a considerable contest—the court having duly considered all matters presented in connection therewith—and qualified as such, with A. C. Bear, Jacob Bear, George W. Harnsberger, and R. H. Spindle as his securities, in a bond in the penalty of \$135,000. They now claim to be relieved from any liability because there was subsequently granted administration to R. B. Cook, George W. Miller and Joseph H. Conrad, and new bond and securities given. Your petitioners claim that the securities in the first bond have never been discharged from liability as such. The appointment of additional administrators and execution of a new bond was on their motion without notice, &c., as required by statute. There was a grant of the administration to R. B. Cook, with all of the advantages attending or benefit to be derived from such administration, and this grant could not be revoked, unless upon good cause shown in the regular legal way."

*It is an all sufficient answer to this assignment of error, that during the session of a court, or during the same term of a court, the orders of the court remain within its breast, and may be revoked, annulled or amended at its pleasure, if the act be not done or obtained by fraudulent means. In this case, certainly, there is no evidence that the act was done or obtained by fraudulent means. In *Cawood's case*, 2 Va. Cases, pp. 527, 545. the law on the subject was thus laid down: "A view of the decisions in this country and in England referred to by the counsel, leads us to the conclusion, that during the term the records are in the breast of the court, and that amendments may be

made in the proceedings of the court; but that after the term has passed, no amendments can be made, except of mere clerical misprisons." See also 2 Tuck. Com. p. 43, and cases there referred to.

The case cited by the counsel for the appellants from 2 Va. Cases, p. 230—*Ex parte Colin Clarke*—is not at all in conflict with what is above stated as the law. It was there held that when an executor has been removed from office, and administrator *de bonis non* has been substituted in his place under the act of assembly, another person having equal rights with the substituted administrator, cannot come in at a subsequent term and be allowed to administer, the power of the court over the subject having ceased.

Here, the power of the court over the subject had not ceased when the court during the same term at which R. B. Cook was appointed administrator, revoked and annulled his appointment, which, as we have seen, was a lawful act. The office of personal representative being then legally vacant, it was competent for the court of probate having jurisdiction of the case to fill the vacancy.

The court is therefore of opinion, that the circuit court did not err in the matter stated in the first assignment of error.

*2. The second assignment of error is as follows: "The court erred in discharging R. S. Harnsberger on account of the bonds and notes purchased by him of the administrators. Harnsberger knew that the bonds were the property of John Cook's estate. He says they were payable to John Cook, and some to Robert B. Cook and George W. Miller, administrators of John Cook. He knew the estate of John Cook was not in such a condition as to require immediately \$40,000."

If payment of the debts of the testator, or legacies given by his will, required a sale of bonds or notes due to him, then such a sale, fairly made on reasonable terms, would not have been a breach of trust by the personal representative, but would have been a due execution of such trust; for which, of course, neither he nor a purchaser from him could be made responsible. If such payment did not in fact require such a sale, but the purchaser was wholly ignorant and had no reason to believe that it did not, and in fact believed that it did; then, certainly, the purchaser, being in such case a bona fide purchaser for value and without notice, could not be made responsible, even though the personal representative should be responsible by reason of his guilty knowledge or other breach of trust in the transaction. If he act fairly and honestly, within the scope of his powers, then he is not responsible for the consequences of his act, even though it result unexpectedly to the loss of the trust subject or any part of it. And though he act unfairly and dishonestly in making a sale, which, fairly and honestly made, would be within the scope of his power and duty a bona fide purchaser for value from him would acquire a perfect title against the

testator's estate. *Dodson, &c. v. Simpson & als.*, 2 Rand. 294.

In this case, if there was any unfairness or dishonesty on the part of the personal representative in making the sale in question, certainly there was none on the
270 part of *the purchaser in making the purchase; so far, at least, as the record shows. It therefore follows, as a necessary consequence, that the court did not err in discharging R. S. Harnsberger on account of the bonds and notes purchased by him of the administrators.

There is nothing in the transaction itself, nor is there anything else in the case which indicates unfairness or dishonesty on the part of the administrators in making the sale. If it appeared to the administrators to be necessary to raise the sum of \$40,000 in Confederate notes for the payment of debts and legacies due by the testator's estate, then they had the power and it was their duty to pursue the best course of doing so which was practicable to them. We cannot say that it did not so appear to them, and that they did not pursue the best course of doing so which was practicable to them. On the contrary, the evidence afforded by the record strongly tends to show that it did so appear to them, and that they did pursue such course. The estate consisted largely of bonds and notes due to the testator. They could not be collected in specie, or even in what may be called good money, if anything but the specie could be called good money during the war, which commenced shortly after the qualification of the administrators and lasted nearly four years. They could not be disposed of on better terms or more to the interest of the legatees, as it no doubt appeared to the administrators, than by selling them for Confederate money, which was then the only, or almost only, currency of the country. The legatees were very numerous, residing in different parts of this state and in other states south, west and northwest of this. Naturally, they desire to have the estate settled up and to receive their respective portions of it as soon as possible. Those who reside in this state, or other states of the Southern Confederacy, were doubtless willing to receive Confederate notes on account of their respective
 interests in the estate, especially if they

271 could receive two dollars *in such notes for one in the amount of said interests so paid. There seemed to be no practicable mode of obtaining payment otherwise during the long period of the war, or most of it. They therefore, no doubt, desired the administrators to dispose, as they did, of the bonds and notes which they sold to R. S. Harnsberger, which, doubtless, they could not have sold at a greater price than two dollars in Confederate money for one in the amount of said bonds and notes. It is probable, therefore, that the legatees, or most of them, residing in the Confederate States desired the administrators to make the sale they did to the said Harnsberger. And as to the legatees who resided in the United States, their portion was claimed by

the receiver of the Confederate States, who demanded and received the same from the said administrators.

The cases referred to under this assignment of error in the petition, viz: *Fisher v. Bassett, &c.*, 9 Leigh, 119; *Pinckard v. Woods, &c.*, 8 Gratt. 140, are not at all in conflict with what has been before stated.

See also *Staples & als. v. Staples & als.*, 24 Gratt. 225; *Jones' ex'ors v. Clark & als.*, 25 Id. 642, and *Mills & als. v. Mills' ex'ors & als.*, 28 Id. 442—which have a strong bearing upon this case and strongly support the decision of the court below now under consideration.

3. The third assignment of error is that "the court erred in applying the whole amount of G. W. Miller's legacy as a credit on the bond on which H. A. Kite is security, as there were other bonds, both with and without security, due by said Miller to John Cook's estate; besides, in settling the administration account, he is found to be largely indebted to the estate. And it is contrary to equity and justice to permit one person to have the entire benefit of what Miller would receive as legatee of John Cook, deceased."

Where a debtor owes various debts and makes a payment, the application of
272 the payment may be made by *himself at the time he makes it; and if he fail then to make it, the application may be made by the creditor; and if he fail to make it, the court before which the transaction comes may direct it to be made according as may, in the judgment of the court, appear to be equitable and just, under all the circumstances of the case. The doctrine of the law on this subject has been recently very fully considered by this court, in two cases in which the principles which govern it are laid down by the court. Those cases are *Howard, &c. v. McCall, for, &c.*, 21 Gratt. 205, 206; and *Chapman & als. v. The Commonwealth*, 25 Id. 721, 754. The principles recognized in these two cases appear to conform to the principles, or most of them, recognized by the courts of other states, some if not all of whose decisions on the subject are referred to in a work recently published. 7 *Wait's Actions and Defences at Law or in Equity*, pp. 418, 423. On page 418 it is said that "when a payment is made by a debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be appropriated. If he fails to do so, the creditor has the right to appropriate at his election. But in the absence of any particular application of a payment by either the debtor or creditor, the law will apply it, usually as the justice and equity of the case may require. See also 2 *American Leading Cases*, 5th edition, pp. 334-363, *Field, &c. v. Holland, &c.*, and notes; and *Smith v. Loyd*, 11 Leigh, 512.

In this case the credit in question is not for a payment made by the principal debtor, but for a legacy given by the creditor to the principal debtor, by whom several debts are due to the creditor, some with and some without personal security, and the security being different for different debts. But the prin-

ciples before stated seem to apply to this case. As stated in the decree appealed from, "Geo. W. Miller, with Hiram A. Kite and others as his securities, was indebted by bond to John Cook, deceased, in the sum of \$2,000, with interest thereon from the 2d day of January, 1857, and judgment has been rendered on said obligation against said Hiram A. Kite, Joseph H. Kite and Henry Miller, surviving obligors of themselves and G. W. Miller and Joseph H. Conrad, deceased, all of said obligors being sureties, except said George W. Miller, said judgment being subject to the following creditors, to wit: \$120 as of June 2d, 1858, and \$100 as of March 18, 1859, which said judgment is now under the control of the general receiver in this cause; and that said Hiram A. Kite has paid on said judgment the sum of \$670.78 as of the 7th November, 1870; the legacy coming to George W. Miller must be applied first to the payment of his indebtedness to the estate, and to the extent of such legacy, the sureties in such obligation are entitled to be relieved from their liabilities as judgment debtors to the estate, and the said Hiram A. Kite is entitled to have refunded to him so much of the money paid by him as he may be entitled to upon a proper adjustment of said judgment and legacy as a credit thereon aforesaid." And the court decreed among other things: "Third, that the general receiver of this court adjust the judgment aforesaid under his control in the name of Robert B. Cook, administrator of John Cook, deceased, against Hiram A. Kite and others in accordance with the principles of this decree, giving credit on said judgment for the amount of \$2,490.07, as of the 15th day of April, 1873, and upon the basis of such credit adjusting the claim of the estate against the parties to said judgment, and refunding to Hiram A. Kite so much of the payment made by him as may be necessary upon this principal."

The court is of opinion that there is no error in the said decree upon this subject.

4. The fourth assignment of error is that "the court erred in dissolving the injunction awarded 17th September,

1869, and modified 28th October, 1869, and dismissing the bill with costs.

The said bill and injunction were to restrain the collection of certain of the bonds and notes assigned by the administrators of John Cook to Robert Harnsberger as aforesaid by the said Harnsberger or his assigns, and to have them collected and applied as if the said assignment had never been made.

From what has already been said in this opinion, it appears that the said assignment was valid; from which it results, as a necessary consequence, that the court did not err in dissolving the said injunction and dismissing the said bill with costs.

5. The fifth assignment of error is that the court erred "in dismissing the bills and amended bills seeking to charge liability on securities in bond of July 16th, 1860, and July 17th, 1860, respectively."

Of course the securities on the bond of

July 16th, 1860, are not liable; the appointment and qualification of R. B. Cook as administrator on that day having been revoked and annulled on the next day, the liability of the securities in the administration bonds of R. B. Cook then and thereby ceased and was determined. And a new administration bond, with securities, having been given on the 20th day of August, 1860, by Robert B. Cook, Joseph H. Conrad and George W. Miller, who, on the 17th day of July, 1860, had been duly appointed and qualified as administrators with the will annexed of said John Cook, the said new bond, by express provision of the statute, relates back to the time of the qualification of the said fiduciaries, and binds the obligors therein for the faithful discharge of the duties of the office or trust of said fiduciaries from that time as effectually as if the said new bond had then been executed; and the sureties in the former bond and their representatives upon the execution of said new bond were by the said statute

forthwith discharged, except as to any matter for which a suit may have been then depending on the former bond against any such sureties or their representatives, in which case such suit might have been prosecuted to judgment or decree; but as to every such matter, the new bond, without any express provision therein to that effect, would have bound the obligors therein to indemnify the sureties in the former bond against all loss or damage in consequence of executing the former bond. Code of 1849, ch. 132, § 12, p. 550. In this case there was no such suit depending on the former bond when the new bond was executed as aforesaid.

It therefore follows, from what has been said, that the circuit court did not err in dismissing the bills and amended bills seeking to charge liability on securities in bond of July 16th, 1860, and July 17th, 1860, respectively.

6. The sixth assignment of error is that the circuit court erred "in ordering the bonds, judgments and funds in the hands of the general receiver, which had been assigned to Harnsberger, and had been confided to the said receiver during the pendency of the injunction order should be restored to R. S. Harnsberger."

The assignment to said Harnsberger having been a valid assignment, as already shown in the foregoing opinion, it follows as a necessary consequence that the circuit court did not err in making the order referred to in said sixth assignment of error.

7. The seventh and last assignment of error is, that the said court erred "in allowing the administrators credit for investment in Confederate bonds, as such an order would not be proper, even though sanctioned by the proper Confederate court."

A large amount of Confederate States treasury notes having come to the hands of the personal representatives of said John Cook in the course of the execution of their duty, and they being unable by reason

of the war then existing, and the number and scattered location of the

legatees of their testator, as before shown in this opinion, to distribute the entire fund remaining in their hands after the payment of the debts of their testator, it was of course their duty to invest the surplus until it could be so distributed. An investment of said surplus of Confederate notes in Confederate bonds bearing interest at the rate of seven or eight per cent. per annum was a reasonable and proper investment to be made by them under the circumstances of the case. The investment in question was so made; and it follows from what has been said that there was no error in the action of the circuit court in regard to the matter set forth in the said seventh assignment of error.

The court is therefore of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed.

Decree affirmed.

277 *Miller & als. v. Crawford & als.

September Term, 1879. Staunton.

1. Trusts for Creditors—Release of Dower—Abatement of Consideration.—M being the owner of a large real estate consisting of iron works, ore banks and lands, as well as a large personal estate, but being indebted to insolvency, with judgments and executions against him, made a deed, in which his wife joined him, by which he conveyed to a trustee the whole of his property of every kind for the payment of his debts. In this deed it was provided that the value of the wife's contingent right of dower in the real estate should be ascertained in a mode specified, and in consideration of which sums so ascertained she joined in the deed releasing her contingent right of dower in said real estate. The trusts of the deed were, that C and S, who had undertaken to pay off the executions, and who were creditors of M, and the wife of M, should be creditors of the first class, C and S each for the amounts they should pay, and the amount due them, and the wife for the amount of the value of her contingent right of dower, ascertained as prescribed in the deed; and all other creditors in the second class. The whole property did not sell for enough to pay the first class creditors in full, and a judgment rendered against M, and docketed before the deed was executed—**Held:** That the wife of M must abate ratably with C and S for the payment of said judgment, and for any deficiency of the trust fund to pay the said C, S and the wife, in full of their claims.

This was an appeal by Mary Miller and her children from a decree pronounced by the circuit court of Augusta county, on the 10th day of July, 1877, in a suit which had been instituted by the late John B. Baldwin, as

278 trustee in *a deed of trust executed in 1837, by John Miller and his wife Mary, to secure his creditors, asking for a construction of said deed, and for a settlement of his account as trustee. After the death of said Baldwin the suit was revived in the name of his executrix, and the sheriff of Augusta county, as trustee and commissioner. The case as viewed by the majority of this court is stated in the opinion of Judge Christian.

Sheffey & Bumgardner and Thos. C. Elder, for the appellants.

George M. Cochran, Jr., for the appellees.

CHRISTIAN, J. This case is before us by appeal from a decree of the circuit court of Augusta county.

It has been very elaborately and ably argued by the counsel on both sides.

Upon a careful review of the record before us, we find that the single question we have to determine is, what is the proper construction to be given to the deed of trust executed by John Miller and wife to John B. Baldwin, trustee, and what are Mrs. Miller's rights in this litigation, as secured by said deed?

The facts to be gathered from the record, material to be noticed, are as follows:

John Miller was the owner of a valuable iron furnace, and also of certain real estate, consisting of ore banks, timber land and farming lands, lying in the counties of Rockingham, Albemarle and Augusta.

In the year 1837 he was extensively engaged in the manufacture of iron at his furnace and forge in the county of Augusta. He had become, in the prosecution of this enterprise, largely indebted. Numerous judgments had been recovered against him, and executions to a large amount were in the hands of the sheriff, about to be, if not actually

279 *levied on his personal estate. Owing to the pressure of these debts, it was impossible to continue his business of manufacturing iron, which was very extensive, and then considered a very valuable enterprise, unless his personal estate could be released from the lien and levy of executions then in force against him, amounting to the sum of about ten thousand dollars.

Under these circumstances, being desirous to continue his business, which he hoped to be profitable, and at the same time to secure all his creditors, he executed a deed of trust for that purpose, by which he conveyed to John C. Baldwin, trustee, all his estate, real and personal, which was then considered very valuable; his real estate conveyed in said deed consisting of "ore banks, timber land and farming lands, lying in the counties of Rockingham, Augusta and Albemarle, embracing the iron furnace and forge and mills operated by said Miller," and his personal estate, also conveyed in said deed, consisting "of slaves, stock, machinery, implements and materials, household and kitchen furniture, crops growing and gathered, and every article of personal property of whatever kind and description held, owned or claimed by said Miller, wheresoever situated; also all debts in any wise coming to said Miller or money to which he is in any manner entitled from whatsoever sources, and whether the same be due or not."

In order to carry out the purposes of this trust deed, to wit: to enable Miller to continue his business in the manufacture of iron, and at the same time to secure his creditors, it was necessary, in order to prevent a total suspension of his business, that his personal property employed in, and which was necessary to its successful prosecutions, should be released

from the liens and levy of executions, then in the hands of the sheriff of Augusta county; for if these executions, amounting to the sum of at least ten thousand dollars, were

280 to be enforced, then the enterprise *must stop and disastrously end at once. In this state of things, two of the friends of Miller, Benjamin Crawford and Joseph Smith, came forward and undertook to pay off these executions, and thereby release the personal estate of Miller from the liens and levy of these executions upon conditions that they should be secured for the money so advanced by them, and in order that the business should be continued, and the other purposes of the trust deed be carried out. Accordingly a deed, carefully drawn by that distinguished lawyer and eminent citizen, the late John B. Baldwin, was executed on the 26th day of September, in the year 1857, by John Miller and Mary Miller his wife, which conveyed to Jno. B. Baldwin all the estate real and personal as above described, of which the said John Miller was seized and possessed, of every kind and description whatsoever, upon certain trusts plainly and specifically set forth in said deed.

Among these trusts the prime object was to secure the creditors of Miller, and to prevent a forced sale at public auction of the large and valuable property conveyed. Accordingly ample power was invested in the trustee Baldwin, to continue the business of the furnace and forge, and to use all means necessary to secure its efficient operations, until such time as a sale of the whole iron works could be beneficially effected.

It was stipulated in said deed that "if upon these operations" (by the trustee) "there shall be realized any clear profit, it shall constitute a part of the trust fund, and if there shall be any loss it shall be paid out of the fund."

This deed also contained the following provision: "The real estate hereby conveyed is subject to the contingent right of Mary Miller, wife of the said John Miller, to dower therein, a right which, unless released, would seriously interfere with, if not wholly prevent the sale of the property for the purposes of this trust.

The said John Miller is unwilling to ask **281** of his wife, or to permit her to *grant any release of this right, except upon terms of fair compensation. And the said Mary Miller deems it but just to her and her children to demand and accept, in consideration of such release hereby made, the compensation and security hereinafter provided."

The deed further declared that "the great object of this conveyance, however, being the sale of the entire trust property as soon as practicable, and the application of the proceeds to the payment of the debts intended to be secured, the trustee is authorized and required to proceed, as soon as practicable, to sell publicly or privately, at his discretion, and upon such advertisement and terms of payment as he shall deem best, all such portions of the real estate as he shall find to admit of separation from the iron works establishment, and all such personal property as can be spared from the uses of said establishment.

"He shall also proceed in like manner to

sell the iron works establishment, except that it shall not be forced to sale at public auction without the written order of a majority in value of the trust creditors of the first and second class secured or indemnified in this conveyance, omitting the said Mary Miller.

"Out of the proceeds of the trust property, whether arising from the operations of the iron establishment or from sales of property, real or personal, the trustee shall, in the first place, pay all costs and expenses incurred in the making of this deed, or about the execution of the trust, including a commission to the trustee of five per cent. upon his receipts and disbursements, and shall then pay the following claims against the said John Miller, in classes as follows, viz:

"First class. To Benjamin Crawford and Joseph Smith, or to either of them, all such sums as they, or either of them, shall have paid in discharge of executions now in force against the said John Miller, with interests till paid. To Joseph Smith all such sums of money as the said John Miller may owe him

by bond or note, believe to be about **282** *three thousand two hundred dollars (\$3,200). To Benjamin Crawford all such sums as the said Miller may owe by him bond or note, whether payable to the said Crawford or to the late firm of B. & J. S. Crawford, and for which the said Crawford has no other security. These claims are believed to be of principal money, \$1,312.38, by note or bond to B. Crawford; \$1,562.56 by note or bond to B. & J. S. Crawford.

"To Mary Miller, wife of said John Miller, to be placed in the hands of such trustee as she may select, and upon such trusts as she may appoint, in consideration of her uniting in this conveyance, such sum as John N. Hendren, commissioner in chancery for the circuit court of Augusta county, shall ascertain to be the value of her contingent right of dower at this date according to the rule adopted by that court for the ascertainment of such values. As the basis of such valuation, the trustee shall furnish to said Hendren the written appraisal of the property conveyed, made by Gen. Samuel H. Lewis, Dr. G. W. Kemper, Sr., and Stephen Harnesberger, Esq., and the report of the said Hendren thereon shall be conclusive. If said Mary Miller shall fail to select the trustee, the said Baldwin shall hold the fund as trustee for her sole and separate use so long as she may live, and at her death divide the same among her children as if she had died sole and intestate."

It will thus appear that the grantor, by his deed, placed as debts of the first class, to be first secured by the property conveyed, whatever sums were due to his friends Crawford and Smith, who came forward and paid off the executions, which were liens upon his personal estate, and also the value of his wife's contingent right of dower to be ascertained and conclusively fixed by Commissioner Hendren, whatever that amount might be. These obligations were considered of equal sanctity and were placed upon the same

footing, and to be enforced and made good by the same security.

283 *The nature of Mrs. Miller's contingent right of dower, as ascertained by Commissioner Hendren, upon the appraisal of the property made by the gentlemen secured in the deed, was the sum of \$16,300.

It was this sum, therefore, which was recognized in the deed as compensation to Mrs. Miller for the relinquishment of her right of dower in the real estate of her husband, and this sum was secured to her in the deed as a debt of the first class against the trust fund, and with the debts due Crawford and Smith were first to be paid out of the assets coming to the hands of the trustee.

It further appears from the record that in furtherance of the objects and purposes of the deed, the trustee made sale of all the property, real and personal, conveyed by the deed. At this sale the first class creditors secured, Crawford, Smith and Mrs. Miller, became large purchasers.

The sales of the personal estate was made in January, 1859, and of the real estate in December of the same year; and an account of said sales reported by the trustee to the county court of Rockingham. At the sales of property, real and personal, made by the trustee, Mrs. Miller, Smith and Crawford became, as before observed, very large purchasers; it being manifestly their purpose to save the claim secured to them as first class creditors under the deed, it being ascertained at that time that the entire proceeds of the property would not, after paying losses and expenses, fully discharge their claims.

Before any final settlement of the transactions of the trustee could be made, and before payments by these purchasers could be adjusted, and deeds made by the trustee, the late civil war commenced; the trustee went into the military service, and all proceedings under the trust deed were for the time suspended.

After the close of the war, the trustee, John B. Baldwin, filed his bill in the circuit court of Augusta, in which he set forth very fully his transactions as trustee, the

284 sales *of the property, and the purchases of the same by the first class creditors, Smith, Crawford and Mrs. Miller. The bill alleged that upon a settlement made by the trustee, it was ascertained that the trust fund would not pay in full the claims of Mrs. Miller and Messrs. Smith and Crawford, constituting the first class debts. It became necessary, therefore, to determine how to apply the fund. The trustee construed the deed as putting all three of the first class creditors (Mrs. Miller, Smith and Crawford) upon the same footing and requiring them all to abate ratably in case of insufficiency of assets to pay all.

He asks that the deed, may be construed by the court in this and other respects, and that he be instructed how to make application of the trust fund, and that another trustee be appointed for Mrs. Miller and her children. To this bill Mrs. Miller and her children, John Miller's administrator, and

Benjamin Crawford in his own right, and as executor of Joseph Smith, were all made parties.

Under this suit, thus commenced by the trustee, various proceedings were taken, and accounts settled, only a part of which are necessary to be noticed in this opinion.

During the pendency of the suit, and before any disposition of the trust fund had been made, or the rights of the parties under the deed adjudicated, one Harvey Kyle, who had been named in said deed as a second class creditor, filed his petition in the cause, in which he set forth, that before the deed was executed by Miller and wife to Baldwin, trustee, to wit, on the 20th of July, 1857, he recovered a judgment against John Miller for the sum of \$3,600, with interest from said date, and \$7.31 costs, in the county court of Rockingham, which judgment was at once docketed; and that Baldwin, trustee, and Crawford and Smith who were secured as first class creditors, had full notice of his judgment and lien; and that no part of his judgment had been paid; and he prays that he may be made a party to said suit, and that a decree be rendered in

285 *his behalf, for the amount of the said judgment against the person or persons who may be legally bound to account for it; claiming that his lien is binding upon the purchasers of the real estate sold by Baldwin, the trustee, and purchased by Smith and Crawford and Mrs. Miller secured in the deed as first class creditors.

On the 21st October, 1874, the circuit court entered its decree, by which it affirmed, "that the true meaning and construction of the deed of Jno. Miller and Mary his wife to John B. Baldwin, trustee, dated 26th September, 1857, is to secure to Mrs. Miller the commuted value of her contingent right of dower in the lands of her late husband, John Miller, embraced in said deed, as a debt in the first class in said deed, on an equal footing with Benjamin Crawford and Joseph Smith, the other creditors secured in the said first class; and said debt to the defendant Mary Miller is to be paid out of the trust fund pro rata with the debts due to said Crawford and Smith, secured in said first class. And that the property purchased by Mrs. Mary Miller, with the assent of her trustee, at the sale made by John B. Baldwin, trustee, for and on account of the trust fund, secured to her, must now contribute to pay back to the John Miller trust fund the amount received or purchased by her, in excess of what her said trust fund was entitled to from the said John Miller trust fund, in the order indicated in Commissioner Kennedy's report."

In the same decree it was declared that the debt reported in the name of Harvey Kyle (being docketed judgment set up in his petition as recovered and docketed before the execution of the deed by Miller to Baldwin) is proved to the satisfaction of the court, and the same is ordered to rank as one of the preferred debts.

By this decree the cause was recommitted to Comm'r Kenney for further report; and upon the coming in of his report fixing the

sums respectively, which the creditors secured in said deed as first class creditors, must contribute *to the preferred creditors, to equalize the trust fund, by ratable abatement of the amount which had been received by Mrs. Miller, Crawford and Smith, as first class creditors, secured by the deed, it was decreed "that the said parties must contribute to the fund to be raised in this cause for the creditors of John Miller, who are secured in advance (i. e. who had prior liens), of the first class in said Miller's trust deed, and yet remain unpaid, as follows:" and then follow the specific amounts which Mrs. Miller, Crawford and Smith must each contribute.

The court is of opinion that there is not error in this decree.

Under the provisions of the deed above quoted it is plain that Mrs. Miller made an absolute sale and conversion of her contingent right of dower in the real estate of her husband. She, by that deed, accepted the sum to be ascertained by Commissioner Hendren, upon report to him of the value of the real estate of her husband by parties selected by herself and named in the deed.

She then became a creditor of her husband's trustee for that amount, and her debt, by way of compensation for her contingent right of dower, was secured as a first class debt, with those of Crawford and Smith. She accepted the same security, and was placed on the same footing with them. She had no prior claim as against the Kyle judgment or any other. Her contingent right of dower was absolutely sold and converted into the sum ascertained by commissioner Hendren, and for that sum she was a creditor, secured with other first class creditors, with all the benefits of such a position, and subject with them to any abatement growing out of an insufficiency of the trust fund.

If it had been the intention of the parties by the terms of the trust deed to give to Mrs. Miller a prior and superior claim against all creditors, it must be conceded, that so able a lawyer and careful a draftsman as

287 John Baldwin *would have so expressed it in the deed. If a so plain and carefully drawn instrument could need any such interpretation, we have it, made by him, the counsel of all the parties, and draftsman of the deed, in his bill in which he says he construed the trust deed as putting all three (Crawford, Smith and Mrs. Miller the first class creditors), upon the same footing, and that all should be required to abate ratably (from what they received) in case of insufficiency of assets to pay all.

In the arrangement made by her husband Mrs. Miller has deliberately accepted the compensation provided for her, and the security for its payment. She cannot now claim any right of dower against Kyle. She has no right of dower. She has parted with it for an adequate and liberal compensation, and accepted her security with the first class creditors under the deed. She has no rights superior to theirs. She must stand or fall with them. She, having with them, reaped the advantage of the trust deed, must share with them its responsibilities, and with them

refund whatever she has received in excess of her just and fair proportion of the trust fund.

We are therefore of opinion, that there is no error in the decree of the circuit court, and that the same must be affirmed.

MONCURE, P., and BURKS, J., concurred in the opinion of CHRISTIAN, J.

STAPLES, J., acquiesced with reluctance in the decree.

ANDERSON, J., dissented.

Decree affirmed.

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* Campbell v. Smith.

September Term, 1879, Staunton.

1. Jurisdiction—Amount in Controversy.—S moved the court below to quash an execution issued against his effects on a judgment recovered against him by C, on the ground that he had paid it. The court allowed a credit on the execution to the amount of \$420; and from this judgment C obtained an appeal to this court. On the motion of S to dismiss the appeal on the ground that the matter in controversy was not as much as \$500—**HOLD:** That the appeal being by C. it is not the amount of the execution, but the amount of the credit which is the matter in controversy, and this court does not have jurisdiction of the case, and the appeal is dismissed.

This was a motion by the appellee, Henry E. Smith, to dismiss the writ of error which had been allowed to the appellant, John T. Campbell, on the ground that the matter in controversy was less than \$500, and therefore that this court did not have jurisdiction of the case. The facts are stated by Judge Burks in his opinion.

James B. Dorman and Hugh W. Sheffey, for the appellant.

Tucker & Tucker, for the appellee.

BURKS, J., delivered the opinion of the court.

Smith made a motion in the county **289** court of Rockbridge *to quash an execution of fieri facias issued against him and others in the name and on behalf of Campbell, on the ground that the judgment on which the execution was issued had been satisfied by him (Smith). The court overruled the motion, but ordered a credit of \$420.91 to be endorsed on the execution. To the judgment of the circuit court of Rockbridge affirming the judgment of the county court a writ of error, on the petition of Campbell, was awarded him by one of the judges of this court.

Smith now makes his motion here to dismiss the writ of error, on the ground that the matter in controversy is less in amount than five hundred dollars, and that therefore this court, under the provisions of the constitution of the state, has no jurisdiction to review the judgment complained of. See

***Jurisdiction—Amount in Controversy.**—See also Harman v. Lynchburg. 33 Gratt. 87, and note; 4 Min. Inst. (2nd Ed.) 966; Arnold v. County Cl. 28 W. Va. 145.

constitution of Virginia, art. 6, § 2, and statute, Code of 1873, ch. 178, §§ 1, 2, 3.

At the date of the judgment of the county court, the amount of the execution, exclusive of costs, was a little more than \$500, while the credit ordered to be endorsed, as has been seen, was less. Is it the amount of the execution, or of the credit, which determines the "value or amount" of "the matter in controversy," within the meaning of the constitution?

There are several recent decisions of this court bearing upon this question. *Umberger & wife & others v. Watts & others*, 25 Gratt. 167; *Eacho v. Cosby*, 26 Gratt. 112; *Gage v. Crockett*, 27 Gratt. 735.

In the last named case, the judgment in the court below was in behalf of the plaintiff, and the defendant, against whom the judgment was rendered as garnishee, was the plaintiff in error here. The amount of the judgment, exclusive of costs, at its date, was a little less than \$500, but at the date of the writ of error awarded by this court it was somewhat more than \$500. The writ of error was dismissed for want of jurisdiction, the

amount of the judgment at its date, and
290 not the amount at the date of the writ, being regarded as determining the amount of the matter in controversy as to the defendant.

Judge Staples, in the opinion of the court delivered by him, after adverting to the rule established by the supreme court of the United States in the construction of the judiciary act of 1789, regulating the appellate jurisdiction of that court, in which act language is employed similar to that used in the constitution of this state, proceeds to say, "that this court has uniformly adopted substantially the same rule. It also looks to the amount actually in dispute between the parties. If the plaintiff claims in his declaration or bill money or property of greater value than five hundred dollars, he is entitled to his appeal or writ of error, although the judgment may be for less. On the other hand, the defendant in the very same case is denied an appeal, for the reasons already given, and that is, the plaintiff being satisfied, the only matter of controversy is the judgment, which, being for less than five hundred dollars, there is no ground for the jurisdiction of this court.

There are cases which would not admit of a strict application of the rule as stated, as a test of jurisdiction. Such was the case of *Stuart v. The Valley Railroad Company*, decided by this court during the present term. There the claim of the plaintiff was for several quotas of stock subscribed amounting to \$300 only, for which judgment was rendered against the defendant. Yet the defendant was allowed his writ of error, because the validity of his entire subscription (\$500) was drawn in question in that suit. So it would be, we apprehend, if suit were brought and judgment rendered against the defendant on interest-coupons less in amount than \$500, and the validity of the bonds from which the coupons were taken was drawn in question. Other cases, perhaps, might be

suggested in which the real matter in controversy as to the defendant would not be ascertained alone by the judgment
291 *rendered against him. But this is not one of these cases. This is a case in which the general rule before stated applies.

Smith was the plaintiff in the court below. Campbell (plaintiff in error here) was defendant there. Smith claimed that the judgment on which the execution was issued had been wholly satisfied. The amount of his claim was measured by the amount of that judgment. The court allowed a part only of his claim, to-wit: the sum of \$420.91, and gave judgment for it by ordering it to be credited on the execution, and disallowed the residue. The plaintiff Smith does not complain of that judgment. He is satisfied with it, although he did not get all he claimed. It is the defendant who complains and to whom the writ of error has been allowed. His complaint is, that the judgment on behalf of the plaintiff for the credit of \$420.91 is erroneous. That judgment is "the matter in controversy" as to him, within the meaning of the constitution, and as it is less in amount than five hundred dollars, the writ of error must be dismissed as improvidently awarded.

The judgment was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid, the motion of the defendant in error to dismiss the writ of error aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the matter in controversy in this case is less in amount than five hundred dollars, and that this court, therefore, under the constitution and laws of this commonwealth, is without jurisdiction to review said judgment. Therefore, it is considered and ordered that the said writ of error be dismissed, and that the defend-
292 ant in error recover against *the plaintiff in error his costs by him expended in the defence of the said writ of error here.

Which is ordered to be certified to the said circuit court of Rockbridge county.

Writ of error dismissed.

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*Grim & al. v. Byrd.

September Term, 1879. Staunton.

Absent. Moncure, P., and Anderson, J.

1. On a bill by G against B to set aside a contract and conveyance by which G conveyed to B certain real estate in consideration of twenty shares of R. Springs Co.'s stock, on the ground of the fraudulent or false misrepresentation of the value of the stock, which at the time was worthless—HELD:

1. *Contracts—False Representation.*—That a false representation of material fact constituting an inducement to the contract, on which the pur-

**False Representations.*—The principal case is cited and the doctrine stated by its first headnote is sustained in *Guarantee Co. v. National Bank* 95 Va. 491; *M'Mullin's Adm'r, etc., v. Sanders*, 79 Va. 364; *Lowe*

chaser had the right to rely, is a ground for the rescission of the contract by a court of equity, although to the party making the representation was ignorant as to whether it was true or false: and that the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract.

2. *Same-Same*.—Though the representation must as a general rule, be of a fact, as distinguished from a mere matter of opinion, which ordinarily is not presumed to deceive or mislead, yet a matter of opinion may amount to an affirmation, and be the inducement to a contract, especially when the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other.

3. *Same-Same*.—If the purchaser does not rely upon the representations of the seller, but seeks information from other sources, the law will often impute to him all the knowledge necessary to a proper understanding of the facts. But if the purchaser has not equal means of information with the *seller—if it is a case in

294 which he has a right to rely upon the representation—the evidence to show that he did not rely upon it, but upon information obtained elsewhere, must be of the clearest and most satisfactory character. In such case there ought to be no room for inference or implication.

4. *Case at Bar*.—In this case held, that whether the representations were fraudulent, or merely false, whether they were of facts or opinion, they were such as the seller had a right to rely upon; and it is a case for the rescission of the contract and the reconveyance of the real estate.

This was a suit in equity in the circuit court of Rockingham county, brought by Samuel and George Grim against Mark Byrd, the object of which was to rescind a contract and set aside a deed bearing date February 1st, 1876, by which said Grims conveyed to Byrd a parcel of land and the mill thereon, called and known as "Craney Island Mills," in consideration of twenty shares of the stock of the Rawley Springs Company. The grounds on which the plaintiffs claimed a rescission of the contract and a restoration of the property conveyed by them, was that at the time of the contract and conveyance the stock of the Rawley Springs Company was worthless, the company being in fact insolvent, and that said Byrd had falsely and fraudulently represented to the plaintiffs the condition of the company; or if his representations were not fraudulently made, they

were made as true, and were in fact false; and plaintiffs relying upon them, had been deceived and led to make said contract and conveyance under this false representation.

Byrd answered the bill denying the fraud, and insisting that the plaintiffs had the same means as he had to ascertain the condition of the company, and that they had consulted other persons on the subject.

Many witnesses were examined in the case, and the cause coming on to be heard on 295 the 24th day of October, 1878, *the court dismissed the original and amended and supplemental bills with costs.

And the plaintiffs thereupon applied to a judge of this court for an appeal; which was awarded.

The view of the evidence taken by this court appears in the opinion of Staples, J.

Henry C. Allen and George R. Calvert, for the appellants.

Charles E. Haas, for the appellees.

* STAPLES, J., delivered the opinion of the court.

The appellants, being the owners of property in the county of Rockingham, known as "Craney Island Mills," and the appellee, being the holder of twenty shares of stock in the Rawley Springs Company, entered into a negotiation which resulted in exchanging the mills property for the stock. And thereupon the appellee assigned to the appellants the certificate of stock, and the latter conveyed to the former the property by deed with proper covenants of warranty. This was in February, 1876. It was shortly afterwards ascertained that at the time of the exchange the Rawley Springs Company was insolvent and its stock utterly worthless, so that the appellee has in fact acquired the "Craney Island Mills," worth twenty-five hundred dollars or more, in exchange for a commodity confessedly valueless.

The appellants, in their bill asking for a rescission of the contract, base their claims to relief on two grounds. First, a false and fraudulent representation of the value of the stock by the appellee, know by him at the time to be such, and made by him with intent to deceive. Second, even though the appellee did not know at the time the representation to be false, he is neverthe-

296 less responsible, *because he was a stockholder of the company and as such it was his duty to know and to give correct information of the value of this stock. The appellee, in his answer, denies any fraudulent intent or misrepresentation; he denies that he induced the appellants to sell and convey the property by representing the stock as worth \$2,500, or any other sum; or that he used any language which could possibly be construed as a representation that the stock was worth more than its full value, or worth its nominal value. He avers that he knew nothing personally about the stock, and referred the appellant, Samuel Grim, to certain parties for the necessary information. The evidence is, perhaps, not sufficient to convict the appellee of any wilful misrepresentation of the value of the stock. It must be admitted, however, that there are circum-

v. Trundle *et al.*, 78 Va. 68; Rorer Iron Co. v. Trout, 83 Va. 407; Linhart v. Foreman's Adm'r *et al.*, 77 Va. 545; Hull v. Fields & Thomas, 76 Va. 597; Terry v. Fontaine's adm'r and heirs, 83 Va. 451; Herron & Holland v. Dibrell Bros., 87 Va. 295; Lane v. Black, 21 W. Va. 625; 2 Min. Inst. (4th Ed.) 896 *et seq.*; Wilson v. Carpenter, 91 Va. 187; Crump & als. v. U. S. Min. Co., 7 Gratt. 352. The principal case is cited and the doctrine contained in its second and third headnotes is sustained in Rorer Iron Co. v. Trout and wife, 83 Va. 397. See also 2 Min. Inst. (4th Ed.) 897; Max Meadows &c., Co. v. Brady, 92 Va. 77; Orr & Littleton v. Goodloe, 93 Va. 267; Wren v. Moncure, 95 Va. 372.

stances of grave suspicion against him throughout the whole transaction with the appellants.

The appellant Samuel Grim, with whom the contract was made, has given his deposition in the case. He states that the appellee represented the stock as worth "above par," and that the appellant "could not make a better investment." Another witness—Abraham Andes—proves that the appellee admitted to him that the appellant Grim had correctly stated in his deposition what the appellee had said in respect to the stock as a good and safe investment, but that he (the appellee) was honest in his representation of the stock.

Another witness—W. D. Hopkins—says the appellee told him that he was going to trade the stock to Mr. Grim for his mill; and the appellee further said that he thought the stock was good, and had so represented it to Mr. Grim. The testimony of these witnesses completely overthrows the answer, so far as it denies any representation of the value of the stock, and places it beyond question that the appellee, in this particular, has not given a truthful account of the transaction.

297 *But this is by no means the whole case, as made by the proofs.

The appellant Samuel Grim, in his deposition, has narrated, at considerable length, his version of the transaction. He tells us very explicitly what was said by the appellee during the progress of the negotiation. He says he asked the appellee if the company was in debt, and he answered the debt was about sixty thousand dollars; but the company had been offered \$100,000 for the property; that \$40,000 of the stock had been sold, and the capital stock was \$100,000; that the president of the company had told him he was about negotiating for a loan of money to fund the debt against the property, and then they would declare a dividend of what they had made at the springs, and they would sell the balance of the stock and pay off the debt.

The witness further stated that the appellee told him they were going to issue stock for the 11½ and 17½ per cent. they had made the previous seasons, and this would make over \$2,500, and the appellant would have to give him \$500 in the boot. Now, if these representations were not made by the appellee, it is difficult to understand why he did not say so. He was present when the deposition was taken, and cross-examined the appellant at great length and with considerable skill. He shortly afterwards gave his own deposition, and he not only did not deny the statements attributed to him, but his counsel was careful to avoid all allusion to them. It is most apparent that this omission did not proceed from inadvertence or forgetfulness, but was the result of a deliberate purpose. The testimony of the appellant must, therefore, be taken as true. This conclusion cannot be avoided, without disregarding the plainest presumptions arising from the conduct of men.

Treating the appellant's testimony as true, it convicts the appellee of the grossest mis-

298 representation with respect *to the condition and resources of the Rawley Springs Company. The debt of the company, instead of being \$60,000 as represented by him, amounted to nearly one hundred thousand dollars, with incumbrances on the property amounting to \$80,000 or \$80,000, the existence of which he never mentioned, and which he must have known at the time. The statement that \$100,000 had been offered for the property; that the president of the company was about negotiating a loan to pay off the debt against the property, did not have the slightest foundation in fact; and the same might be said with respect to the statement of the 11½ and the 17½ per cent. alleged to have been realized in 1874 and 1875, for which additional stock was to be issued. The season of 1875, was a very disastrous one. So much so, that at its close, the company could not pay its ordinary current bills. No dividend was declared, or could have been honestly declared, or new stock issued by a company pressed down with such heavy liabilities. When the appellee undertook to assert that this profit had been realized, and that it would be divided among the stockholders in the form of stock, he made the strongest possible assertion of the solidity and prosperity of the company; one most calculated to impress a stranger with the most extravagant ideas of the value of the stock.

The appellant testifies that after the article of agreement was drawn, he asked the appellee if he would have to have anything to show to get that extra stock, which was for the 11½ and 17½ per cent. which they were about to issue; and he said "No, that he would assign the certificate of stock, all his right and title, and that would be sufficient."

This testimony explains how it was that the mill property, alleged in the bill to be worth \$2,500, not denied in the answer, and fully proved by the evidence, was exchanged for twenty shares of stock, the par value of which was one hundred dollars.

299 *The record discloses the fact, that at the time these representations were made the Rawley Springs Company was hopelessly insolvent. The floating debt amounted to nearly forty thousand dollars; and the incumbrances upon its property, \$60,000 bearing 10 per cent. interest. Five shares of the stock were sold in the spring of 1876 for \$2.50, and in the spring of 1877 the entire property was sold for a great deal less than its indebtedness, and the company dissolved and its existence terminated. The record further shows that since the dissolution of the company a bill has been filed in the circuit court of Rockingham county in behalf of its creditors; the object of which is to make the shareholders, at the time of the dissolution, individually responsible to the extent of their respective shares of stock for all the debts of the company. To this bill the appellants are made defendants along with the other shareholders, and a decree asked against them for contribution. It does not appear whether such a decree has been

obtained, or what further steps have been taken in the prosecution of the suit. The appellants, in their bill, set forth the pendency of this suit and the expensive litigation to which they are to be subjected, as an additional reason of a rescission of the contract. The appellee, in his answer, says it may be true that complainant, when he became the owner of the said twenty shares of stock, was receiving a ticket to an unlimited number of law suits, growing out of the holding of said certificates. Such is life; that no such result was anticipated by respondent—it was caused by the hard times.

Now, whether this result was anticipated by the appellee, or whether he was aware of the condition of the company at the time of the sale of the stocks, it is impossible to say. It is difficult to believe that he did not have more accurate information on the subject than he imparted to the appellant, or that he now professes to have. He attended a stockholders' meeting in October, 1875, a few **300** *months before the sale, and must have heard the condition and prospects of the company discussed at the time. He is a man of intelligence, and it is incredible that he did not inform himself of matters to some extent it materially served him to know.

One of the witnesses testified that the appellee had told him he had long known the stock was worthless. However that may be, whether he was aware of the condition of the company, or that the stock was valueless, is not material to the purposes of the present inquiry. He is responsible for his representations to the same extent as if they were falsely and fraudulently made.

Whatever conflict of opinion may have existed in the English writers on this subject, the doctrine is believed to be well settled in the United States, that a false representation of a material fact, constituting an inducement to the contract, on which the purchaser had the right to rely, is a ground for a rescission by a court of equity, although the party making the representation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract. For in such case, whether the false representation was innocently made or knowingly made, the effect is the same upon the purchaser. In Story's Equity Jurisprudence, the rule is thus laid down: Whether the party thus misrepresents the material fact knew it to be false or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and in law, unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party. 1 Story Equity, § 193, note.

In *Smith v. Richards*, 13 Peters' R. **301** *26, the supreme court of the United

States said: "It was immaterial to the purchaser whether the misrepresentation proceeded from fraud or mistake. The injury to him is the same, whatever may have been the motives of the seller. See also *Adam's Equity*, mar. p. 177, and note; 2 *Parson on Contracts*, 177; 1 *Story on Contracts*, § 632, and notes of cases cited—note 3; *Bispham P. of Equity*, 268.

The doctrine of these cases was substantially affirmed by this court, in *Crump v. United States Mining Co.*, 7 Gratt. 352. It was there decided, that in written proposals of sale for stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, the contract founded on such misrepresentation is void, whether the vendors knew the representation to be false at the time they were made or not, and whether made with fraudulent intent or not.

It has been said, however, that in the case before us, the representations were matters of opinion, in respect to which the appellant was as competent to form an opinion as the appellee. The means of information were equally accessible to both parties. That one of the appellants did in fact make inquiries, with a view to satisfy himself of the value of the stock, and relied upon the information thus obtained, and not upon the representation of the appellee.

Now, it may be conceded, that in all this class of cases, the representations must, as a general rule, be of a fact, as distinguished from a mere matter of opinion which ordinarily is not presumed to deceive or mislead. But even a matter of opinion may amount to an affirmation, and be the inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them

has, or is presumed to have, means of **302** information *not equally open to the other. *Pomeroy on Contracts*, § 212; 1 *Story on Contracts*, § 197.

It is also true, that if the purchaser does not rely on the representations of the seller, but seeks information from other sources, the law will often impute to him all the knowledge necessary to a proper understanding of the facts.

But it is equally true, if the purchaser has not equal means of information with the seller, if it be a case in which he had the right to rely upon the representation, the evidence to show that he did not rely upon it, but upon information obtained elsewhere, must be of the clearest and most satisfactory character. In such cases, there ought to be no room for inference on mere implication. *Pomeroy on Contracts*, §§ 221, 4, 5 and 6. See also *Slaughter's adm'r v. Gerson*, 13 Wall. U. S. R. 379.

It has already been seen that the appellee, pending the negotiations, declared that the appellants could not make a better investment than to purchase the stock. This did not profess to be a mere opinion, but the positive affirmation of a fact. But even if it is to be regarded as an opinion merely, it was

avowedly based upon certain information the appellee professed to have, touching the indebtedness of the company, the value of its property, the amount of its stock sold, the dividends declared. The appellants had the right to rely upon these statements; they had the right to suppose the appellee had correctly informed himself. He was a stockholder of the company, and therefore presumed to know something of its resources and liabilities. He had means of information not accessible to the appellants. He had the undisputed privilege at any time to inspect the records and books of the company, and make himself familiar with its condition—a privilege not accorded to any stranger—and when he undertook to make statements of the value of the stock, and the assets and

the liabilities of the company, third
303 persons had the right to *presume he had made the necessary examination, and to rely upon what he said. Instead of referring the appellants to the books of the company, and aiding them in gaining access to these books, he referred them to one or more of the stockholders, who might well be presumed, like himself, to entertain the most favorable opinions of the stock, and to wish to impress others with that opinion.

The appellants, or one of them, it seems did apply to one of the persons named; but it is very questionable, to say the least, whether any response was obtained from the person applied to, until after the contract was closed.

No one can read the record without being satisfied that the appellant most active in making the trade had the most implicit confidence in the good faith, as well as the sound judgment of the appellee, and that in purchasing the stock he relied almost exclusively upon the statements of the latter. Under all these circumstances, the appellee cannot now be heard to say that his representation was a mere matter of opinion, or that he honestly believed it to be true, or that the appellants were not influenced by it in purchasing the stock.

In any and every view in which the case may be considered, it is one calling for the interposition of a court of equity.

The decree of the circuit court must, therefore, be reversed, the contract of the 20th February, 1876, be rescinded, and the cause remanded to the circuit court, that an account of the rents and profits may be taken, subject to any credit to which the appellee may be entitled for permanent improvements and other proper charges incurred by him.

The decree was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid, and the arguments of
304 counsel, *is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in dismissing the original, amended and supplemental bills of the appellants, this court being of opinion that the appellants are

entitled, upon the pleadings and proofs, to a rescission of the contract of the 1st of February, 1876. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellants recover against the appellee their costs by them expended in the prosecution of their appeal and supersedeas aforesaid here.

And this court, proceeding to pronounce such decree as the said circuit court ought have pronounced, doth decree and order that the deed executed by the appellants to the appellee on the said first day of February, 1871, be and the same is hereby annulled and the contract rescinded. It is further decreed and ordered that the appellee reconvey the property to the appellants by proper deed of release, and that he surrender the possession of the same to the appellants; that the appellants reassign to the appellee the certificate of twenty shares of stock in the Rawley Springs Company; that an account be taken, if required by the appellants, of the rents and profits of the land from the time the appellee acquired possession of the same, subjects to any just and proper credits to which the appellee may be entitled by reason of taxes, or other proper charges, on the property, and any permanent improvements the appellee may have made thereon, such credits, however, not to exceed the value of the rents and profits of the land and premises.

Which is ordered to be certified to the said circuit court of Rockingham county.

Though Judges Moncure and Anderson were absent when the opinion was delivered, they had previously concurred in it in conference.

Decree reversed.

305 *Garland v. Pamplin & als.

September Term, 1879. Staunton.

Absent, Moncure, P., and Anderson, J.

M. the wife of P. was entitled to real estate by descent from her father and by devise from W. but her husband had not reduced any part of it into possession when he made a deed, by which he conveyed to C and L all his interest and right in said estate in trust for the sole and separate use of his wife M. free from all claim by him, with full power in her to control and dispose of the same as if she was not a married woman. The real estate was afterwards divided, and M came into actual possession of it, and she sold a part of it to McD, retaining the title, who improved it, and sold it again to her; and she executed her bond to S. by direction of McD. for a part of the purchase money. She also executed to B a bond as security for G. Upon a creditor's bill by S to subject the land of M to pay his debt—**Held:**

1. Wife's Separate Estate—Husband's Gift—Right of Disposal.—Whatever interest the husband had in the real estate of his wife M. whether as tenant by the mere marital right, or as tenant by the courtesy initiate, was conveyed by the deed in trust for his wife: and such estate was liable for his debts and subject to his disposal by deed without the concurrence of his wife.

2. **Same—Same—Merger.***—By this deed M acquired in equity a separate estate in her husband's estate and interest in her lands conveyed to the said trustees, distinct from her legal estate in fee in said lands, and which did not merge in said legal estate.

3. **Same—Same—Alienation—Power to Encumber.**—Under this deed, and upon the well settled principles of equity, M had full power to use, control, alien and dispose of her said separate estate as if she were a *feme sole*; and as incident to this absolute power of alienation, she had the right and power to charge and encumber said separate estate with the payment of debts.

4. **Same—Implied Intention to Charge—Power to Charge Wife's Legal Estate.**†—M, by executing the bonds to S and B, must be presumed to have intended thereby to charge the said separate estate with their payment, and the said separate estate is therefore in equity liable for such payment. But such liability extends only to said separate estate in the interest of her husband and acquired under the deed aforesaid, and not to the legal estate in fee of M in said lands; which legal estate is distinct from said separate estate, and could not be charged by the mere execution of said bonds, with the payment thereof, by reason of her disabilities of coverture.

5. **Same—Alienation—Disabilities of Coverture.**—M, by reason of her disability of coverture, had no power to sell to McD the fee in any part of her lands; and so the contract was not voidable merely, but absolutely void. She could make a valid sale of her separate estate, and only to that extent she did or could bind said land; and such interest, but not the fee, was subject to sale for the payment of the bond of S.

6. **Same—Wife's Power to Encumber—Creditor's Bill.**—The court below should order accounts to be taken of the said separate estate, and of all debts or claims for which said estate is liable, upon the principles aforesaid, including the debts of S and B; and when said debts have been established, to proceed to subject said separate estate to the payment of the same.

***Wife's Separate Estate.**—The principal case is cited, and the doctrine under which it was held that the wife acquired a separate estate, which did not merge in her husband's estate is sustained in *Dugger's children v. Dugger et al.* 84 Va. 144. See also 1 Min. Inst. (4th Ed.) 847.

Same—Jus Disponendi.—The principal case is cited and its holding that the wife had power to charge the separate estate acquired by her in her husband's estate is sustained in *Little v. Bowen*, 76 Va. 727; *Bain & Bro. v. Buff's Adm'r et al.* 76 Va. 374; 1 Min. Inst. (4th Ed.) 355; *Christian & Gunn v. Keen*, 80 Va. 373. See also *Ropp v. Minor*, 33 Gratt. 106 and cases cited therein. The holding that the wife could not dispose of the fee in any part of her lands is sustained in *Stroud v. Connelly et al.* 33 Gratt. 221, citing the principal case.

†**Same—Implied Intention to Charge.**—The holding that the wife's intention to charge her separate estate was implied by her execution of the bonds is sustained in *Duval v. Chief*, 92 Va. 493; *Frank & Adler v. Lillienfeld et al.* 33 Gratt. 397, citing this case, among others. See also 1 Min. Inst. (4th Ed.) 355; *Price v. Planters Nat. Bk.*, 93 Va. 468.

7. **Same—Same—Bonds Executed by Married Woman—Equity—Limitations.**—The bonds, though void at law, are valid in equity, as evidences of debt against the separate estate of M; and the debts are not barred by the statute of limitations as simple contract debts.

This was a creditor's suit in the circuit court of Nelson county, brought in August, 1874, by Samuel M. Garland, to subject the real estate of Martha L. Pamplin, the wife of John H. Pamplin, to the payment of a bond for \$884, executed by said Martha L. Pamplin to the plaintiff in 1856, and payable on the 1st of January, 1857. The bond purports to be given in part of the purchase money of land and buildings thereon (mills, &c.) at the Gulf Ford, *purchased by Mrs. Pamplin of James McDonald and others. It appears that Mrs. Pamplin had sold to McDonald this land, retaining the title; that McDonald had made extensive improvements thereon, building a mill and other houses; and that she afterwards purchased it back at an enhanced price; and McDonald being indebted to Garland, this bond was executed to Garland by the direction of McDonald. The plaintiff insisted that he was entitled to a vendor's lien on this land, in preference to any other creditor of Mrs. Pamplin.

The bill then sets out a deed made on the 6th of September, 1845, between John H. Pamplin, of the first part, Daniel H. Cheatwood and Jane London, of the second part, both of whom the bill states are dead, and Martha L. Pamplin, wife of John H. Pamplin, of the third part, by which said John H. Pamplin conveys to the parties of the second part all his interest in the estate, real and personal, of his said wife, upon trust for the separate use of the wife; and prays that the land purchased of McDonald may be subjected to the payment of his debt, and for an account of his debt, and of all real estate liable to its payment, and all liens upon it, &c.

In October, 1875, Willis A. Brockman filed his petition in the cause asking to be made a party, and setting out that he is a creditor of Mrs. Pamplin by a bond executed in November, 1863, by a certain B. F. Gatlin, John H. Pamplin and Martha L. Pamplin. He admits the debt is subject to be scaled; but is due, principal and interest.

It seems to be impossible to understand the questions involved in the cause and considered by this court, without giving the deed of John H. Pamplin to Cheatwood and Jane London. That deed, which was duly recorded, proceeds as follows:

This indenture, made this 6th day of September, in the year 1845, between John H. Pamplin of the first part, Daniel A. Cheatwood and Jane London of the second part, and Martha L. Pamplin, wife of the said John H. Pamplin, of the third part, witnesseth that, whereas, there is at the date of these presents in the hands of the said Daniel A. Cheatwood, as administrator of Lavender London, dec'd, a portion of his estate which the said John H. Pamplin has not, as the husband of the said Martha L.

Pamplin, reduced to his possession, she being one of the heirs at law, and distributee of the said Lavender London, dec'd, and, whereas there is also at the date hereof, certain slaves and other property in the hands of the said Jane London, as widow of the said Lavender London, held in right of dower, and of which the said Martha L. Pamplin will be entitled to her distributive share at the death of her mother, and which the said John H. Pamplin has not, as husband, reduced to his possession; and whereas also the said Martha L. Pamplin is entitled to certain rights and property in the estate of Austin Wright, dec'd, of whose will the said Lavender London was the executor, and which interest, right and property, the said John H. Pamplin has not as husband of the said Martha reduced to his possession; and whereas also the said Martha is entitled in her own demesne as of fee to certain lands situated and lying in the county of Nelson, a portion thereof descended to her from her father, the said Lavender London, dec'd, and which has never yet been divided between herself and the widow and the other heirs at law, and into which the said John H. Pamplin, as husband, has never entered; and she is also entitled to certain lands in said county devised to her from her uncle, Austin Wright, dec'd, and into which the said John H. Pamplin has never entered; and the said John H. Pamplin being disposed, as an act of justice to his said wife, not to reduce her said property and estate to his possession and divest her thereof, and to leave the same untouched and unaffected by his marital rights, or by any exercise on his part of such marital rights by reducing it to his possession

309 or of appropriating *it in any manner whatsoever, so that she may at any aftertime receive, control, enjoy and dispose of the same for her own separate use and benefit, separate and apart from him as fully as if no marriage had ever been had between them, leaving her the power and right to dispose of the same as fully as if she were an unmarried woman. Now to effectuate these ends, and in consideration thereof, and for the further consideration of one dollar in hand paid to him by the said Daniel A. Cheatwood, who is the brother-in-law of the said Martha, and the said Jane London, who is her mother, he, the said John H. Pamplin, doth by these presents covenant and agree with the said Daniel A. Cheatwood and Jane London, and with each of them, that he will not at any aftertime after the date of these presents, take any step or make any attempt in law or equity, or in any other manner or form whatsoever to reduce to his possession, or to sell, transfer, convey or assign or in any other manner interfere with any of the rights, interests, property and subject hereinbefore referred to as belonging to the said Martha, and that he will abandon, as he does hereby abandon, all manner of right to or control over said property and subject; that he will abandon, as he does hereby abandon forever, all manner of marital right which he could exercise over the same, leaving the same for the use, benefit and support of the

said Martha, as fully as if she had never married, and hereby agreeing that the said property, right, interest and subject shall stand forever discharged from any claim on his part, as husband, leaving the same in the hands of the said Daniel A. Cheatwood and Jane London, in trust for the said Martha L. Pamplin, leaving them to account with the said Martha, therefor, in any manner consistent with the equity in her favor flowing from this indenture, as also leaving them, the said Daniel A. Cheatwood and Jane London, for and in behalf of the said Martha to enter upon the said lands for the use and behoof of the said Martha,

310 untrammelled *by any marital right of the said John H. Pamplin, intending that the said Martha shall stand protected by the trustees aforesaid, and by each of them against any and every attempt, act or deed of the said John H. Pamplin, as husband or otherwise, in relation to the said rights and property and estate of the said Martha, hereby and herein enumerated and specified. And the said John H. Pamplin, for himself, his heirs, ex'ors and adm'rs, covenants and agrees to and with the said Daniel A. Cheatwood and Jane London, that he will well and truly perform all the stipulations contained in this indenture to be performed on his part, and this indenture is not only not to be construed as an act of ownership over said rights, interests and estate hereinbefore enumerated, but it is to be construed as a covenant and declaration on the part of the said John H. Pamplin, that he never has, nor never will exercise any marital right whatever in relation to said property, subject and estate by reducing it to possession or otherwise interfering with it in any manner or shape whatever, in law or equity, or otherwise.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

JOHN H. PAMPLIN, [Seal.]
DANIEL A. CHEATWOOD, [Seal.]
JANE LONDON, [Seal.]

Mrs. Pamplin filed her answer in the cause. She insists that a married woman cannot execute a sealed instrument that can bind her; and that as the said writings are only simple contract debts, they are barred by the statute of limitations, and she relies upon the statute; except so far as the Gulf Ford land itself may be liable by sale to pay Garland what may be due on his bond. She insists that upon the conveyance by John H. Pamplin of his interest in her real estate, it merged in her fee simple interest in said real estate, and she held the same free

311 *from any trust created by said deed, and could only dispose of it in the manner prescribed by the statute, for the conveyance of real estate by married women. And she denies that the fee simple in her land, or the issues or profits thereof, are liable in any mode of proceeding for said debts, even if they are binding on her, or any separate estate she might have, and are not bound by the statute of limitations. As to Garland's debt, she insists she had no

power to buy lands; and that no property of hers is liable to pay any balance of said debt, which a sale of said land will not produce. She denies that Brockman's debt is in any sense her debt, except as security in a sealed instrument for the debt of the principal, and not for her husband. And she denies that she has done any act, or intended to do any, indicating an intention to bind any separate estate she may have. She insists further, that if she holds a separate property under the deed of her husband, by the express terms of the deed there is trust for her support, and she could not bind said estate so as to deprive herself of a support out of the rents and profits thereof, and she avers that the rents and profits are not sufficient to provide for her the support intended by the deed. She insists that Brockman's debt was for a loan of Confederate money to B. F. Gatlin, and should be scaled.

The cause came on by consent to be heard in vacation on the 20th of January, 1877, when the court made a decree by which certain commissioners named should proceed to sell the Gulf Ford tract of twenty-six and a half acres of land in the bill and proceedings mentioned, for so much cash as may be necessary to defray the expenses of sale, and the plaintiff Garland's costs, and on a credit of one, two and three years, with interest from the day of sale for the residue of the price of said land, and take bonds with good security bearing interest as aforesaid, and retain the title, &c.

And it was further decreed that one **312** of the commissioners *of the court, upon being requested so to do by the plaintiffs, or either of them, do take an account of the value of the real estate, except the Gulf Ford tract aforesaid, mentioned in the deed of the 6th of September, 1845, and also of the annual rents, issues and profits of the same; and also enquire, ascertain and report whether John H. Pamplin, the husband of Martha L. Pamplin, is of ability to maintain and support his said wife in a decent and comfortable manner, independent of the said real estate; and if not, how much and what part of the rents and profits of the said real estate are necessary and ought to be appropriated to her support and maintenance. And thereupon Samuel M. Garland applied to a judge of this court for an appeal from said decree, except as to the sale of the twenty-six and a half acres; which was awarded.

S. V. Southall and J. T. Brown, for the appellant.

Robert Whitehead, for the appellees.

BURKES, J., delivered the opinion of the court.

At the date of the deed executed by John H. Pamplin, Daniel A. Cheatwood, and Jane London, Martha L., the wife of the said John H. Pamplin, was entitled in fee simple to certain lands in Nelson county derived by descent from her father, and to other lands in said county devised to her by her uncle, Austin Wright. The controversy in this case relates exclusively to these lands, and

the bill seeks to subject them as the separate estate of the said Martha L. Pamplin, created, as alleged, by the deed aforesaid.

The court is of opinion, that all the estate, right, title, and interest of the said John H. Pamplin, as husband of the said Martha L.,

in and to said lands, passed, under **313** *and by virtue of said deed, to the said Daniel A. Cheatwood and Jane London, in trust for the said Martha L. Pamplin.

The deed is not merely a renunciation by the husband of all his marital rights in respect of said property, but it is a renunciation in favor of his wife, and to make it effectual, it is expressly provided, "that the said property, right, interest, and subject shall stand forever discharged from any claim on his part, as husband, leaving the same in the hands of the said Daniel A. Cheatwood and Jane London, in trust for the said Martha L. Pamplin, leaving to them to account with the said Martha," &c. The intent, as well as the legal effect, of this deed, was to invest the said Daniel A. Cheatwood and Jane London with whatever title the said John H. Pamplin had to these lands in right of his wife, and to create a trust for her benefit.

The precise nature and extent of the husband's interest in the lands do not distinctly appear from the record. They might and should have been made to appear more satisfactorily. The seisin of the wife is not questioned in the pleading or in the arguments of counsel. According to the recitals of the deed, at the date thereof, the lands descended and devised had not been divided amongst the heirs and devisees, but they were no doubt in the possession of some or all of them. Partition was made at some time, it does not appear when.

It is clear that the seisin of one is the seisin of all the co-partners, and co-tenants. Marriage alone, without issue, casts upon the husband an estate in all the wife's real property in possession, whether of inheritance or of freehold for life, during the joint lives of himself and wife. The death of the wife, or the death of the husband, ends this estate. If the property comes to the wife after marriage, the consequence is the same. Such an estate is denominated by some text-writers an estate as tenant by the mere marital right, as distinguished from an estate

314 as tenant by *the courtesy initiate. If

the wife is actually seized, during the coverture, of an estate of inheritance, such as that the issue of the marriage may by possibility inherit it as heir to the wife, upon the birth of such issue alive the husband acquires an estate in the land as tenant for his life, which, during the coverture, is said to be initiate; and upon the death of the wife, if he survive her, becomes consummate.

It does not appear in this case whether or not there was issue of the marriage. However that may be, whatever estate, right, title or interest the husband, as such, had in the lands in question, whether as tenant by the mere marital right or as tenant by the courtesy initiate, was conveyed by the deed aforesaid in trust for his wife. Such estate was liable for his debts, and was

subject to his disposal by deed without the concurrence of his wife. *Poindexter & wife v. Jeffries & others*, 15 Gratt. 363, 376; 2 Minor's Ins. (2d ed.), 103 et seq.; 1 Bishop's Law of Married Women, §§ 53, 535 (note 3), 536; 1 Wash. on Real Prop. 137, 141 (mar. pp.); 2 Kent's Com. 130, 131 (mar. pp.); 4 Id. 28, 29, 30, et seq. (mar. pp.).

The court is further of opinion that, under and by virtue of the said deed, Mrs. Pamplin acquired a separate estate in the interest which her husband had in the lands, and which was conveyed to the trustees named in said deed, and that this equitable estate was distinct from her legal reversionary estate in fee, and did not merge therein.

If there had been no language used in the deed appropriate to the creation of a separate estate, still the deed itself would have imported such estate.

The general rule is that a conveyance by the husband directly to his wife, although void at law, or to a third person for her benefit, is construed as operating to her separate use; and the reason assigned is, that the conveyance otherwise would be wholly inoperative. *Leake, trustee, v. Benson & als.*,

29 Gratt. 153; *Harshberger's adm'r v. Alger & Wife*, 3 Va. Law Journal, 78, 85; 31 Gratt. 52, and authorities cited in these two cases.

But the language in the deed leaves no room for doubt on this question. The separate estate is expressly created, and resort to implication is unnecessary.

Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged—that is, sunk or drowned in the greater. To this result, it is necessary that the two estates should be in one and the same person, at one and the same time, in one and the same right. 2 Bouv. Institutes, 375, No. 1989; 2 Minor's Ins. (2d ed.), 368, et seq.

It is perfectly plain that under the construction we have given to the deed of September 6, 1845, there was no merger in this case. The legal title to the particular estate is in the trustees under the deed, or their representatives, while the reversion in fee is in the wife. The two estates have never met in the same person, and therefore merger is impossible. For the like reason, there has been no merger of the wife's equitable estate. Generally, where the legal and equitable estates in the same subject meet in the same person, the equitable is merged in the legal estate because, as it is said, one cannot be trustee for himself. Here the wife still holds her equitable estate, while the legal title to the subject is outstanding in the trustees. Even, however, where merger would take place at law, equity often interferes to prevent it. It is not favored in equity, and is never allowed, it is said, unless for special reasons, and to promote the intention of the party. While the rule at law may be inflexible, in equity it depends upon circumstances, and is governed by the intention, either expressed or implied (if it be

a fair and just intention), of the person on whom the estates unite, and the purposes of justice, whether the equitable estate shall *merge or be kept in existence. 4 Kent's Comm. 102 (mar. p.); 2 Minor's Ins. 369 (2d ed.).

Now, manifestly, the intention of the deed of September 6, 1845, was to divest the estate of the husband in his wife's property and secure it to her separate use. If merger was the immediate consequence, as contended for by the appellee's counsel, then the husband's marital rights reattached eo instanti, and the intended operation of the deed was defeated. Such a result a court of equity never would permit. But it is not necessary to invoke this equitable rule in the present case, as we are of opinion, for the reasons already stated, that merger was not possible under the circumstances.

The court is further of opinion, that Mrs. Pamplin, although she labors under all the disabilities of coverture as to her reversion in fee in said lands, has, in equity, under said deed, all the rights and powers of a feme sole in and over her said separate estate. She takes the whole interest of her husband under the deed as her separate estate without limitation or restriction upon her powers over it. Indeed, the largest powers are expressly conferred. Her husband renounces in her behalf all his marital rights in her property and stipulates, that she "may at any aftertime receive, control, enjoy, and dispose of the same for her own separate use and benefit, separate and apart from him as fully as if no marriage had ever been had between them, leaving her the power and right to dispose of the same as fully as if she were an unmarried woman. Such is the broad language of the deed. The stipulation of the husband in the subsequent part of the deed, that he would leave the property "for the use, benefit and support" of his wife "as fully as if she had never married," is of the same import as the language already quoted? It is not restrictive in its meaning and application. It must be read in

connection with what precedes *and follows. It is evidently used to exclude the husband's rights, not to limit or restrain the wife's, and the same intent is manifest in every part of the deed. Under this deed, Mrs. Pamplin has the power to use, control, enjoy and dispose of her separate estate, which is confined to her husband's interest in her lands (the personal property having perished), in like manner and to the like extent as if she were sui juris. In fact, under this deed, she is, in equity, sui juris as to this separate estate.

The court is further of opinion that as the greater includes the less, the absolute power of alienation in the wife includes the power, at her will and pleasure, to encumber and charge her separate estate with the payment of debts. While she cannot, by her engagements, subject herself to any personal judgment or decree, she may bind her separate estate, if she will, and equity will make good the charge against the estate. To bind the estate, her engagements must have reference

to and be made upon the credit of such estate. She must intend to make it liable. The intention, however, need not be expressed. It may be implied. It is implied, unless there is something to rebut the implication, when she executes a bond, note or other instrument for the payment of money, either as principal or as surety for her husband or other person. Such is now the well settled law of this state. As the charge or liability is a question of intention, it may of course be extended to the whole or to a part of the estate. If no specific part is appointed for the payment of the debt, the fair implication is that the whole estate was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair implication, is designed to be charged, no liability will attach to the residue. *Burnett & wife v. Hawpe's ex'or*, 25 Gratt. 481; *Darnall & wife v. Smith's adm'r & als.*, 26 Gratt. 878. These cases have been repeatedly referred to with approbation in subsequent decisions by this court. See *Leake, trustee, v. Benson & als.*, 29 Gratt. 153;

Bank of Greensboro' v. Chambers & others, 30 Gratt. 202, 209; *Justis v. English & als.*, *Idem*, 565, 579; *Harshberger's adm'r & others v. Alger & wife & als.*, 3 Va. Law Journal, 78, 85; 31 Gratt. 52.

The court is therefore further of opinion, that Mrs. Pamplin, by executing the two bonds in the proceedings mentioned must be presumed to have intended to bind her separate estate aforesaid for the payment of said bonds, and as there is nothing to indicate that she intended the obligations to be confined to a part only of said estate, she must be taken to have intended to bind the whole. The fact, that the bond of the appellant Garland, the sum of money therein specified is expressed as "being in part for the purchase of the land and buildings thereon (mills, &c.) at the Gulf Ford, purchase," &c., does not imply an intention to charge that land only. The language was used merely to express the consideration of the bond. There are no extrinsic facts and circumstances sufficient to show, that the liability of that land only was in contemplation of the parties in the execution of the bond.

It is very possible, that Mrs. Pamplin was under the impression, that her whole estate, the reversion as well as the particular estate which had been settled to her separate use, was at her sole disposal, as if she were a feme sole and that she could validly contract debts upon the faith of it. This would seem probable from the fact, that she sold or attempted to sell a portion of the land absolutely to McDonald and others. But if such misapprehension existed, it could not operate to relieve her estate from liability to the extent of her power to charge it. In delivering judgment in the somewhat noted case of *Tullett v. Armstrong*, 4 Beavan R. 319, 323. Lord Langdale, after stating that the execution of a bond, bill, promissory note or other obligation by a married woman having a separate estate, furnished a conclusive inference of an intention, a clear one, on her part, that her separate estate should

319 be *bound, says, "Again, I apprehend it to be clear, that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may be mistaken as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act." The act of limitation relied upon by Mrs. Pamplin in her answer is no bar to the claims asserted against her separate estate. The bonds, though void at law, are valid in equity as evidences against the estate. 2 Perry on Trusts (2d. ed.), § 663, and authorities there cited.

The bond to Brockman is dated 8th of November, 1863. Mrs. Pamplin in her answer avers that it is a Confederate debt, and Brockman in his petition admits that it is subject to scale.

It results from what has been said, that, in our opinion, the decree of the circuit court is erroneous. It is erroneous in construing the deed of September 6, 1845, as restricting the power of Mrs. Pamplin to bind her separate estate by her contracts and engagements, and in making the claims of her creditors subordinate to her support out of said estate. It is further erroneous in subjecting the Gulf Ford land to sale out and out. It seems that Mrs. Pamplin contracted to sell this land to McDonald and others, retaining the title, and repurchased it from them, after they had erected valuable improvements upon it, and that she gave the bond to Garland, a creditor of McDonald, for the consideration in part of the purchase. Now, Mrs. Pamplin, being under the disabilities of coverture, had no power to make any contract binding upon her for the sale of the reversion in fee in this land. So far as she undertook to sell the reversion, which was hers, but was no part of her separate estate, the contract was not voidable merely, but absolutely

320 void. She could sell her separate estate, her husband's interest in the land acquired by her under the deed of 1845, and to that extent, and no further, she could and did bind said land; and such interest, but not the fee, was liable for the payment of the Garland debt.

It would seem from Mrs. Pamplin's answer that she would perhaps not object to the sale of her entire estate in the Gulf Ford land as ordered, if she was not disturbed in the use and enjoyment of the residue of her lands; but as a partial reversal of the decree lets the creditors in upon her husband's interest, now hers, in all the lands, we think errors to her prejudice apparent in the decree should be corrected, and this necessitates the total reversal of the decree. If, when the case is remanded, she is still willing that her entire estate in the Gulf Ford land shall be sold and the proceeds paid to Garland on his debt, a consent decree to that effect can be entered by the circuit court, and by uniting with her husband in a deed to the purchaser she can convey a good title in fee simple.

If the sale has already been made under the decree, and it was made after six months from the date of said decree, and such sale has been confirmed, the rights of the parties are fixed by the statute. Code of 1873, ch. 174, § 11.

The decree of the circuit court will be reversed and the cause remanded, with directions to order an account to be taken of the separate estate of Mrs. Pamplin, and as the bill in the case is in behalf of all the creditors of Mrs. Pamplin, an account of all debts and claims for which said separate estate is liable, including the debts of the appellant Garland and Willis A. Brockman, scaling the debt of the latter to its true value, and when said debts have been ascertained, to proceed to subject said separate estate to the payment of the same, and further proceed to final decree, in conformity with the principles hereinbefore declared.

321 *Though Judges Moncre and Anderson were absent when the opinion was delivered, they had concurred in the decree which was to be made.

The decree was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that all of the estate, right, title and interest of John H. Pamplin in the lands of his wife in the bill and proceedings mentioned, was, by the deed of the 6th of September, 1845, conveyed to the trustees therein named in trust for the benefit of the appellee, Martha L. Pamplin, the wife of the said John H. Pamplin, and that the said Martha L. Pamplin, under and by virtue of said deed, acquired, in equity, a separate estate in her husband's said estate and interest so conveyed as aforesaid, distinct from her legal estate in fee in said lands and which did not merge in said legal estate.

The court is further of opinion that the said Martha L. Pamplin, by the provisions of said deed and upon the well settled principles of equity, was invested with full power to use, enjoy, control, alien and dispose of her said separate estate in like manner and to the like extent as if she were a feme sole, and as incident to this absolute power of alienation she had the right and power to charge and incur said separate estate with the payment of debts, if she chose to do so.

The court is further of opinion that the said Martha L. Pamplin, by executing the bond to the appellant Samuel M. Garland, and the bond to Willis A. Brockman, in the proceedings mentioned, must be presumed to have intended thereby to charge her said separate estate with the payment of said bonds, and the said separate estate is

322 therefore in *equity liable for such payment; but said liability extends only to said separate estate in the interest of her husband acquired under the deed aforesaid, and not to the legal estate in fee of said Martha L. Pamplin in said lands, which legal estate is distinct from said separate

estate and could not be charged by the mere execution of said bonds with the payment thereof, by reason of her disabilities of coverture.

The court is therefore of opinion that the said decree of the circuit court of Nelson county is erroneous in construing the deed of September 6th, 1845, as restricting the power of said Martha L. Pamplin to bind her separate estate by her contracts and engagements, and in making the claims of her creditors subordinate to her support out of said estate; and that said decree is further erroneous in subjecting the Gulf Ford land to sale out and out. It seems that the said Martha L. Pamplin contracted to sell this land to McDonald and others, retaining the title, and repurchased it from them, after they had erected valuable buildings upon it, and that she gave the bond before mentioned to the appellant Garland, a creditor of McDonald, for the consideration in part of the repurchase. Being under the disability of coverture, she had no power to make any contract binding upon her for the sale of the fee in this land. So far as she undertook to sell the fee, which was hers, but no part of her separate estate, the contract was not voidable merely, but absolutely void. She could make a valid contract for the sale of her separate estate, her husband's interest in the subject acquired under the deed of 1845, and to that extent, and no further, she could and did bind said land; and such interest, but not the fee, was subject to sale for the payment of the Garland bond.

Therefore, it is decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against the appellee, Martha L. Pamplin, to be levied of

323 *her said separate estate, his costs by him expended in the prosecution of his appeal aforesaid here. And this cause is remanded to the said circuit court with directions to order accounts to be taken of the separate estate aforesaid, and of all debts and claims for which said estate is liable according to the principles hereinbefore declared, including the debts aforesaid of the appellant Garland, and Willis A. Brockman, scaling the latter to its true value, if ascertained to be a Confederate debt, and when said debts have been established to proceed to subject said separate estate to the payment of the same; and further to proceed to final decree in conformity with the principles aforesaid and the opinion hereinbefore expressed.

Which is ordered to be certified to the said circuit court of Nelson county.

Decree reversed.

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*Womack v. Circle.

November Term, 1879, Richmond.

Malicious Prosecution—Evidence of Probable Cause—Judgment of Justice.—In an action for a malicious prosecution, the judgment

*Malicious Prosecution—Evidence of Probable Cause.—See also Jones v. Finch, 84

of the justice before whom the plaintiff C was brought upon the complaint of the defendant W, that C had attempted to bribe H to burn W's property, requiring C to give security for her good behavior, though upon appeal the judgment of the justice is reversed and C discharged, is conclusive evidence of probable cause for the prosecution, unless W knew the testimony before the justice was false.

This is a sequel to the case of *Womack v. Circle*, reported in 29 Gratt. 192. The cause came on again to be tried in the circuit court of Botetourt county in April, 1878, when there was a judgment in favor of the plaintiff for \$500, and a writ of error to this court. There seems to have been no conflict of the evidence, and it is given by Judge Anderson in his opinion. The only material question in the cause is, whether the judgment of the justice, which was upon appeal reversed, was conclusive or only *prima facie* evidence of probable cause for the proceedings by the defendant against the plaintiff.

After the evidence had been introduced the defendant asked for four instructions to the jury; only two of which need be given. These the courts refused to give, and gave an instruction in lieu of the second instruction asked by the defendant. These instructions are as follows:

I.

If the jury shall be satisfied from the evidence that Sallie Ailstock gave information to the defendant, William W. Womack, that Margaret Circle and Charles Circle had attempted to bribe Hannah Scott to burn defendant's wheat stacks, and that defendant, believing said information to be true, went before Henry C. Douthat, a justice of the peace in the county of Botetourt, and made complaint that the plaintiff and her brother, Charles Circle, did attempt to bribe Hannah Scott to burn his wheat; and if the jury shall furthermore, from the evidence, be satisfied that said Henry C. Douthat, justice of the peace, caused said plaintiff and witnesses to be brought before him, and examined into the truth of said complaint, and upon such examination decided that said plaintiff, Margaret Circle, was guilty as charged, and required her, on account thereof, to enter into a bond or recognizance for her good behavior, this constitutes sufficient proof of probable cause for the proceedings of the defendant; and the jury cannot find a verdict for the plaintiff on account of said com-

plaint on oath before Henry C. Douthat, justice of the peace, or on account of the arrest or imprisonment of the plaintiff in pursuance thereof, even though they should find that the complaint was subsequently dismissed by the county court, the plaintiff acquitted and the said bond or recognizance quashed by said court, unless the jury shall be satisfied by the evidence that William W. Womack, the defendant, knew the testimony before the justice to be false.

II.

If the jury shall be satisfied from the evidence in the case that the defendant, William W. Womack, made complaint before Henry C. Douthat, a justice of the peace of the county of Botetourt, against Margaret Circle and Charles Circle, that they had attempted to bribe Hannah Scott to burn the wheat then stacked on his farm, and furnished said justice the names of witnesses to be examined in relation thereto, and that thereupon said justice summoned said witnesses before him and examined them on oath touching the guilt or innocence of said Margaret Circle, and upon such testimony and upon the statement which the parties chose to make, decided that said Margaret Circle was guilty of the offence alleged against her in the complaint, and required her to give security for her good behavior on account thereof, such decision and requirement of said justice are conclusive evidence of the existence of probable cause for the complaint, even though the jury shall find she was innocent of the offence and was afterwards acquitted on appeal to the county court; and the jury must find for the defendant, unless they shall be further satisfied from the evidence that said Womack procured said decision of the justice by testimony known to him to be false at the time.

Instruction given by the court in lieu of Instruction II asked for by defendant's counsel:

I.

If the injury shall be satisfied, from the evidence in this case, that the defendant, William W. Womack, made complaint before Henry C. Douthat, a justice of the peace of the county of Botetourt, against Margaret Circle and Charles Circle, that they had attempted to bribe Hannah Scott to burn the wheat then stacked on his farm, and furnished said justice the names of witnesses to be examined in relation thereto, and that thereupon said justice summoned said witnesses before him, and examined them on oath touching the guilt or innocence of said Margaret Circle, and upon such testimony and upon the statements which the parties chose to make, decided that said Margaret Circle was guilty of the offence alleged against her in the complaint, and required her to give security for her good behavior on account thereof, such decision and requirements of said justice, although reversed by the county court of Botetourt county, is *prima facie* evidence, and only *prima facie* evidence of probable cause for the complaint therein mentioned and the proceedings thereon, and that the presumption of probable

Va. 204. In this case Richardson, J., in delivering the opinion of the court, said: "The case (*Womack v. Circle*, 32 Gratt. 324) came to this court on a writ of error, and the court being equally divided, the decision of the court below was virtually affirmed. But on the second coming of the cause to this court, that decision was reversed, *Staples & Burks, J. J.*, dissenting. * * * But later in *Banks v. Robinson*, reported in Va. L. J., 1886, p. 398, this court overruled the decision of the majority in the latter case, and sustained the opinion of the dissenting judges that a judgment of conviction by the justice is only *prima facie* evidence of probable cause for the prosecution." See also *Hall v. Boylen*, 22 W. Va. 241, 244.

cause raised by said judgment of the justice may be repelled by other evidence. And if the jury believe, from all the evidence in this cause, that the defendant had probable cause for the complaint and proceedings thereon, then the jury must find for the defendant.

To the action of the court in refusing to give the instructions asked, and in giving the instructions given by the court, the defendant excepted.

Edmund Pendleton and J. H. H. Figgatt, for the appellant.

George W. Hansbrough, for appellee.

ANDERSON, J. This is an action for malicious prosecution. It is the second time it has been brought here, and it is contended for the defendant in error, that the questions now raised are res adjudicata, and cannot be again heard. But the court is unanimously of a different opinion, and consequently that they are open to adjudication on this appeal. We will proceed, therefore, to the consideration of the case as presented by the record.

Sallie Ailstock, a colored woman, who lived on James river in the county of Botetourt, opposite the farm of Wm. W. Womack, the defendant below, sent him word by a colored man, Billy Burks, on the 1st of July, 1876, that Hannah Scott, also a colored woman, had been bribed by Margaret Circle and Charles Circle, to burn his wheat which was stacked on his said farm. Billy returns from Womack's without seeing him, he being from home. The next morning he started again to go to Womack's house, and met him on Lick Run bridge, and delivered to

328 him *Sallie Ailstock's message. Womack, naturally startled by such a message, and the solicitude shown to give him the information, went the same day to the house of Sallie Ailstock, and told her what Billy Burks had said, and asked her if it was so. She told him it was so; that Hannah Scott had told her that Miss Margaret Circle wanted to get her to burn the wheat stacked on defendant's farm, and she wanted to get her to go with her and help her to burn it; that the burning was to have taken place on the Wednesday night immediately previous. She further said that she and Hannah Scott had gone to see Margaret Circle on the previous Monday; that they were in the kitchen at Circle's, and Hannah asked her to go to the garden with her; that when she got there she told her, she did not want to show her the garden; that she wanted to tell her that Miss Margaret Circle wanted her to go and burn the wheat on Womack's place; that she and witness could burn it, and then wade the river, as she had tried it and found it was not deep enough to drown her; that there was no conversation between Margaret Circle and her (Sallie) on that occasion, but she heard Margaret Circle ask Hannah if there was no danger in talking before her. That Margaret Circle and Hannah Scott then went into an adjoining room, and remained there talking for half an hour. Afterwards she and Hannah left and walked home together, and on the way Hannah told her that if she would go with her and help

her to burn the wheat, she would get her husband to get her a calico dress. She said she had been at Circle's once before with Hannah Scott, and that whilst there, Margaret Circle told Hannah that her brother Charles wanted to see her, and Hannah went to another room to see Charles Circle; and when she and Hannah came away, going home together, Hannah told her that Charles Circle wanted her to burn defendant's tobacco and houses. The foregoing was the tetsimony

of Sallie Ailstock in this suit, as certified by the *court below. And she further testified that she had made the same statement to the defendant Womack, when he called to see her on the 16th of July, 1876, and testified to the same before Captain Douthat, the justice who tried the case; and that she had also stated in her testimony before him, that Hannah Scott had offered to give her part of the pay she was to get from Margaret Circle, and that she told Hannah that she would not go with her to burn the wheat.

After this alarming communication was confirmed by Sallie Ailstock, with such details and incidents as were calculated to make an impression of its truth, Womack returned home, and doubtless immediately informed V. C. Ryals, his father-in-law, and G. W. Ryals, his brother-in-law, one or both of whom were probably interested in the wheat, of the alarming communication which had been made to him by Sallie Ailstock, and the pains she had taken to give him the information. And, upon consultation, they concluded to lay the matter before a justice of the peace, and ask for protection to their property.

The justice, Henry C. Douthat, after hearing their statement of what had been communicated to Womack by Sallie Ailstock, and doubtless an expression of their fears for the safety of their property, which was grounded alone upon said communication of Sallie Ailstock, as the justice was informed—for they did not profess to know anything personally, and neither of them was examined as a witness—determined of his own motion (for no particular mode or kind of protection was designated by them) evidently to proceed under chapter 196 of the Code of 1873. It is by no means clear that an action of malicious prosecution would lie for a prosecution originating in that way. Lord Eldon held in *Leigh v. Webb*, 3 Esp. R. p. 165, that, if a party makes a complaint before a justice of peace, which the justice conceives to amount to a felony, and issues his warrant accordingly to arrest the party complained

330 against, *and the facts do not amount to felony, no action for a malicious prosecution will lie against the party who made the complaint.

But to proceed with the narrative. The justice, pursuant to section 2 of said chapter, caused Sallie Ailstock and Hannah Scott to come before him, and heard the statement of the former on oath, hereinbefore given, and examined the latter, one of the accused, whether on oath or not he did not remember, and reduced the complaint to writing as

directed by said section, which he copied from the Code or Mayor's Guide in duplicate, no part of which in its preparation was dictated either by Ryals or Womack, one of which he required the defendant, and the other G. W. Ryals, to sign; and upon the complaints and the testimony of the witness, he issued warrants for the arrest of all three.

The complaint is that the complainant is afraid and has good cause to fear that the said Margaret Circle, Charles Circle and Hannah Scott will do him some grievous bodily injury, or will burn his wheat now on his farm, and therefore prays they may be required to give security to keep the peace toward him; and the said Wm. W. Womack also says on oath that he does not make complaint against the said Margaret Circle and Hannah Scott, nor require such security from any hatred, malice or ill will, but merely for the preservation of his property from injury. The same averment is made in the complaint signed by G. W. Ryals. But it appears that neither complaint was sworn to until after the trial was over, and the judgment of the justice was pronounced.

The written complaint states the grounds of the complainant's fears—to wit: that Margaret Circle and Charles Circle did attempt to bribe Hannah Scott to burn the wheat, &c. Such allegation is made evidently upon the information received from Sallie Ailstock, and not upon any personal knowledge of the complainant; which was

331 *well known to the justice. It was upon that information alone, and not upon any personal knowledge of its truth, that he felt that he had good cause to fear his wheat would be burnt, and he sought this preventive justice. It was not a prosecution instituted against Margaret and Charles Circle for the substantive offence, the misdemeanor, of soliciting a person to commit a felony, which was not committed; but it was a proceeding to prevent the commission of the crime, which the defendant in this suit had been informed and believed Hannah Scott had been solicited to do by the plaintiff.

If it had been a prosecution for the misdemeanor, the justice should have proceeded under chap. 199 of the Code of 1873. In such a prosecution the justice is invested with power by section 15 to discharge the accused, but has no power to convict. He has only authority to commit for trial, and the recognizance shall be for appearance before the county court for trial. His jurisdiction is only to make inquiry whether the accused should be tried for the offence charged.

But the defendant in this suit instituted no such prosecution against the plaintiff. He only applied to the magistrate for such proceedings as would afford protection to his property, which he feared was in danger, from the communication which he had received from Sallie Ailstock, which he feared and believed was true. The justice instituted this proceeding, tried the case, and decided that he had good cause for his complaint, &c., and gave judgment recognizing or binding the plaintiff in the penalty of \$500 to keep the peace toward him for twelve months. The

plaintiff gave the bond, or recognizance, and appealed to the county court. And upon the case being called in that court, she obtained an order reversing the judgment of the justice, quashing the recognizance, and dismissing the complaint, and then instituted this action for malicious prosecution, in which she obtained a verdict for \$500

332 *damages, which the defendant moved the court to set aside, but this motion was overruled and judgment rendered against him; to which judgment he obtained a writ of error from one of the judges of this court.

Two errors are assigned in the petition:

1st. The refusal of the court to give the instructions asked for by the defendant, and the giving of others in their stead.

2d. The refusal of the court to grant a new trial on the ground that the verdict was against law.

Let us consider the last first. The appellate tribunal cannot decide whether the verdict was contrary to the evidence or not, because all the evidence is not certified. But it is well settled that to maintain this action, both malice and want of probable cause must be shown, and the onus is on the plaintiff to prove both.

Malice may be implied from want of probable cause; but not necessarily. In the celebrated case of *Johnstone v. Sutton*, 1 Durn. & East. p. 544. Lord Mansfield and Lord Loughborough said, "From the want of probable cause malice may be, and most commonly is, implied. But that must be shown by the plaintiff."

In *Herman v. Brookenhoff*, 8 Watts R. 240, Chief Justice Gibson said, "In a criminal prosecution want of probable cause must be combined with malice." Again he says, "want of probable cause is evidence of malice, though inconclusive in the origination of a prosecution." Cases may be readily conceived, where the prosecution was instituted upon grounds of suspicion which would not amount to probable cause, where there was an entire absence of ill will or malice, on the part of the prosecutor. In such cases the action would not lie, because there must be combined malice and want of probable cause shown. And although malice may be implied from the want of probable cause, if the circumstances will warrant the implication, yet the existence of malice may be repelled by the circumstances

333 *though there was not good ground for the prosecution; and in such case the action will not lie. This doctrine is clearly stated and supported by authorities in Biglow's L. C. on the Law of Torts, p. 178 to 181.

In this case we have all the evidence that was before the justice; and it seems to me, it shows, that his anxiety for the safety of his property, which he feared was in danger, sufficiently accounts for the procedure of the defendant below, and his friends, in their application to the justice of the peace for protection, without imputing malice. The communication which incited his fears, was made by a colored woman. It was made voluntarily, and with no ostensible motive of

doing any one an injury, but only from a wish to save her neighbor from a great loss, which she, from the pains she took, of her own motion, to give him timely warning, it would be naturally inferred, believed to be impending. It is not a question of the guilt or innocence of the plaintiff. It is whether the complainant's proceedings were malicious and without probable cause.

"Probable cause for instituting a prosecution is such a state of facts in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the person accused is guilty." Chief J. Shaw in *Bacon v. Towne & al.*, 4 Cush. R. 217. It seems to me that such a communication made to any reasonable man, in the manner and under the circumstances that it was made to the defendant below, would arouse his fears, and impress him with the necessity of seeking legal protection of some sort, unless he knew the party making the communication to be mischievous and utterly unworthy of belief—of which there was no such proof before the justice. But it is manifest that the defendant below did credit it, and apprehended that his property was really in danger, and in applying to the magistrate was prompted by a desire to protect it; which repels the idea of malice

in the absence of other testimony
334 *tending to show it. But if the evidence does not show both malice and want of probable cause, the action will not lie. The record contains, in my opinion, no evidence of malice, which it devolved on the plaintiff in the action to show. But inasmuch as all the evidence on the trial of this case is not certified, the judgment cannot be reversed on that ground.

I am of opinion, also, that there was not a full and fair trial of the prosecution upon the appeal to the county court, but that the prosecution was in fact abandoned by the commonwealth's attorney, who refused to examine any witness on behalf of the commonwealth, although her witnesses were all present in court. In *Bacon v. Towne & al.* 4 Cush. R. 217, Chief J. Shaw said: "It must appear, before this action will lie, that the defendant in the indictment has been fully acquitted." He also held that a discharge from an indictment by a *nolle prosequi* is not sufficient to maintain the action. The mere abandonment of the prosecution, and the acquittal of the prisoner, are no evidence of a want of probable cause. *Williams v. Taylor*, 16 Bing. 183; *Johnson v. Chambers*, 10 Ired. 287; *Vanderbilt v. Mathis*, 5 Duer, 304. It shows only that the prosecution has failed. It may still have been taken on reasonable grounds of suspicion. *Youngs v. Polly*, 1 B. Mun. 358.

The attorney for the commonwealth testifies that he abandoned the prosecution, and that he had been retained by Margaret Circle as her counsel to prosecute this suit; which, I think, disqualified him to represent the commonwealth in that prosecution. No imputation against him is intended. No one who knows him would question the rectitude

or purity of his motives. Yet, in accepting a retainer as counsel for the defendant in that prosecution to prosecute this action on her behalf, to the maintenance of which the reversal of the justice's judgment against her by the county court, in the case then

335 pending, was indispensable, *disqualified him to represent the commonwealth in that case; and however faithfully and conscientiously he may have discharged his duty to the commonwealth in that case—as, doubtless, he felt he could do, because upon examining the papers and hearing the statement of Hannah Scott, one of the accused, he honestly believed that the prosecution ought not to be sustained—yet it seems to me that to give force and validity to a judgment of acquittal obtained under such circumstances, to lay the foundation of an action for malicious prosecution, or to allow it as evidence of want of probable cause, to any extent, would be to establish a precedent which would be unsafe and deleterious. The attorney for the commonwealth was not the arbiter of the guilt or innocence of the accused, and his opinion, however honestly formed, was not evidence of her guilt or innocence. And a judgment so obtained, not upon evidence, but upon an abandonment of the prosecution by the commonwealth's attorney, could not establish the innocence of the plaintiff in this suit, and lay the foundation for this action. Much less would it show want of probable cause for the prosecution; and it most probably having influenced the verdict of the jury, the judgment should be reversed on that ground.

We will now consider the rulings of the court upon the instructions tendered by the defendant's counsel. The first instruction does not assert the doctrine that the judgment of the justice was sufficient or conclusive proof of probable cause. It is not founded merely upon the hypothesis of the judgment of conviction by the justice, but upon the facts upon which the judgment was founded—i. e., first, that Sallie Ailstock gave information to complainant that Margaret Circle had attempted to bribe Hannah Scott to burn his wheat stacks; second, that complainant believed said communication to be true, and went before the justice, and made complaint upon such belief, that the Circles had attempted to bribe Hannah Scott to

336 burn his *wheat, as he had been informed by the said Sallie Ailstock; and third, that the justice caused the said plaintiff and the witnesses to be brought before him, and examined into the truth of the complaint, and, upon such examination decided that said plaintiff, Margaret Circle, was guilty as charged, and required her to enter into a bond or recognizance for her good behavior. And the doctrine asserted by the instruction is, that if this be so—that is all that is hypothetically stated—it constitutes sufficient proof of probable cause for the proceedings of the defendant; and the jury cannot find a verdict for the plaintiff on account of said complaint, or on account of the arrest and imprisonment of the plaintiff, even though they should find

that the complaint was subsequently dismissed by the county court, &c., unless the jury should be satisfied by the evidence that the defendant knew the testimony before the justice to be false.

The second instruction does not vary materially from the first, except that it makes the decision of the justice conclusive of probable cause, even though the jury should find that she was innocent of the offence, and though she was afterwards acquitted on appeal to the county court, and the judgment of the justice was reversed; and reiterates the qualification of the first instruction, that "the jury must find for the defendant, unless they shall be further satisfied from the evidence that said Womack procured said decision of the justice by testimony known to him to be false at the time."

The first instruction assumes the sufficiency of the evidence of probable cause, not only by reason of the judgment of conviction by the justice, but also upon the ground that the complaint was honestly made, upon information which the complainant believed to be true, and which, if true, as he believed, was conclusive of probable cause, inasmuch as it proved the plaintiff's guilt. If the complainant honestly be-

337 lieved it to be true, although it was afterwards shown not to be true, he could only act upon his honest belief, and the judgment of a disinterested magistrate within the limits of his jurisdiction, fairly obtained upon hearing the testimony, being against the plaintiff and sustaining the complaint, though afterwards reversed upon an appeal therefrom to the county court, was sufficient to show that the complainant had probable cause for his complaint and proceeding against the plaintiff, unless the judgment of the justice was obtained by his false swearing or the false swearing of others, which he knew to be false. To this last qualification the instruction is limited, as it only was applicable to the case, the complainant not having been a witness in the case at all. It seems to me that this instruction ought to have been given by the court. I cannot conceive how the conclusiveness of such evidence of probable cause could be impaired, except by proof that the judgment of the justice was fraudulently procured by bribery or false swearing of the complainant, neither of which is pretended—and both of which are guarded against by the postulate of the instruction, which assumes that the judgment was fairly obtained—or that the complainant obtained it by imposing false witnesses on the justice, whose testimony he knew to be false.

The second instruction enunciates the doctrine substantially that the judgment of conviction of the justice, fairly rendered without fraud or undue influence, the justice having jurisdiction of the case, and his decision within his jurisdiction being final, is conclusive of probable cause, although his judgment has been reversed upon an appeal to the county court. I am not aware that this question has ever been decided in Virginia.

An eminent writer on the law of torts says,

it has been held that if the plaintiff (in an action for malicious prosecution), was convicted of the offence charged, before a court or magistrate, having jurisdiction of the subject matter, and without undue means

338 of the prosecutor, as, for instance, chiefly or wholly by his false testimony, this will be conclusive evidence of probable cause, although the plaintiff was afterwards acquitted by a jury. (1 Hilliard on Torts, p. 479.) And cites the following cases in support of it: Reynolds v. Kennedy, 1 Wils. R. 232; Cloon v. Gerry, 13 Gray's R. 201; Payson v. Caswell, 9 Shepl. R. 212; Witham v. Goown, 2 Shepl. 362; Griffis v. Sellars, 4 Dev. & Batt. R. 176; Herman v. Brookerhoff, 8 Watts R. 240; Whitney v. Peckham, 15 Mass. R. 243, and Kaye v. Kean, 18 B. Mon. R. 839.

This conclusive effect is given to the judgment of a justice, if final and decisive of the case within his jurisdiction, though subsequently reversed by an appellate court. Chief Justice Gibson in Herman v. Brookerhoff, 8 Watts R. 240, said, "The existence of probable cause is conclusively established by a conviction." Citing Fisher v. Bristow, Doug. R. 215; Fitzherbert's Natura Brevium, 114. And he remarks, "a competent tribunal has sanctioned the accusation, and there can be no more trouble about it."

But proof that the magistrate bound the party over to appear at court, being an *ex parte* examination to inquire whether the plaintiff should be put on his trial, is not conclusive evidence of probable cause. Although no action lies, when a plaintiff prevailed in a justice's court, after a trial on the merits, though the judgment was reversed by the county court, still the effect of such judgment may be met by proof of fraud, conspiracy, perjury, or subornation. In the absence of such evidence the court should order a nonsuit. 1 Hilliard on Torts 480, citing Palmer v. Avery, 41 Barb. R. 290. In opposition to the foregoing decisions, the author cites only the case, Goodrich v. Warner, 21 Conn. R. 432. There are some other decisions in the same way. But as far as my investigations have gone, I think the decided weight of authority is in support of the conclusiveness of the judgment of the

339 *justice to show probable cause, unless met by proof of fraud, conspiracy, the false swearing of the prosecutor, subornation, or the false swearing of other witnesses, with the knowledge of the prosecutor that their testimony is false, whilst he imposes them on the justice as reliable.

There is no evidence in the record tending to show unfairness on the part of the justice, or fraud on the part of the plaintiff in error. If many of the justices of the peace in this commonwealth have been selected from the lowest grades of society, without regard to race or qualification, moral or intellectual, it is a most lamentable fact, and a gross reflection upon the character of their electors, and augurs badly for the future of our commonwealth. But, if so, the evil cannot be cured by the judiciary: The remedy is political. Nor is it competent

for the courts to change the law as to the conclusiveness of a justice's judgment of conviction in a criminal prosecution, fairly rendered, upon the question of probable cause, in an action for malicious prosecution, because of the appointment to the office of justice of the peace persons of inferior qualifications.

But in this case there is nothing in the record, in all the evidence which has been certified, to indicate or to raise a suspicion that Capt. Douthat, the justice who decided this case, was a man of low grade of character, or that he was not a gentleman of the strictest integrity, and a man of intelligent and honest and honorable bearing, and of suitable qualifications for his office; which, in the absence of all evidence to the contrary, the law will presume. Nor is there any evidence as to the character and standing of the plaintiff or defendant in this suit. It does not appear from the record that she was a lady of high character, or that the defendant to the action was a man of bad character. There is not the slightest evidence in the record to show that William W. Womack, in making the complaint, was influenced by ill will, malice or any

340 other motive than *a desire to protect his property, which he believed to be in danger upon the information he received from Sallie Ailstock, to the truth of which she testified, on oath, before the justice, or that he knew the testimony to be false, or did not honestly believe it to be true, or, in fact, that it was not true. The judgment of the county court does not show it, because that court did not hear her testimony. Nor is there a scintilla of evidence of fraud, conspiracy, false swearing by the prosecutor, who was not examined as a witness at all, or of perjury by any witness for the commonwealth, or that the prosecutor knew or believed that any witness for the commonwealth had sworn falsely, or that the justice had not honestly and faithfully rendered his judgment. If it should be said that all the evidence is not certified, it is true. But the defendant in error cannot assume as facts what are not proved by the evidence which is certified. If she does, it is surely competent for the plaintiff in error to reply that there is no evidence of such facts in the record, although all the evidence is not certified. It is not more competent for the former than for the latter to assume that to be a fact in the cause which the evidence certified does not prove.

But the instructions tendered by the defendant below were upon the hypothesis that the facts were proved as assumed, which would be a question for the jury, and repels the inference that, if unfairness, fraud, &c., on part of the prosecutor, or of the justice, in the procurement of the judgment were shown, that the jury would be required by the instructions still to regard the justice's judgment as conclusive of probable cause. It moreover appears that the justice resided in the immediate neighborhood of the parties and the witness, and may be presumed to know their character and stand-

ing; and it was upon his official responsibility that he directed what proceedings should be taken, prepared the complaint, arrested the parties, heard the testimony, and decided the case.

341 *It seems to be well settled law, that a final judgment of conviction, from which there is no appeal, is conclusive evidence of probable cause, and will bar an action for malicious prosecution. It is not only conclusive evidence of probable cause, but of the guilt of the party prosecuted. If an appeal should lie to a higher court, and the judgment should be reversed, and the accused acquitted, the first judgment would be no longer evidence of his guilt; but it by no means follows, that it would not be conclusive evidence that at the time it was rendered the defendant had probable cause for the prosecution. It would be unreasonable, it seems to me, to hold that the prosecutor had instituted the prosecution without probable cause, and is liable to an action for malicious prosecution, when the officer of justice, whom the law presumes to be disinterested and faithful, in the exercise of his lawful judicial jurisdiction, has tried the case, weighed the evidence, and is satisfied that there was not only probable cause for the prosecution, but that the accused is guilty, and so decides, although it is afterwards held upon an appeal to the county court that the accused is not guilty.

In *Gorton v. De Angelis*, 6 Wend. R. 418, it was held that in an action for malicious prosecution it was necessary for the plaintiff to give some evidence of want of probable cause, and that "it was insufficient to prove a mere acquittal. That alone is not prima facie evidence of want of probable cause." Cited in *Bigelow's L. C.* on the law of torts approvingly, p. 178. The same eminent writer, to whom reference has been made, says, "while the action for malicious prosecution cannot be maintained without proof that the prosecution, or action, has terminated in favor of the present plaintiff, it is somewhat questionable, upon the authorities, whether the record of such termination is of itself even prima facie evidence of the want of probable cause. The weight of authority seems to be that it is not." 1 Hilliard

342 on the Law of *Torts, p. 480, citing *Johnston v. Martin*, 3 Murph. R. 248; *Bostick v. Rutherford*, 4 Hawks R. 83; *Vanderbilt v. Mathis*, 5 Duer. R. 304. If this be so, how can the reversal of a judgment of conviction on appeal, and the acquittal of the accused affect the conclusiveness of the judgment of conviction on the question of probable cause? If the final judgments of acquittal is not even prima facie evidence of want of probable cause, it cannot rebut the conclusive presumption of probable cause arising from the former judgment of conviction.

The contrary opinion results probably, from not considering that the presumption of probable cause from the judgment of conviction, which is raised before that judgment is reversed, which is conclusive of the guilt of the accused until it is reversed, is not founded upon an assumption that the judgment is

infallibly correct, but upon the fact that a disinterested judge or justice, upon a fair trial, has pronounced a judgment of guilty, upon the same facts on which the prosecution was instituted. And that if the officer of justice, in the disinterested and conscientious discharge of his judicial function (which the law presumes), regarded the facts proved as establishing the guilt of the accused, although he may be held by an appellate court to have erred in his judgment, it comports both with reason and public policy to hold, that the prosecutor, who acted in good faith, without fraud, conspiracy, false swearing or subornation, had probable cause for instituting the prosecution, and should not be liable to an action for malicious prosecution. The hypothesis that he so acted in good faith, if not express, is clearly implied in both instructions tendered by the defendant. I am of opinion, that both are substantially correct, and that the court erred in rejecting them, and for the same reasons that the first instruction given by the court is erroneous. Upon the whole, I am of opinion, to reverse the judgment of the circuit court with costs,

and to remand the cause for a new trial to be *had therein in conformity with the principles herein declared.

STAPLES, J. The statute bearing upon the case prescribes that upon complaint made to a justice that a person intends to commit an offence against the person or property of another, the justice shall issue his warrant, and when the accused is brought before him and the witnesses heard, if he is of opinion there is good cause for the complaint, he may require of the accused a recognizance to keep the peace and be of good behavior. The accused may, however, of right, appeal to the county court, which, upon the hearing, may affirm or reverse and dismiss the complaint.

Now, the justice, by his judgment, affirms there is good cause for the complaint. The county court, in reversing, declares that there is not good cause for the complaint. The whole object of the appeal, and the effect of the reversal, is to vacate the decision of the justice, and put it out of the way, with all its direct and collateral consequences and results. I had always supposed the fact that a judgment which has been reversed is a complete answer to every attempt to rely upon it as an estoppel. *Wood v. Jackson*, 8 Wend. R. 1; *Freeman on Judgment*, § 333.

Here, however, it is proposed to give to a judgment which has been reversed and vacated the same force and effect as a judgment which stands unreversed and even affirmed on appeal. When a party against whom an erroneous decision is rendered succeeds in reversing it, he is entitled to all the benefits flowing from that reversal, and it is gross injustice to adopt a rule which holds him controlled by it in any other proceeding.

But the rule now established violates another well recognized principle of law.

It often happens that when articles of the peace are exhibited, the accused is convicted by the justice upon the *testimony of the prosecutor alone. In

criminal cases this constantly occurs; and therefore the record of a conviction in a criminal case is never conclusive of the facts on which it is based in any civil action. One of the reasons is, that the conviction may have been obtained on the evidence of the prosecutor alone; and it is not permitted the successful party to rely upon a decision as conclusively thus obtained, when the mouth of his adversary is closed.

Another reason is, that all estoppels must be mutual, and the prosecutor is never concluded by an acquittal; for if he is afterwards sued for a malicious prosecution, he may, notwithstanding the acquittal, show the existence of probable cause or the absence of malice. According to the present doctrine, however, he may rely on a reversed judgment as an estoppel, although his adversary would not be permitted to do the same thing if the judgment had been in his favor. In *Honaker v. Howé*, 19 Gratt. 50, this court held that the record of a conviction in a criminal case, although obtained on the confession of the defendant, was not evidence against him for any purpose in a civil action brought by the party injured.

In an action for a malicious prosecution, the plaintiff may introduce the verdict of acquittal by a jury in his behalf—not for the purpose, however, of showing want of probable cause or malice, but because he is required to show that the proceeding against him has failed—has resulted in his favor. The record is introduced for that purpose, and that only. *Stewart v. Sonneborn*, 8 Otto, 187. He is still required to establish the existence of malice and want of probable cause by independent testimony. And when, therefore, a person unjustly accused of crime is denied all benefit arising from a record of acquittal, we are now told he is to be concluded by an erroneous judgment, which was reversed because it was erroneous. Such a doctrine may be law, but it does not commend itself to our sense of justice.

345 *It has been said, however, that probable cause means such a state of facts and circumstances as will induce a man of ordinary prudence to believe the charge to be true; and when the justice and officer clothed with judicial authority is satisfied from the evidence there is probable cause, the prosecutor is justified in so believing, and may safely act upon that belief. There are several very conclusive answers to this view. In the first place, an ignorant and illiterate justice in the county may act, and often does act in matters of great concern upon illegal and incompetent testimony, which any reflecting mind would reject as unworthy of a moment's consideration.

What else could be expected in a land where men are being elected to that office without respect to race, color, education or qualification.

In the second place, the party bringing the accusation in many cases is the only witness, and upon his testimony alone the conviction is obtained. The justice may believe the prosecutor's statement, and yet the prosecutor may know it to be false, or he may withhold

important and material information which would give a very different aspect to the case.

In *Spengler v. Davy*, 15 Gratt. 381, this court held that if the party making a criminal accusation did not himself believe the accused guilty, he could not, in a case for a malicious prosecution, rely upon the facts and circumstances which otherwise might have been sufficient to establish the existence of probable cause. But, according to the present view, if the prosecutor can only succeed in impressing the justice of the peace with a conviction of the truth of his story, he is forever secure against all liability, however false and unfounded and malicious his statement may be. The practical result in many cases is to give the force of an estoppel not merely to the judgment of the justice, but to the evidence on which it is founded.

346 *I admit there would be some show of reason and justice in holding a verdict and judgment of a court of record conclusive of probable cause. There the accused is tried by a jury of impartial men, duly selected and under the supervision of a judge learned in the law. He is assisted by his counsel; the witnesses are subjected to the test of a public examination, and the whole proceeding is calculated to eliminate fully the merits of the case. But what confidence is to be reposed in trials before a single justice in the county, if men choose to pervert them to purposes of revenge and oppression. The accused is usually without counsel, often without advice and without witnesses, the whole proceeding conducted in the loosest and most irregular manner, without the least regard to law, or the rules of evidence.

It is a matter of no great concern, after all, that it is so, because the law treats the judgment as merely preliminary; the party affected may appeal, as of right, and have any injustice done him corrected, by reversing the judgment of the justice. But if that judgment is to be held to be conclusive, then, indeed, the most innocent and deserving may be the victims of the most malignant and unfounded criminal prosecution, without possibility of redress. There are in many counties of Virginia to-day persons filling the office of justice of the peace, both white and black, utterly and notoriously incapacitated, whom no sane man would think of consulting in a business transaction, and yet under the rule now adopted the decision of these men, upon the difficult and perplexing question of probable cause, is to be held hereafter conclusive upon the party most injured by the proceeding, even after it is declared to be erroneous by the proper tribunal.

The case before us is a sufficient illustration, without going further. The defendant in the present action is told by a colored woman, called Sallie Ailstock, that she had

347 been informed by another colored woman, called *Hannah Scott, that the plaintiff and another person intended to burn the defendant's wheat stacked on his farm. And thereupon, the defendant, without further information, appeared before a justice, and made complaint that the

plaintiff and her brother had conspired with and offered a bribe to the woman Hannah Scott to commit a felony in burning defendant's wheat. The warrant was issued, the parties arraigned before the justice. The only witness examined in support of the charge was the same Sallie Ailstock, who stated that the woman Hannah Scott had told her that she had been offered money by the plaintiff to burn the defendant's wheat. Hannah Scott was also duly examined, who denied that she had ever made any such statement. It will be seen the only evidence against the accused was that of the colored woman, who merely undertook to retail what another colored woman had told her; and upon this illegal and unworthy testimony, disgraceful to all the parties concerned, a respectable and virtuous lady is convicted, as far as the justice can convict, of an infamous offence involving loss of character and liberty.

The plaintiff seems to have been hopeless of any fair decision by the justice, and she therefore contented herself with appealing to the county court at its next term. And, as might have been expected, the next court dismissed the whole proceeding without the least hesitation. Whether the defendant was actuated by any malice in what he did, is not material to inquire: That was a question for the jury. The point of complaint I make is, that parties unjustly subjected to charges of this sort, involved in trouble and expense, injured in good name and reputation without any just or probable cause, are denied all redress if an ignorant justice can be found to give credence to the accusation.

If the plaintiff had been acquitted by the justice, that acquittal would have been **348** prima facie evidence of want of probable cause, and nothing more. All the authorities agree in so holding. Why should an erroneous conviction by the same justice, in the same cause, have a more conclusive effect? I have never heard of any satisfactory reason given for the distinction.

I do not propose to enter into any minute examination of the cases on this subject. They are conflicting and wholly irreconcilable. The decision in *Whiting v. Peckham*, 15 Mass. R. 243, is, I admit, contrary to the view I have taken; but the opinion of the court in that case is a mere statement of results. No reasons are given, and no authorities cited.

In the subsequent case of *Parker v. Farly*, 10 Cush. R. 279, the doctrine is laid down in a more qualified manner. In that case it appears the plaintiff had been convicted by the verdict of a jury, and had excepted to various rulings of the court in matters of law, but his exceptions were not sustained by the supreme court. At that stage of the cause when he stood liable to be sentenced for the offence, he applied to the court for a new trial, which was granted to admit newly discovered evidence. No new trial was ever had, however, but a nolle prosequi was entered. Chief Justice Shaw, after stating these facts, proceeds to say: "The court is

therefore of opinion that such a verdict of conviction upon instructions correct in matters of law, though afterwards set aside for another cause, must be regarded as proof of probable cause for the prosecution, and stand as a bar to the action for a malicious prosecution."

All will concede, I think, that a verdict and judgment of conviction in a court of record upon correct instructions, affirmed in an appellate court, though afterwards set aside to let in after-discovered evidence, and never again tried, stands upon much higher ground than the judgment of a single justice in the country reversed for error by a court of competent jurisdiction.

With respect to one or two North Carolina cases, relied upon by the defendant's counsel, I will only say that they lay down the extraordinary doctrine that the judgment of the justice is conclusive, although procured by perjury and subornation of perjury, and although reversed for error by an appellate court. With becoming respect it may be said that the reasoning of Justice Ruffner applies very well to the judgment of a court of competent jurisdiction in full force and effect, but it has no sort of application to a judgment which has been reversed and annulled. On the other hand, the Maine cases hold that the judgment of the justice is not conclusive if it is obtained by unfair means, or by fraud, or by falsehood, or by circumvention of the prosecutor. *Payson v. Caswell*, 22 Maine, 212; *Witham v. Gowen*, 14 Maine, 362.

It is impossible to reconcile these cases. To hold, as was done in North Carolina, that the judgment of an inferior magistrate, procured by fraud and circumvention, and which for that very reason is reversed, protects the party who obtained it against all liability, is to violate every rule of justice and every sound principle of law.

Any and every judgment or decree procured by fraud, no matter how high the court, may for that cause be impeached, even collaterally, whenever relied on. On the other hand, to say that a judgment is not conclusive if obtained by unfair means, as often occurs where the prosecution is malicious, is simply to throw open the door to every sort of investigation and inquiry without any settled rule on the subject. The real point of inquiry is not whether the judgment of the justice was procured by perjury, fraud or circumvention, but whether the party instituting the prosecution had probable cause for doing so, and whether he was influenced by malicious motives.

If the judgment was erroneous, no matter how obtained, and has been reversed, it ought not to operate as an estoppel, to exclude the plaintiff from an investigation into the merits of his case. Now let us examine into the cases in the subject.

350 *In the case of *Israel v. Brooks*, 23 Illi. R. 575, Breese, in discussing this question, said, "How many magistrates are there in obscure localities who are as little capable of determining what is probable cause for a criminal action, as they are of

explaining any of the phenomena of nature. The decision of such an official on intricate questions of law or fact, should not weigh against the accused, and they do not practically, for it is admitted the grand jury pay no attention to the finding of the magistrate." *Thorpe v. Balkett*, 25 Illi. R. 339, is to the same effect.

In *Goodrich v. Warner*, 21 Conn. R. 432, a well considered case, the same identical question involved here was discussed and decided. There, in an action brought for a malicious prosecution, it appears that the plaintiff had been tried for the offence before a justice of the peace, and found guilty; whereupon, he appealed to the county court, and was thereupon acquitted. It was held that had there been no appeal from the first judgment, it would have been conclusive evidence of probable cause. That as the result was, the conviction was not conclusive evidence of probable cause; but if the trial was fair and full, it was entitled to great consideration. *Waite, J.*, with whom all the judges concurred, said, "As to the conviction of the plaintiff before the magistrate, upon the charge of an assault and battery, we think the subject was properly submitted to the jury. Had the plaintiff taken no appeal from that judgment, it would have been conclusive evidence of probable cause." *Mellor v. Baddeley*, 6 Car. and Payne, 374, 25 Eng. C. L. 444.

But if upon a full and fair trial, the evidence against the plaintiff was sufficient to satisfy the justice of his guilt, that circumstance will afford strong presumptive evidence of probable cause existing at the time, although upon a subsequent trial, and perhaps upon other and further investigation, a jury

might be of opinion, that it was not **351** *sufficient to justify a conviction. See *Jones v. Kirksey*, 10 Alab. R. 829, which is to the same effect. In *Moffatt v. Fisher*, decided during the last year by the supreme court of Iowa, 47 Iowa R. 473, it was held that in an action for a malicious prosecution, the judgment of a justice of the peace was prima facie evidence, but not conclusive evidence of probable cause. The court said the rule which made such a judgment conclusive was too arbitrary to effect justice between the parties. The weight to be given to such a judgment would depend much upon whether there was a full and fair trial.

In *Burt v. Place*, 4 Wend. R. 591, Mr. Justice Marcy, delivering the opinion of the court, said, the case of *Whitney v. Peckham*, 15 Mass. 243, was decided without due consideration. And he further said that in the case of *Reynolds v. Kennedy*, 1 Wilson, 232, the question seems to have been what was sufficient, rather than what was conclusive evidence of probable cause. And in the case then before him he laid particular stress on the fact that, although the judgment of the justice was against the plaintiff, that judgment had been reversed upon appeal in the common pleas.

If I have read them aright, the few English cases on the subject hold the same doctrine.

In *Mellor v. Baddeley*, 25 Eng. Com. Law

R. 444, it appeared that the plaintiff had been convicted of a trespass under the gaming act of 1 and 2 Will.; that he underwent sentence of imprisonment under that conviction, and did not appeal against it. It was held that the conviction was an answer to the action for a malicious prosecution. Park, J., said, "I have heard the case throughout, because Mr. Grimes (the counsel) has cited a great number of authorities. I am of opinion that the action cannot be maintained without showing the conviction was quashed." The learned judge, of course, must have meant that if the conviction had been quashed

352 on appeal, the action might *be maintained. But if the judgment of conviction was conclusive, although reversed, as now contended, the quashing the conviction was of no sort of importance. *Whitworth v. Hall*, 22 Eng. C. L. R. 173, is a similar case.

That case was carried to the court of exchequer chamber, and is reported in 2 Compton and Meeson R. 675. The court say, "the simple question before us is, whether a conviction unreversed must of necessity be an answer to the action as showing probable cause. The statute gives to the party convicted an appeal to the quarter sessions upon certain terms and conditions. The plaintiff in this case neither gave notice of appeal, nor entered into recognizance, but suffered the punishment awarded on conviction; therefore, as he acquiesced in the conviction, that was conclusive of probable cause. It will thus be seen that conclusive effect was given to the conviction solely upon this ground, that the party acquiesced in and did not appeal from the sentence.

Although our own reports furnished no cases involving this particular point, yet they do contain cases in which the same principles were involved. One of these is *Maddox v. Jackson*, 4 Munf. 462. That was an action for a malicious prosecution. It appeared that a warrant was issued upon complaint of the defendant, charging the plaintiff with a felony; and upon the investigation the justice had required the plaintiff to appear before the county court; and upon the trial in that court, the plaintiff was acquitted and discharged. This court held that the decision of the magistrate was sufficient evidence of probable cause, although the person accused was acquitted by the court, unless the plaintiff could show by other evidence that, in fact, the prosecution was without probable cause.

According to this decision the judgment of the judges was merely prima facie; liable to be rebutted by other testimony. And yet the magistrate in that case acted

353 in the *exercise of judicial functions. His duty was to examine the witnesses and weigh the evidence. He decided there was probable cause to believe the accused guilty. It was a judicial determination and ascertainment of the fact by an officer clothed with the requisite authority.

I know it is said such investigations are *ex parte*; how *ex parte*? The commonwealth is the party on one side, and the accused

on the other. In principle, what is the difference between the determination in that case and the one now under consideration? There is this important distinction. In the case before us the judgment of the justice was reversed on an appeal in the same proceeding. When a party is brought before a justice charged with a felony, and the justice decides there is probable cause to believe the accused guilty, even if the party is afterwards acquitted by the verdict of the jury, that does not necessarily involve a reversal of the justice's judgment. The jury may acquit because of a doubt, because the evidence is not conclusive, and therefore it is, a verdict of acquittal does not necessarily carry with it a reversal of the justice's judgment. And yet that judgment unreversed is never considered as more than prima facie evidence of probable cause, while a reversed judgment of the same justice is treated as conclusive in almost a similar case. The only difference is that in one case there is a complaint of a felony committed, and in the other a complaint of an intention to commit an offence.

We have a case, however, nearer home, decided by the present court—*Scott & Boyd v. Shelor*, reported in 28 Gratt. 891. The plaintiff was arrested and taken before a United States commissioner upon a charge of passing counterfeit money made by the defendant. Upon hearing the witnesses, the commissioner sent the plaintiff on for trial before the district court of the United States in Abingdon; and upon the final trial the plaintiff was acquitted by a jury.

354 *He thereupon brought his action for a malicious prosecution against the plaintiff, and recovered a verdict and judgment for damages; which was unanimously affirmed by this court. The functions of the commissioner in committing for trial are precisely like those of a justice of the peace, and he must decide that there is at least probable cause before he can send on for further trial.

This court held that the decision of the commissioner was prima facie evidence of probable cause, but nothing more. If, however, upon the facts and circumstances, the commissioner believed there was good cause to impute guilt, it might be said the defendants were justified also in so believing. Judge Burks, in examining the testimony, proceeded to enquire, not whether the defendants knew the testimony to be false, but whether they believed the plaintiff to be guilty when they made the charge; and secondly, was such belief unwarranted by the facts and circumstances within their knowledge, taking them to be men of ordinary caution and prudence; and both of these questions were decided in the negative.

I can see no distinction in principle between the effect of the justice and commissioner's judgment in these two Virginia cases and the one under consideration. And here let me say, I cannot perceive that the defendant can be injured because the judgment does not operate as an estoppel. The onus is upon the plaintiff at every step of the cause to show malice and want of probable cause. The defendant may rely upon the judgment

as prima facie in his favor, and he may rely upon the facts and circumstances stated on the trial before the justice, as sufficient to establish probable cause; and he will be entitled to the benefit of any presumptions arising therefrom.

In conclusion, I agree that as the public interests often require the institution of criminal prosecutions, the court should be careful not to lay down rules which will expose

355 *parties to liabilities because of honest mistakes made in such cases. On the other hand, it is equally necessary to take care that the exercise of the law shall not be prostituted to mere purposes of private revenge.

A person assailed by a false and malicious prosecution, injured in his good name and fortune, should not be cut off from all redress by any mere technical estoppel which does not go to the merits of the case. Every consideration of public justice requires that there should be in such cases a full and fair investigation. If wrong has been done through a provision of the law, redress should be allowed by the law. I am therefore of opinion to affirm the judgment of the circuit court.

BURKS, J. When this case was before this court on the first writ of error prosecuted by the defendant, the judges—only four sitting—were divided in opinion upon the question as to the weight which should be given to the judgment of the justice of the peace, which, on appeal, had been reversed by the county court. See 29 Gratt. 192, 209. The same question is before us again. Further investigation and deliberation have strengthened my convictions as to the correctness of the views presented in the opinion which I delivered when the case was here before. I adhere to that opinion, and for the reasons assigned therein, and also in the opinion of Judge Staples just delivered—in which I fully concur—I think there is no error in the rulings of the circuit court, and that the judgment should be affirmed.

MONCURE, J., and CHRISTIAN, J., concurred in the opinion of Anderson, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, **356** that to maintain this action it was incumbent on the plaintiff to show that the prosecution had been determined favorably to the plaintiff and in her acquittal, and that the prosecution was both malicious and without probable cause, and the circuit court erred in refusing to give the first two instructions to the jury moved by the defendant's counsel; and in giving the first instruction which it gave. It is therefore considered that the judgment of the circuit court be reversed and annulled, and that the plaintiff in error recover his costs expended in the prosecution of his writ of error here. And this court now proceeding to enter such judgment as the said circuit court ought to have rendered, it is considered that the said verdict be set aside, and the cause is remanded to the circuit court of Botetourt county for a new trial to be had therein in conformity with the opinion filed

with the record and with this order. And if, upon such new trial, the defendant should ask the court to give the first and second instructions to the jury which he tendered at the former trial, that the same be given.
Judgment Reversed.

357 *The Missionary Society of the M. E. Church v. Calvert's Am'r & al.

November Term, 1879, Richmond.

C, owning several tracts of land and personal estate, by his will says: 3. I give to my wife Theresa, during her natural life or widowhood, all my estate, real and personal, except as hereinafter excepted. But if she should marry again, then she is to have the same portion of my estate as if I died intestate. He directs his executors to sell his lands and personal property; and then says the home place is for my wife to live on as long as she may remain my widow, and then it is to be sold. He then says: I wish the proceeds of the sales of my real and personal estate, and the debts due me after paying my debts, to be put at interest by my executor, and my wife to receive the interest. But so long as she remains my widow, she is at liberty to receive from my executors or from my estate such part of it as she may choose and to appropriate it as she believes to be just and right. And he then directs that all such part of his estate as she does not thus appropriate, and all the rest of his estate, shall be given and paid over to the Missionary Society of the Methodist Episcopal Church, incorporated by an act of the legislature of the state of New York, passed April 9, 1839. All so paid to the said Missionary Society shall be paid to the India mission by that society—Held:

1. Construction of Will—Repugnancy.*

—That under the provision that his wife Theresa is to be at liberty to receive from his executors such part of it as she may choose, and appropriate it as she believes to be just and right, all the estate directed to be sold and invested by his executors, passed absolutely to his wife.

2. Same—Same.—The Home place, which was to be sold after the death or marriage of his wife, did not pass absolutely to the wife, but the proceeds of the sale thereof passed to the said Missionary Society.

358 *3. Validity of Bequest to Missionary Society.†—The testator directing the Home place to be sold by his executors, the

*Validity of Limitation Over after a Devise, with Unlimited Power of Disposal in the First Taker.—The principal case is cited, and its holding on this subject is sustained in *Cole v. Cole et al.*, 79 Va. 253; *Hall v. Palmer*, 87 Va. 358; *Bowen v. Bowen*, 87 Va. 440; *Farish v. Wayman*, 91 Va. 435; *Davis v. Heppert*, 96 Va. 776; *Wilmoth v. Wilmoth*, 34 W. Va. 431. See also *Shermer v. Shermer's Ex'ors*, 1 Wash. (Va.) 266; *May v. Joynes*, 20 Gratt. 692; *Carr v. Effinger*, 78 Va. 197; *Reddick v. Cohoon*, 4 Rand. (Va.) 547; *Melson v. Cooper*, 4 Leigh. 409; *Brown v. George*, 6 Gratt. 424; *Milhollen v. Rice*, 13 W. Va. 519; 2 Min. Inst. (4th Ed. 251 *et seq.*, and 443 *et seq.*, 444, and 1074.

†Religious Use—Bequests.—The holding that the bequest to the Missionary Society was valid is sustained by the doctrine of Trustees, etc., *v. Guthrie et al.*, 86 V. 150, citing the principal case. See also 3 Min. Inst. (2nd. Ed.) 585.

bequest to the Missionary Society though a foreign corporation is valid; they taking the proceeds of the sale.

1. **Same—Same.**—The direction that the Missionary Society shall expend it on the Indian mission does not avoid the bequest for uncertainty.

This case was heard at Staunton, but was decided in Richmond. It was a suit in equity in the circuit court of Frederick county, brought by Wm. L. Clark, administrator de bonis non with the will annexed of Jesse Calvert, deceased, against the widow of said Calvert and the Missionary Society of the Methodist Episcopal Church, a New York corporation, to have a construction of the will of his testator, and a settlement of his accounts.

Jesse Calvert died in 1863, leaving a widow but no children, and leaving a will, which was admitted to probate in the county court of Frederick on the 4th of January, 1864. The will, just as it was written, is as follows:

In the Name of God Amen the Last Will and Testament of Jesse Calvert of Mill Brook Frederick County and State of Virginia and I Jesse Calvert Considering the uncertainty of this Mortal Life and Being of Sound Mind and Memory Blessed Be Almighty God For the same Do Make and Publish this My Last Will and Testament in Manner and Form Following to wit that is to say 1 I Direct that after My Decease My Body Shall Be Decently interred in the Grave yard at Mill Brook at the spot Which I have selected and Suatable Grave stones there 2 I Direct that all My Debts Be Paid as soon as Can Be after My Death. 3 I give to My Wife theresa Calvert During Her Natural life or Widowhood all My Estate Real and Personal Except as Hereinafter Excepted But if she should Marry a Gain then she is to Have the same Portion of My Estate as if I Died intestate.

359 *My Will is that all of My Estate shall Be appraised as soon as Convenient after My death Bouth Real and Personal stocks Merchandise and Household Furniture &c My Merchandise and such of My other Personal Estate as My Wife May not want to Keep shall Be sold By My Executors after My Death as soon as Convenient But What My wife Wants to keep need not be sold at that Time. I want My Executors to sell My Lands at Timber Ridge Two Tracts one of 200 acres and one of 120 acres as soon as Convenient after My Death to the Best advantage Eather at Public or at Private sale as they May think Best and if it Cannot Be sold to advantage they May Rent it out until they Can Sell it as they think Best so do and one Small Tract of Land Lying ½ Mile West of Mill Brook of some More than 33 acres May Be sold When it Can Be Sold to advantage if My Wife Do not Want to Keep it and the Home Place of about 230 acres is For My Wife to Live on as Long as she May Live or Remain My Widow and then in Either Case all is to be sold. and if the Home House and What Land May Be to it Can Be sold Without Mutch Loss I Wish it to Be sold to a Member of the Methodist Church Who

Will keep the Preachers and attend to the church and Grave Yard I wish the Proceeds of the Sale of My Real and Personal Estate and the Debts due to Me after paying My Debts to Be Put at Interest By My Executors and My Wife to Receive the Interest But so Long as she Remains My Widow she is to Be at Liberty to Receive From My Executors or From My Estate such Part of it as she May chose and to appropriate it as she Believes to Be Just and Rite. But such Part of it as She May not thus appropriate is to Pass as Directed By My Will at the Death of My Wife all the Remainder of My Estate Real and Personal shall Be Given and paid over to the Missionary Society of the Methodist Episcopal church Incorporated by an act of the Legislature of the State of

360 New York Passed April 9. *1839 and the Receipt of the Treasurer of the society shall Be a sufficient Discharge therefore to My Executors. and it is My Will that all My Executors shall Pay to the Missionary Society a Buve stated shall Be Paid to the India Mission By that said society of New York and the Receipt of the Treasurer shall Be to that Effect and the Better to Effect this Purpose My Executors are to sell My Real and Personal Estates and if My Wife shall Mary again then such Portion of My Estate as she Will not Be entitled to under My Will is to Be Disposed of and Paid over to the said Missionary Society as son as convenient after Her Mariage.

and the Real and Personal Estate or the Proceeds of them Witch she shall Hold as her Dower shall Be Paid over at Her Death to the Said Missionary Society at New York For the Benefit and applied to the India Mission. 4 I appoint My Friend Charles L. Wood and Dear Wife Theresa Calvert My Executors to Carry out this My Last Will and Testament. In Witness Whereof I Have Hirunto set My Hand and seal this 21st day of March, 1861.

Jesse Calvert, [Seal.]

Signed Sealed Published and Declared by the above named Jesse Calvert to Be His Last Will and Testament in the Presence of us Who at His Request and in His Presence Have subscribed our Names as Witnesses Thereto.

Jesse Wright,
Moses W. Shippe.

Both the defendants answered the bill, and the cause coming on to be heard at the June term, 1879, the court decreed that the will of Jesse Calvert vests in the legatee Theresa Calvert an estate in fee simple to all the property, both real and personal, left by the decedent, except in the tract of land therein described as the home farm, and as

361 *containing about two hundred and thirty acres; as to which the said legatee is only entitled to an estate for life or widowhood. And thereupon the Missionary Society applied to a judge of this court for an appeal; which was awarded.

Holmes Conrad, for the appellant.
Wm. L. Clark, for the appellees.

BURKS, J., delivered the opinion of the court.

Intention, it is often said, is the polar star to guide in the construction of wills, and when discovered effect must be given to it unless it violates some rule of law. The difficulty lies in the discovery of that intention where the instrument is obscure and ambiguous, as in the present case.

It does not appear who wrote the will of the testator, Jesse Calvert. It was probably written by himself. In framing it, the draftsmen, whoever he was, paid very little attention to the rules of grammar. To say nothing of the errors which abound in the orthography, every other word, upon an average, I would say, commences with a capital letter; what little punctuation is attempted is generally in the wrong place, and in parts of the will there is more or less incongruity in the language employed.

Still, I think, by scrutinizing the whole instrument and carefully comparing one part with another, we may get at the meaning with sufficient certainty.

The testator was the owner of several tracts of land, as the will shows, and some personal property. The value of his estate does not appear with any distinctness. He was childless, and his wife and the Missionary Society of the Methodist Episcopal Church, incorporated by the legislature of

New York, were the sole objects of his bounty. *It was evidently his intention to provide for both, but chiefly for his wife. Hence, at the outset, after directing the payment of his debts, is this clause (some obvious grammatical errors being corrected): "3. I give to my wife, Theresa Calvert, during her natural life or widowhood, all my estate, real and personal, except as hereinafter excepted; but if she should marry again, then she is to have the same portion of my estate as if I died intestate."

Under this clause, taken alone, it would appear to be the obvious intention to give to the wife during her life or widowhood the whole of the estate, save such part or parts thereof as should be excepted from the bequest by the subsequent provisions of the will. We therefore naturally look for and expect to find these exceptions in what follows. But a careful examination does not enable me to discover any such exceptions, either express or implied. The intent, in what follows, to the end, is that she is to have without exception the entire estate until the termination of her widowhood by marriage or death. Whatever may have been the design in the use of the language, "except as hereinafter excepted," in the connection in which it is found, it could not have been intended thereby to except from the bequest to the wife any of the testator's property. She was to have all during widowhood. The phrase must have been used with some other intent, and that intent, I think, as disclosed in a subsequent part of the will, was to qualify the estate given to her, as expressed by the words "during her natural life or widowhood," so as to give her a larger interest in a portion at least of the property bequeathed to her.

He manifestly intended that she should hold a portion of the property in specie, namely, the tract of land which he called the "Home Place," and such of the personal property, except his merchandise, as she might wish to keep. The residue of the property, real

and personal, he directs to be sold, and the proceeds of the sales and of the debts owing to him to be invested by his executors, and his wife to receive the interest. If there had been no other direction, it is plain that the estate intended for the wife was, as expressed in the clause of the will already referred to, an estate "during her natural life or widowhood." But just here comes in the provision which, I think, qualifies and enlarges the estate already given, at least to the extent of the fund directed to be invested. After directing the sales to be made, the language is, "I wish the proceeds of the sales of my real and personal estate and the debts due me, after paying my debts to be put at interest by my executors, and my wife to receive the interest; but so long as she remains my widow, she is to be at liberty to receive from my executors or from my estate such part of it as she may choose, and to appropriate it as she believes to be just and rite." The grammatical corrections which I have made in copying do not alter the sense.

Now, here is a right, not only to the interest on this fund, but to the fund itself. It is not a mere naked power to appoint or to dispose of, but a right to "receive" such part of the fund "as she may choose," and further "to appropriate it," when received, "as she believes to be just and right."

The language imports absolute dominion, and absolute dominion is one of the best descriptions of absolute property.

It was with reference to this absolute right of disposal, I think, that the expression "except as hereinafter excepted" was used in the clause of the will first commented upon. The testator meant to declare that, although he had given in general terms to his wife his whole estate during her widowhood, which terms, unqualified, would limit her interest to the use merely of the property, yet as to the fund ordered to be raised by sales to be made soon after his death, she

should not only be entitled to the interest thereon, but also have the right to dispose of the principal subject. I do not think, however, that this right of disposition extends to the "Home Place," which she was to occupy, and which was not to be sold until her widowhood was determined, either by marriage or death. From the connection in which the language giving the right of disposal is used, I think this right was intended to be confined to the fund already mentioned.

I am of opinion, therefore, that Mrs. Calvert is entitled absolutely to all the estate devised and bequeathed, except the plantation called the "Home Place," and perhaps such of the personal property, if any remains, as she kept in specie under the will; for, with these exceptions, all the property was designed and directed to be sold soon after the testator's

death, and the proceeds, together with the debts owing to the testator, constituted the fund on which she was to receive the interest, with the right, also, to receive and appropriate the principal during her widowhood.

The limitation over to the Missionary Society of such part of the fund as she should not appropriate is void as well for uncertainty as on account of its inconsistency with and repugnancy to the estate already given to her. *May v. Joynes & others*, 20 Gratt. 692, and numerous cases there cited in argument.

As to the "Home Place," Mrs. Calvert is entitled to the use of that during her life or widowhood. If she never marries again, it is to be sold at her death, and the proceeds paid over to the Missionary Society of the Methodist Episcopal Church. If she marries, she will be entitled, from the date of her marriage only, to an estate in it equivalent to dower; and subject to this, the place goes to the Missionary Society, or, rather, the proceeds of sale; for it is directed to be sold either after her marriage or death, whichever event first happens. The direction for sale, in either event, is peremptory, and there-

fore the *property is equitably converted into money, which the Missionary Society, although a foreign corporation, is competent to take as legatee.

The judge of the circuit court, in the decree appealed from, does not expressly declare that the "Home Place," or proceeds of the sale of it, must go to the Missionary Society, but he does declare that Mrs. Calvert has an estate in it only for her life or widowhood.

It seems plain to me that there is no partial intestacy in this case, and that the testator intended that whatever of his estate his wife did not get the Missionary Society should have.

Some question is raised by the appellee as to the validity of the bequest to the Missionary Society, on the ground that the bequest is to the society in trust for the "India mission," and that the trust is too indefinite. I do not think this objection well founded. The real legatee is the Missionary Society of the Methodist Episcopal Church incorporated by the legislature of New York. No trust is created by the bequest. Among the various missions to which the funds of the society are applied is the India mission mentioned in the will, and the testator merely indicates a preference for that mission over others in the application of the property bequeathed.

In the case of *Cozart & wife & others v. Manderville's ex'or & others*, lately decided by this court at Wytheville, Judge Anderson delivering the opinion, the bequest of the residuum of the testatrix's estate to the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America," incorporated by the state of New York, "to be equally divided between them," the latter words being taken as directing one-half of the legacy to be applied by the corporation to domestic and the other half to foreign missions, was not regarded as too uncertain, and was sustained.

I am of opinion that the decree of the circuit court *should be modified, so

as to declare more explicitly the right of the Missionary Society to the proceeds of the sale of the "Home Place," subject to the interest of Mrs. Calvert in said property, as hereinbefore indicated, and that the decree thus modified should be affirmed.

The decree was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully argued but not determined at said place of session, this day came again the parties by their counsel, and upon mature consideration of the transcript of the record of the decree aforesaid and the argument of counsel, for reasons stated in a written opinion filed with the record, it is decreed and ordered that the said decree be so far modified, and so far only as to declare that the appellant is entitled in absolute right to the tract of land called the "Home Place" in the will of the testator, Jesse Calvert, deceased, and that said appellant is entitled to the same as personalty, into which it is equitably converted under said will at the termination of the estate of the appellee, Theresa W. Calvert, therein, as indicated in said written opinion; and it is further decreed and ordered that said decree, as so modified as aforesaid, be affirmed, and that the appellees, as the parties substantially prevailing here, recover against the appellant their costs by them expended in the defense of the appeal aforesaid here; which is ordered to be certified to the said circuit court of Frederick county.

Decree modified and affirmed.

367 *Ryan's Adm'r v. McLeod & als.

November Term, 1879, Richmond.

I. **Debts of Decedent—Alienation by Heir to Bona Fide Purchaser—Contribution by Other Heirs.**—Where real estate in the hands of heirs is sought to be subjected to the payment of the decedent ancestor's debts, and that portion of it assigned to one of the heirs before the commencement of the suit has been aliened to a bona fide purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who have not aliened it, is liable, not only for the proportionate share which each heir would at first have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him. See *Lewis v. Overbys*, 31 Gratt. 601.

II. **Interlocutory Decrees.**—In March, 1875,

***Decrees.**—The principal case is cited, and its rule determining whether a decree is final or interlocutory is applied in *Core v. Strikler*, 24 W. Va. 693; *State v. Hays*, 30 W. Va. 120; *Morgan v. Ohio &c. R. Co.*, 39 W. Va. 20; *Rawlings' Ex'or v. Rawlings et al.*, 75 Va. 84; *Wright, etc., v. Strother*, etc. 76 Va. 859; *Wayland et al. v. Crank's Ex'or*, 79 Va. 605; *Barker v. Jenkins*, 84 Va. 899; *Jameson v. Jameson's adm'r et al.* 86 Va. 54; *Noel's adm'r v. Noel's adm'r*, 86 Va. 112; *Sims v. Sims*, 94 Va. 581; *Yates' adm'r et al. v. Wilson*, 86 Va. 627; *Spilman v. Gilpin*, 93 Va. 702. See also 4 Min. Inst. (2nd Ed.) 1390, where the leading case is cited; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Cocke v. Gilpin*, 1 Rob. 20; *Camden v. Haymond*, 9 W. Va. 687.

the circuit court rendered a decree that the heirs of a decedent, who had not aliened the land of their father, were liable only, each for his or her proportion of the decedent's debts; fixed the amount to be paid by each of them, and in default of such payment, directed commissioners named to sell so much of the real estate of each, as was necessary to pay his or her proportion of the debts; the sale to be upon a credit of one, two and three years; the purchase money to be secured by bonds and deed of trust on the land, and the commissioners to report their proceedings to the court at the next term. On a petition filed in March, 1879, by a creditor of the decedent for a rehearing of said decree—**HOLD**: The decree of March, 1875, was not a final but an interlocutory decree, and being erroneous should be reheard and reversed.

III. **Same**.—As to when a decree is final and when interlocutory, see the opinion of *Staples, J.*

IV. **Same**.—A decree cannot be in part final, and in part interlocutory, in the same cause, for and against the same parties who remain in court.

368 *V. **Same**.—Whenever a particular relief is contemplated, if anything remains to be done by the court to make the relief effectual, the decree is interlocutory. When no further action is required the decree is final.

VI. In this case there were four heirs. The land of one of them sold for more than enough to pay his fourth of the ancestor's debts, and under a subsequent decree of March, 1876, he received a part of this surplus, and a part of it was still in court, and he was insolvent: A creditor of his filed his petition in the cause to have this surplus applied to pay his debt—**HOLD**:

1. †**Debts of Decedent—Heirs—Contribution**.—Upon reversing the decree of March, 1875, that this surplus still in the hands of the court, was liable to pay the debts of the decedent, in preference to the debts of the heir.

2. **Same—Same—Same**.—The creditors of the decedent not having objected to the payment of a part of this surplus to the heir at the time the decree was made, and not having filed their petition for a rehearing of the decree of March, 1875, and March, 1876, until March, 1879, when the heir was insolvent, the other heirs who are able to pay, will be allowed a credit for the amount of the said surplus received by him, upon the deficiency of the other insolvent heirs' payments of their proportion of the debts.

This case was heard in Staunton and decided in Richmond. It was a creditor's bill commenced in the county court of Frederick and afterwards transferred to the circuit court, brought in February, 1873, by Thomas M. Miller, for himself and the other creditors of Joseph Long, deceased, to subject the real estate of which said Long died possessed to the payment of his debts.

Joseph Long died in 1864 intestate, leav-

†**Heirs—Debts of Decedent**.—The principal case is cited, and the principle involved in the holding that the surplus in the hands of the court should be applied to the payment of the debts of decedent, in preference to the debts of the heir is sustained in *Leake's Ex'r et al. v. Leake et al.*, 7 Va. 310; *Hoge et al. v. Junkin, etc.*, et al., 79 Va. 232; *Watts et al. v. Taylor's adm'r et al.*, 80 Va. 635; *Alexander v. Byrd et al.*, 85 Va. 701; *Scott's ex'x v. Ashlin et al.*, 86 Va. 587. See also 2 Min. Inst. (4th Ed.) 523.

ing four children, viz: Jane A. McLeod, Mary E. Rust, Robert H. Long and George A. Long; who divided the real estate among them. His personal estate had been carried off or destroyed during the war, except a small amount, which was also divided among these parties.

369 *Before this suit was instituted Robert H. Long had sold a part of the real estate he had received on the division, and had conveyed the remainder in trust for the payment of his debts, for a greater amount than its value; and he was insolvent. Mrs. McLeod had also conveyed a part of the real estate, in like manner, for more than it sold for under the decree of the court.

In May, 1873, a commissioner was directed to take an account of the debts of Joseph Long and their priorities, and also of the real estate of which he died seized, and in whose possession it was at the time of the decree, and by whom and to whom the said real estate, or any part of it, had been aliened on encumbered since the death of Joseph Long. And by a subsequent decree in May, 1874, the commissioner was directed to report how much of the indebtedness of Joseph Long, deceased, would fall on each of his heirs.

Under the first decree the commissioner reported the debts of Joseph Long with interest to the 1st of July, 1874, at \$6,706.59; and of which there was due to Joseph Ryan's estate \$2,368.12; and the value of the real estate received by his four children at \$40,484.98. And he reported the conveyances by Robert H. Long and Jane A. McLeod as hereinbefore stated. Under the second decree he reported, that the residue of the debts, after crediting the amount which might remain after the payment of the debts secured by the deed of Robert H. Long, would fall on the other heirs. To this last report Mrs. Rust excepted, on the ground that it undertakes to settle the principle that the other heirs of Joseph Long, deceased, on account of the lands descending to them, are bound to his creditors for any part of Robert H. Long's just proportion of said Joseph Long's debt; and she claimed that the portion of said lands received in the partition would only be subjected by said creditors to the payment of one-fourth of their debts.

370 *The cause came on to be heard at the March term, 1875, when the court, "being of opinion that where a decedent's estate descends to his heirs, the said heirs are only bound on account of such realty for their proportion of the decedent's debts, and that the lands of the ancestor in the hands of some of the heirs cannot be subjected to the payment of such portion of said debts as should have fallen upon a co-heir who has aliened his share of said land," decreed that the said exception to the report should be sustained; and with this exception, that the report be confirmed; and that the creditors of Joseph Long, with one exception named, should recover one-fourth of the amount respectively due to them from each of the four heirs of Joseph Long, deceased, among whom partition of his lands were made, viz:

that they do recover of Mrs. Mary E. Rust, Mrs. James E. McLeod, George A. Long and Robert H. Long, each the sum of \$1,630.26, with interest on \$910, the principal thereof, from the 1st of July, 1874; and each of the said parties should pay one-fourth of the costs of this suit. And it was further decreed, that in default of payment of the aforesaid sums of money, to commissioners named, within thirty days after the rising of the court, the said commissioners should proceed to sell so much or the whole of the real estate of Joseph Long, deceased, in the possession of the aforesaid parties, as they should deem requisite and proper to pay the said amounts due by them respectively as aforesaid, upon the terms, for cash enough to pay the costs of suit and sale and commissions, and for the residue on a credit of one, two and three years from the day of sale, with interest on the deferred payments, to be secured by the bonds of the purchaser, and deed of trust on the property; and make report to the court at its next term.

There were decrees in June and November, 1875, confirming reports of sales by the commissioners, and directing the disposition of the moneys received. And at 371 the March *term, 1876, there was another decree which confirmed the report of another sale. And it appearing to the court that the proceeds of the sale of the land, which had been assigned to George A. Long in the partition of Joseph Long's estate, was more than sufficient to pay said George A. Long's proportion of the debts as fixed by a former decree in the cause, said George A. Long consenting to a confirmation of the sale, provided he receives his proportion of said sale as the payments fall due, and the purchaser agreeing to pay one-third of the purchase money in cash, the commissioner is directed to receive the deferred payments at or before maturity, as well as the cash payment, and after applying the proportion of each to the payments of the debts of Joseph Long, deceased, as fixed by the decree of March term, 1875, to pay over the residue to the said George A. Long.

It appears that the land of George A. Long sold for \$3,733.81, and that the proportion of the debts of Joseph Long which he was held to pay amounted in 1878 to \$1,721.26; and he had received his proportion of the moneys received by the commissioner up to that time.

In March, 1878, Adam Dean filed his petition in the cause, setting out that he was a judgment and execution creditor of George A. Long, to the amount of \$700, with interest, and praying that the fund coming to said Long in the cause might be applied to the satisfaction of his judgment. And by a decree of November term, 1878, the commissioner was directed to collect in all the funds that were then due, and all that was to become due in the cause, and out of these funds to pay any debts that may be ascertained to be due by the estate of Joseph Long, deceased, and out of so much of the residue of such funds as may be the share of George A. Long, the commissioner should

pay to Adam Dean, or his attorney, the amount of the judgment and interest referred to in his petition.

In March, 1879, Charles B. Han- 372 cock, Sheriff of Frederick *county and as such administrator with the will annexed of Joseph Ryan, deceased, filed his petition in the cause for a rehearing of the decrees of the March term, 1875, of the March term, 1876, and of the November term, 1878, on the grounds that the court erred in holding that the lands in the hands of each of the heirs of Joseph Long, deceased, was only liable for the one-fourth of the debts; and that by the decree of the November term, 1878, a portion of the proceeds of the land received by George A. Long was directed to be paid to Adam Dean, upon a debt due to him by George A. Long. And he asks that the debt due to his testator's estate may be paid out of the funds under the control of the court, &c. And to account for the delay which had occurred in asking for a rehearing of the decree of the March term, 1875, and 1876, he states that George A. Long had been the executor of Ryan's estate, and his powers as such had only been revoked on the 3d of March, 1879, when the estate was committed to the petitioner. Mrs. Rust and others demurred to this petition.

By a report by a commissioner it appeared that Mrs. Rust had property yet unsold considerably more than sufficient to pay the balance of her one-fourth of the debts of Joseph Long, deceased; that all Mrs. McLeod's land had been sold, and she still was indebted on her one-fourth of said debts in the sum of \$293.41; that the land of George A. Long had been sold for \$3,733.31, out of which his one-fourth of said debts had been paid, and all the residue had been paid to him except a balance of the last payment in the hands of the court; and that nothing had been paid out of the lands received by Robert H. Long. The balance due Ryan's estate was \$1,452.45, with interest from the 15th of December, 1878, on \$1,441.95. And it appears that George A. Long, as well as Robert H. Long, was insolvent.

The cause came on to be heard on 373 the 24th of March, *1879, when the court made a decree, which, ascertaining that there was under the control of the court the sum of \$649.86 of the proceeds of the sale of the land of George A. Long, directed the commissioner to pay to Adam Dean the balance due on his debt; and the balance, if any, of the said \$649.86 should be paid to George A. Long. And the petitioner of Ryan's administrator for a rehearing of the decrees of March term, 1875, &c., was dismissed; the court being of opinion that the said decree of March term, 1875, was a final decree. And thereupon Ryan's administrator applied to a judge of this court for an appeal; which was awarded.

Wm. L. Clark, for the appellant.
Dandridge & Pendleton and Holmes Conrad, for the appellees.

STAPLES, J., delivered the opinion of the court.

The creditors of Joseph Long, deceased, brought their suit in equity for the purpose of obtaining satisfaction of the debts due them out of the real estate in the possession of his heirs. It appeared in the progress of the cause that one of his heirs, Robert H. Long, had aliened his share of the realty to a bona fide purchaser before the institution of the suit, and was utterly insolvent.

The circuit court, by its decree entered at the March term, 1875, held that the other heirs were responsible each for his portion of the decedent's debts, according to the value of the lands descended, but could not be held liable for the portion properly chargeable upon Robert H. Long. In conformity with this view, the court rendered a personal decree against each of the four heirs for the amount with which each was chargeable; and in default of payment, it directed a sale of the lands in their possession.

374 *As this decree proved wholly unavailing with respect to Robert H. Long, the result was that the creditors received only three-fourths of the debts due them.

In March, 1879, the administrator of Joseph Ryan, deceased, filed a petition for a rehearing of the decree of March, 1875. Upon a demurrer to the petition, the circuit court was of opinion that decree was final, and for this and other reasons, deemed by the court sufficient in law, it dismissed the petition at the cost of the petitioner. From that decree an appeal was taken to this court.

The question first to be determined is whether there is error in the decree of the March term, 1875. Upon this point the decision of this court in *Lewis et als. v. Overby's adm'r*, 31 Gratt. 601, would seem to be conclusive. In that case it was unanimously held (the president delivering the opinion) that the whole of the real estate of which the decedent died possessed is liable for his debts; and if one of the heirs or devisees has aliened or wasted his part of the estate, and is insolvent, the others must contribute ratably to make up the deficiency, according to the value of the lands descended. No reasons are given in the opinion of the president, because the point seems to have been conceded by the counsel representing the devisees. Our attention has been called, however, to an opinion of Judge Tucker, found on page 113, 2d volume, of his commentaries, in which he states "there is much reason and some authority for the doctrine that each heir should be held responsible only for his portion of the debts." And he cites as authority the cases of *Mason's devisees v. Peter's adm'rs*, 1 Munf. 347; *Foster & Wife et als. v. Crenshaw's ex'ors*, 3 Munf. 514; *Hopkirk v. Dennis & als.*, 2 Munf. 326. It will be found, upon examination, the first two cases only decide that the lands of all the devisees should bear their ratable proportion of the debts, in the first instance, instead of decreeing against one, and turning him around upon the other for contribution—a principle universally conceded and repeatedly acted upon by this court.

375 *The last case—that of *Hopkirk v.*

Dennis—holds the very reverse of what Judge Tucker supposes. There it was conceded that one of the devisees had wasted his portion of the estate, and was insolvent. This court held that the chancery court erred in not decreeing that the other devisees should pay the insolvent devisee's portion, in due and ratable proportions, to the extent of the lands devised. That case is therefore direct authority for *Lewis et als. v. Overby's adm'r*.

The statute makes all the real estate of the decedent in the hands of his heirs assets for the payment of debts, to be applied in the order in which the personal estate is applied. As long as any part of it so remains, it is difficult to see how the claim of the creditor can be resisted, unless he has in some way forfeited his right by laches or other causes. There is no injustice in this. The creditor knows that the personal estate is the primary fund for the payment of debts, and that he has no right to resort to the realty except in case of a deficiency. He is not acquainted with the condition of the estate; he knows nothing of its assets or its liabilities. In many cases the necessity of resorting to the realty is not ascertained until years after the death of the decedent.

To impose upon the creditor the burden of prosecuting inquiries upon this point, at the peril of losing his recourse against the solvent heirs, is to require of him duties which the statute certainly does not demand. On the other hand, if any of the heirs apprehends loss by reason of the alienation or insolvency of a co-heir, he can easily take the necessary steps to protect his interests. He can bring a suit to have the estate administered under the supervision of a court of equity, or he may require a proper report of the debts and liabilities to be filed by the personal representative in the proper court, as is required by the statute. See Code 1873, chap. 127, §§ 3, 4, 5.

The main question in the case is **376** whether the decree of *March, 1875, is final or interlocutory. That decree, after deciding that the heirs of Joseph Long, who had not aliened the lands acquired from their father, were liable only for three-fourths of his debts, proceeds to fix the amount to be paid by them respectively, and in default of such payment it directs the commissioners named to sell so much of the real estate of each, as was necessary to satisfy his proportion of the debts; the sale to be upon a credit of one, two and three years; the purchase money to be secured by bonds and deeds of trust; and the commissioners were directed to report their proceedings to the court at its next term.

From this statement it will be seen, the court reserved complete power over the sale, to confirm it or set it aside, as the interests of the parties might require. No title could be made to the purchaser, without further action of the court; and what is most material to notice, no disposition is made of the purchase money; no direction given to the commissioners on the subject; so that the creditors could not receive a dollar of the

proceeds, nor the heirs the surplus, without a further decree. If this be a final decree, the court has deprived itself of all control over the subject matter of controversy, and ended the cause, without giving the parties the slightest relief.

The very fact, that no direction is given as to the proceeds of sale, and that the commissioners are required to report their proceedings to court, is conclusive that further action of the court was not only contemplated, but actually necessary.

According to the uniform decisions of this court, a decree which disposes of the whole subject gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final. *Vanmeter's ex'ors v. Vanmeter*, 3 Gratt. 142; *Harvey and wife v. Branson*, 1 Leigh, 108. On the other hand, every decree which leaves anything in the cause to be done by the

377 *court, is interlocutory as between the parties remaining in the court.

In the language of Judge Baldwin, in *Cocke's adm'r v. Gilpin*, 1 Rob. R. 20, 27-8, when the further action of the court in the cause is necessary to give completely the relief contemplated, there the decree upon which the question arises is to be regarded not as final, but interlocutory. In that case, there was a decree for the payment of money, and in default of such payment for the sale of land, and for the application of the proceeds to the payment of the debt. Judge Cabell said, "such a decree is such as is usually entered in a suit to foreclose a mortgage; and he thought he might affirm without the hazard of contradiction, that there is not a single case, within the last forty years, in which such a decree has been held to be other than interlocutory."

The rule laid in *Cocke and Gilpin* has been repeatedly recognized by this court, and is now the established doctrine. *Fleming et als. v. Bolling & als.*, 8 Gratt. 292; *Ambrouse's heirs v. Keller*, 22 Gratt. 769, 774.

It is very probable that the decision of the learned judge of the circuit court was based upon the idea that whilst the decree of March, 1875, may have been interlocutory, as respects the sale of the land therein directed to be sold, it was nevertheless final so far as it adjudicated the liability of the three heirs for the debts of the decedent. This presents a question a good deal discussed in some of the earlier decisions of this court, that is, whether a decree may be final in some of its provisions, and interlocutory in others.

One of the earliest cases on this subject is that of *Templeman v. Steptoe*, 1 Munf., 339. It was there held that a decree dismissing the bill as to the personal estate, and as to the real estate determining the rights of the parties, but directing an account to be taken, is not final in any respect between the parties retained in court; but is subject to revision in every part at any time before

378 a final decree. The *cases of *Young v. Skipwith*, 2 Wash. 300; *Grymes v. Pendleton and McCall v. Peachy*, 1 Call. 54, 55, were cited by the judges as sustaining this view. A question somewhat similar in its char-

acter arose in *Alexander's heirs v. Coleman and wife*, 6 Munf., 328. That was a bill for partition by the devisees of James Cleveland, deceased, against other devisees of the same person, and also against John Alexander, claiming part of the land by adverse title. The bill asked for a surrender of the title deeds in Alexander's possession, and that he might be decreed to convey to the plaintiffs.

The court entered a decree vacating the deeds under which Alexander claimed, and further decreed that the title of the complainants to the lands in the bill mentioned be quieted; and, by consent of parties, it was ordered that the cause be continued as to the other defendants. Chancellor Taylor held that this decree was interlocutory as to Alexander. Upon an appeal to this court by him, the four judges then sitting were equally divided upon the question. Judges Brooke and Roane concurred with Chancellor Taylor in holding the decree to be merely interlocutory. Judges Coalter and Cabell were of opinion that it was final. Both of these judges were careful to place their decisions upon the ground that the effect of the decree was practically to dismiss Alexander from the court and put an end to the cause so far as he was concerned. Judge Coalter said that the cases theretofore decided to be interlocutory were cases in which all the parties remained in court, and in which it was competent for them, by motion, to have a rehearing and a reversal of the decree; and this competency to move for a rehearing seemed to result from the consideration that the parties remained in court.

It is very clear, had Judges Coalter and Cabell been of opinion that Alexander was still before the court, they would also have held the decree to be interlocutory as to him, notwithstanding it was ostensibly a final adjudication of his rights.

379 *The case of *Royall's adm'r v. Johnson*, 1 Rand. 421, is not at all in conflict with the foregoing decision. That case decided that when a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such a decree is final as to him, although the case may be still pending in court as to the rest. The effect of the decree was to make a final disposition of the cause as to one of the defendants, who remained no longer in court, and whose rights and liabilities were perfectly distinct from those of the other defendants.

The case of *Hill's ex'ors v. Fox's adm'r*, 10 Leigh, 587, was decided by a full court, and has been generally recognized as authority. Judge Tucker, speaking for the whole court, said: "It is a decree, indeed, against Nathaniel Fox for a sum of money; but it further provides that if no property can be found, he shall deliver up certain trust and mortgage property to the marshal to be sold to satisfy the plaintiff's demand. Had the creditors found it necessary to proceed to enforce this provision of the decree, it would only be done by attachment against Fox in his lifetime, or

by bill, demanding from his representatives or others in possession of his property a compliance with the decree, and enforcing it against them by attachment."

It is true this course has not been taken, the creditors still insisting that there are assets. But the provision itself gives the character to the decree, for the cause never would be out of the possession of the court so long as its direct action might be called for to compel the delivery of the property. Here, then, we have a case in which there was an absolute decree for the payment of money enforceable by execution, and this decree is considered merely interlocutory, because coupled with it is a provision for the sale of land in default of payment, under the superintendence of the court and which required its further action. And the latter provision, it was held, gave character to the whole decree.

380 *The foregoing decisions were nearly all made under statutes which allowed a right of appeal only from final decrees. The theory of these statutes was, that the court might, upon more mature reflection, correct any errors into which it had fallen in the progress of the cause, and it was better to afford it an opportunity of doing this than to subject the parties to the expense and delay of numerous appeals. Experience demonstrates, however, that in many instances unnecessary expenses and litigation would be avoided by permitting appeals from interlocutory decrees in certain classes of cases, and therefore it was, the statute allowing such appeals was passed. But that statute did not affect the well established distinction between interlocutory and final decrees. These distinctions still remain. There is no intermediate class between final and interlocutory decrees. A final decree presupposes the termination of the cause in the lower court, before that of the appellate court commences. Whatever may be the rule where there are several parties having distinct interests, it may be safely assumed that a decree cannot be in part final and in part interlocutory in the same cause, for or against the same parties who remain in court. Whenever a particular relief is contemplated, if something remains to be done by the court to make the relief effectual, that is an interlocutory decree. When no further action of the court is required, the decree is final. See *Bowyer v. Lewis*, 1 Hen. & Mun. 557. Whatever may be the rule and action elsewhere, this is the doctrine of the Virginia courts.

The learned counsel for the appellee occupied much of his time in an effort to show that a decree might be considered interlocutory upon the question of the right of appeal, and yet be considered final upon the motion or application to rehear. The rule would seem to be directly diverse. In those states where appeals lie only from final decrees, a decree is sometimes held to

381 be final for the purposes *of appeal, and not for any other purpose. See *Forgay v. Conrad*, 6 How. U. S. R. 201; *Whiting v. Bank United States*, 13 Peters R. 15; 4 How. U. S. R. 503. However this may

be, it is well settled that the character of the decree must be determined by its provisions and not by any matter extrinsic or subsequent, whether the application be for a rehearing or for a bill of review, or for an appeal. *Bolling v. Fleming*, 8 Gratt. 292. In conformity with these views, the decree of March, 1875, must be held to be interlocutory, and therefore not effected by the limitations applicable to final decrees.

That decree settled the principles of the cause, but, as has been seen, it did not give the complainants any relief; certainly not the relief to which they were entitled. It is true that there is a provision in the decree for the payments of costs by each of the heirs; but this was intended simply for the guide of the commissioner in making the sale, in the event of a default in paying the amount of the recovery fixed by the decree. Besides, according to the cases already cited, a provision for the payment of costs is equivocal in its character, and not conclusive of the character of the decree.

The decree of March, 1875, being interlocutory, and being erroneous, its reversal would seem to follow, as a necessary consequence.

Perhaps the more correct course for this court to pursue would be to remand the cause to the circuit court, with leave to the appellant to file his petition for a rehearing, and the case to be thereafter regularly proceeded with, in conformity with this opinion. It seems, however, that the whole case is before us in all its aspects; and so the counsel on both sides have understood and argued it.

It is now insisted that the great laches of the appellant precludes him from all right to a rehearing; that since the decree of March, 1875, all the heirs except Mrs. Rust have become insolvent, and the entire burden

382 of discharging *the debts will be thrown upon her portion of the realty if that decree be reversed. It appears that the sum decreed against each of the heirs was about \$1,800, principal and interest. Upon the sale of Mrs. McLeod's interest, there was a deficiency of about \$300; she having aliened a portion of the realty allotted to her before suit was brought. That deficiency has not been met by her. The interest of George A. Long was also sold for a sum largely in excess of the amount for which he was liable, and the proceeds applied, as far as was necessary, in discharge of his indebtedness. The surplus remaining was, under the decree of March, 1876, paid over to him without objection, except the sum of \$649.86, which is still under the control of the court; but which, by the decree of March, 1879, was directed to be paid to Adam Dean, an individual creditor of George A. Long, and a party to this suit. One of the questions arising here is whether this fund shall be paid to Dean or to the appellant and the other creditors of the decedent, Joseph Long. Under the statute, a bona fide purchaser from the heir is protected; but no such preference is accorded to an individual creditor of the heir.

Upon familiar principles, the creditor takes the land or its proceeds as the heir himself takes it, subject to the claims of the ancestor's creditors. The individual creditor has no claim to anything but the surplus remaining after the other creditors are satisfied. The preferable right of the latter must be recognized so long certainly as the fund remains under the control of the court. It is, therefore, clear this sum of \$649 with its interest must be applied to the debts due the appellant and the other creditors of the decedent, in discharge of Robert H. Long's indebtedness. So applying it, there will be left a very small sum, for which George A. Long is liable by reason of the insolvency of Robert H. Long. George A. Long being

383 now also insolvent, the question is presented whether Mrs. Rust, *the only solvent heir before the court, shall be required to make up the deficiency from her portion of the realty. As already stated, after the decree of March term, 1875, a considerable sum, the proceeds of the sales of his land, was paid over to George A. Long. None of the creditors objected; they neither appealed from that decree, nor did they petition for a rehearing until March, 1879—four years later. Had they done either with reasonable diligence, the money would have been withheld until a proper adjudication of the question.

In the meantime George A. Long has become utterly insolvent, and there is no prospect of realizing anything from him. As was said by the learned counsel for the appellees, a rehearing is not, as a general rule, a matter of strict legal right, but of sound discretion with the court, depending upon the particular circumstances of the case. *Kendrick v. Whiting*, 28 Gratt., 651; *Adams' Equity*, 379. It will not be granted where the party applying has been guilty of gross laches in asserting his claim, and the adverse party will be subjected to inconvenience and loss, which might have been avoided had reasonable diligence been exercised. We are therefore of opinion, that the rehearing in this case should be confined to a reconsideration of the points hereinbefore indicated. The result will be, that in the event of the continued insolvency of Mrs. McLeod, Mrs. Rust's liability to the creditors of Joseph Long will be the same, and no more, as it would be if George A. Long were now solvent, and able to pay his just share or proportion of the decedent's debts.

The decree of the circuit court must therefore be reversed, the cause remanded to the circuit court, to be there proceeded with in conformity with the views herein expressed.

384 *The decree was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session: This day came here the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid, is of opinion, for reasons stated in writing and filed with the record, that the decree of March,

1875, is interlocutory, and not final, and that said decree is erroneous in holding that the heirs of Joseph Long, deceased, are liable only each for his proportion of the debts of the said Joseph Long, notwithstanding the insolvency of one of said heirs. The circuit court therefore erred by its decree of March, 1879, in refusing the appellant leave to file his petition for a rehearing, and in refusing to set aside the said decree in the particular herein mentioned.

It is therefore ordered and decreed, that the said decree of March term, 1879, be reversed and annulled, so far as it conflicts with this decree, and that the appellees, the heirs of the said Joseph Long, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. The court is further of opinion, and it is so ordered and decreed, that in the event of the continued insolvency of Robert H. Long, the other heirs are liable for his proportion of the debts of Joseph Long, deceased, to the extent of real assets descended; that is to say, Mrs. Mary E. Rust is liable for one-third of said Robert H. Long's proportion as aforesaid, and in the event of the continued insolvency of Mrs. Jane McLeod, the said Mary E. Rust is liable for one-half of the amount with which the said Jane McLeod is chargeable by reason of the insolvency of the said Robert H. Long; and the said Mary E. Rust is further liable for one-half the amount

385 of \$360.20, *or whatever balance it may be with which the said Jane McLeod is chargeable as her proportion of the said Joseph Long's debts.

The court is further of opinion, that George A. Long, being now insolvent, and a large portion of the proceeds of his real estate having been paid over to him under decrees of the circuit court, and the said creditors having failed to appeal from said decrees or to apply for a rehearing within a reasonable time, they are now precluded from asserting any claim against Mrs. Jane McLeod and Mrs. Mary E. Rust, or either of them, growing out of the failure of the said George A. Long properly to meet his proportion or share of Robert H. Long's indebtedness; the true intent and meaning of this decree being to charge the said Jane McLeod and the said Mary E. Rust, or either of them, with such sums or amount as they and each of them would be liable for, if the said George A. Long was now solvent and able to pay.

The court is further of opinion, and it is so decreed and ordered, that the sum of six hundred and forty-nine dollars, or whatever the amount may be under the control of the court, proceeds of the sale of George A. Long's real estate, is properly applicable to the debts of Joseph Long, deceased, in discharge of Robert H. Long's share or proportion of said debts; and the individual creditors of the said George A. Long can only claim any surplus remaining after the creditors of the said Joseph Long are satisfied.

The court is further of opinion, that if either of said heirs shall be required to pay more than his or her just proportion of the debts of Joseph Long, deceased, in conform-

ity with the principles of this decree, it will be proper for the circuit court to render a decree for contribution against the heir primarily liable in favor of the heir so paying.

386 *It is further ordered and decreed, that this cause be remanded to the circuit court, to be there proceeded with in accordance with the views herein expressed. Decree reversed.

387 *Harrison's Ex'ors & als. v. Payne & als.

November Term, 1879, Richmond.

Assignment of Dower from Proceeds of Sale—Creditors—Consent of Parties.*—

Where, in a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien debts, and an assignment of dower to his widow, the dower cannot be assigned in kind, and it is necessary to sell the whole real estate, and to satisfy the claim of dower out of the proceeds, the court cannot, without the consent of all the parties, satisfy said claim by the payment of a gross sum out of the said proceeds, but must securely invest one-third of said proceeds and direct the interest on such investment to be paid to the widow during her life, in satisfaction of her claim of dower.

This was an appeal from a decree of the circuit court of Madison county, made on the 3d of April, 1874, in two causes pending in said court, brought by John Harrison's executors and other lien creditors of Jackson & Crisler, and Jackson, Crisler & Co., to subject the property of the partners to the payment of their debts. The only question in this court referred to the dower interest of Mrs. Cordelia Jackson, the widow of Thomas R. Jackson, deceased. The commissioners reported that the dower of the widow could not be laid off in kind, and Commissioner Humphreys reported that the value of the land was \$5,000—one-third of which was \$1,500—and he estimated the widow's fee simple value of her dower at \$1,206. The plaintiffs excepted to the report for allowing the widow the fee simple value of her dower estate, and insisted that the dower money should be invested under an order of the court, and the interest thereon paid to her annually.

388 *When the cause came on to be heard, the court overruled the exception to the report, and made a decree in favor of Mrs. Jackson for the said sum of \$1,206, to be paid out of the proceeds of the sale of the land. And the plaintiffs thereupon obtained an appeal to this court.

A. R. Blakey, for the appellants.

The Attorney-General and Gray, for the appellees.

MONCURE, P., delivered the opinion of the court.

The question presented for the decision of the court in this case is, whether, where, in a suit in equity for an assignment of dower,

*Assignment of Dower.—See also White v. White et al., 16 Gratt. 264; Wilson v. Branch, 77 Va. 65.

it cannot be assigned in kind, and a sale of the subject in which the claim to dower exists is necessary in order to satisfy the claim out of the proceeds of the sale, such claim is to be satisfied by the payment of a gross sum, ascertained to be the value of said claim, or, by securely investing in a loan, at legal interest, one-third of the amount of the proceeds of sale of the said subject, and by paying to the claimant the interest which may accrue on the said investment during her life, the creditors of the husband, having liens on his real estate subject to the said claim to dower therein, not having consented that it should be compensated by the payment of a sum of money in gross out of the proceeds of sale of the said estate, but, on the contrary, insisting that it should be satisfied by securely investing in a loan, at legal interest, one-third of the amount of the proceeds of sale of the said estate, and by paying to the claimant the interest which may accrue on the said investment during her life, as aforesaid.

The circuit court, in the decree appealed from, held that such a claim should be compensated by the payment of a sum of money in gross, and decreed accordingly. The

389 appellants, *on the contrary, insist that the said decree is erroneous, and that instead thereof the circuit court ought to have decreed satisfaction of the said claim by investing in a loan, at legal interest, one-third of the amount of the proceeds of sale of the said estate, and by paying to the claimant the interest which may accrue on the said investment during her life, as aforesaid.

This court is of opinion that the circuit court did so err in so decreeing, and that, instead of so decreeing, it ought to have decreed a satisfaction of the said claim in the manner and by the means insisted on by the appellants, as aforesaid.

The three cases cited and relied on by the counsel for the appellants in support of their view, in the petition for the appeal in this case, seem to be conclusive in their favor. They are Herbert & others v. Wren & others, 7 Cranch. 370; Wilson & others v. Davisson, 2 Rob. Va. R. 384, and Blair v. Thompson & others, 11 Gratt. 441.

In Herbert & others v. Wren & others, the opinion of the supreme court of the United States was delivered by Marshall, Ch. J. One of the marginal notes of the decision is that "a court of chancery cannot allow a part of the purchase money in lieu of dower where the estate is sold, unless by consent of all parties interested." In that case, Joseph Deane became a purchaser of the land which was subject to a claim for dower. In the suit in equity brought against him and other defendants by the claimant, she said in her bill that the defendant Deane had not paid the purchase money of the said land, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof. The bill as to him was taken for confessed. The circuit court decreed in favor of her claim to dower, and decreed her a sum in gross as equivalent thereof. The other defendants,

the trustees of P. R. Fendall, appealed from the decree. In the course of the opinion, the

Chief Justice said: "It remains to enquire, *whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase money, might legally be made. This must be considered as a compromise between the plaintiffs and the defendant Deane. His assent being averred in the bill, and the bill being taken pro confesso as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that instead of a sum in gross, one-third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life." And in the decree which he prepared to be entered in the case, there is the following clause: "The court is further of opinion that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one-third part of the purchase money given by the said Joseph Deane for the lands in which the plaintiff Susanna claims dower, set apart and secured to her for her life, so that she may receive, during her life the interest accruing thereon, and shall apply to the circuit court to reform its decree in this respect, the same ought to be done," &c.

In *Wilson & others v. Davisson*, 2 Rob. Va. R. 384, the principle laid down in *Herbert & others v. Wren & others*, 7 Cranch, 380, that where land in which there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested "have a right to insist that instead of a sum in gross, one-third of the purchase money shall be set apart, and the interest thereon paid annually to the tenant in dower during her life," was approved.

In *M. Blair v. Thompson & others*, 11 Gratt. 441, it was held by the whole court—Allen, P., delivering an opinion in which, on that branch of the subject, the other four judges concurred—that there cannot be a decree for a specific sum in lieu of dower without the assent of all the *parties interested. As authority for that position the cases of *Herbert v. Wren* and *Wilson v. Davisson*, before referred to, were cited in the opinion of Judge Allen.

The same doctrine is laid down in the following cases, viz: *Beavers v. Smith*, 11 Alab. 20; *Johnson v. Elliott*, 12 Id. 112; and *Fry v. Merchants Ins. Co.*, 15 Id. 810. In all these cases the court was unanimous, and in none of them did any judge express any doubt on the subject. In *Johnson v. Elliott*, Goldthwaite, J., in delivering the opinion of the court, thus declares: "It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest." See also *Francis & al. v. Goddard*, 18 Alab. 794, new series.

Of course the consent of all persons concerned, supposing all of them to be compe-

tent to give such consent, will authorize the compensation of such dower claim by the payment of a gross sum. But without such consent it can only be compensated by setting apart one-third of the value or proceeds of sale of the land subject to such claim, and giving to the claimant the interest which may accrue on such third during her life. Being entitled to the use during her life of one-third of the subject in which she has a dower interest, and that subject being incapable of division and therefore sold, the proceeds of sale stand in place of the land, and she is entitled to the benefit of one-third of such proceeds during her life, and not to a gross sum out of such proceeds, at least unless the other parties interested therein consent thereto. To allow her such gross sum without such consent, might be to take away from the said parties a substantial part of their inheritance in the event of her early death after receiving such compensation.

The Attorney-General, in his argument of this case, cites *in support of a different view, for which he contends, the cases of *White v. White, &c.*, 16 Gratt. 264; *Jaeger, &c. v. Bossieux*, 15 Id. 83; *Simmons v. Lyles, &c.*, 27 Id. 922. We do not think there is anything in either of those cases in conflict with the doctrine hereinbefore laid down or the cases hereinbefore cited in support of it. But we do not deem it necessary to review in detail the cases cited by the Attorney-General.

Upon the whole, we are of opinion, that the decree appealed from is erroneous and ought to be reversed and annulled, and the cause remanded to the said circuit court for further proceedings to be had therein in conformity with the foregoing opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in overruling the exception taken by the plaintiffs, the creditors in the said suits, to the report of Commissioner Humphreys, of the 19th day of September, 1873, and confirming said report as to the matter of the said exception, and decreeing that James L. Kemper and W. O. Fry, commissioners, out of any money then in their hands or thereafter to come to their hands, arising from the proceeds of the sale of the real estate of Thomas B. Jackson, deceased, do pay to Isaac N. Lindsey, in right of his wife Cordelia E. Lindsey, the sum of \$1,206, with interest thereon from the 6th of August, 1871, in full of the fee simple value of her dower in the real estate of her deceased husband; and that instead of doing so, the said circuit court ought to have sustained the said exception, and decreed to her, in compensation and satisfaction of her said dower, the use for her life of one-third of the proceeds of the sale of the said real estate, which third amounts to the sum of fifteen hundred dollars; to be loaned out on

good security during *her life, and the interest thereon accruing during that period paid to her annually under the order of the said circuit court. And ought also to have decreed payment to her of interest on

the said sum of fifteen hundred dollars from the 6th day of August, 1871, the date of the sale of the said real estate, until the said sum shall be loaned out as aforesaid.

Therefore it is decreed and ordered that so much of the decree appealed from as is above declared to be erroneous be reversed and annulled and the residue thereof affirmed; and that the appellees, Isaac N. Lindsey and Cordelia E. Lindsey, his wife, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

And it is ordered that this cause be remanded to the said circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree.

Which is ordered to be certified to the said circuit court of Madison county.

Decree reversed.

394 *Balt. & Ohio R. R. Co. v. Noell's Adm'r.

November Term, 1879, Richmond.

I. Railroads—Action for Personal Injuries—Foreign Corporations—Removal to Federal Court.—A railroad company, incorporated in another state, which leases a road lying in this state, and operates it as the owner of the same, is liable to be sued in the courts of Virginia for an injury which occurred on said road operated in this state; and said foreign company has no right to remove the suit to the United States court.

II. Same—Same—Same—Same.—Whilst the Baltimore & Ohio R. R. Co., as a corporation of the state of Maryland, can have no legal existence outside of that state, yet, as the lessee of a Va. railroad company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Va. corporation *quoad* the line of railroad under its control in Va., so far, at least, as its liability to the citizens of Va. is concerned.

III. Same—Injury to Passenger—Presumption of Negligence.—When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, wheel or axle, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence

***Removal of Causes—Corporations.**—“If it is liable to suit in the State, it is because it is an inhabitant of the State, as decided by *Railroad Co. v. Harris*, 12 Wall. 65, and if it is an inhabitant of the State, when it is sued by a citizen of the same State, the case cannot be removed into the Federal Court. This has been expressly held in *B. & O. R. R. Co. v. Wightman's adm'r*, 29 Gratt. 431, and *B. & O. R. Co. v. Noell's adm'r*, 32 Gratt. 394. These cases are the necessary result, of the cases of *Gallaher's adm'r v. B. & O. R. Co.*, 12 Gratt., and *Railroad Co. v. Harris*, 12 Wall. If these cases were directly decided, then the late Virginia cases are necessarily correct.” *B. & O. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 876.

†Injury to Passenger—Presumption of Negligence.—See also 14 Am. & Eng. R. Cas., N. S., note, 289, *et seq.* *Carrico v. West Virginia*, etc., R. Co., 39 W. Va. 104.

of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

IV. Same—Carriage of Passengers—Degree of Care.—The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proof, every imputation of such negligence; and therefore, where the death of a passenger on said railroad is caused by the slightest neglect, against which human prudence and foresight could have guarded, the company is liable in damages for such death.

395 *V. Same—Same—Same.—Railroad companies are held by law to the utmost care, not only in the management of their trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Charles L. Noell's adm'r brought suit against the Baltimore & Ohio Railroad Company, lessees of the Washington City, Virginia Midland and Great Southern railroad, running from the town of Strasburg, in Shenandoah county, to the town of Harrisburg, in Rockingham county, to recover damages for the death of said Noell, which occurred by what is known as the “Narrow Passage bridge disaster,” in the said county of Shenandoah, Virginia. N was an unmarried young man, whose father was dead, and who lived with and cared for his mother. On the trial, on the motion of the plaintiff, the circuit court instructed the jury as follows:

1. Same—Same—Same—Damages.—If the jury believe from the evidence that such prudence, foresight and skill (as that required of railroad companies as above indicated) were not used by said company in respect to “Narrow Passage bridge,” by the breaking of which Charles L. Noell was killed, they shall find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand dollars.

2. Wrongful Death—Damages—Mortality Tables.—In ascertaining such damages, the jury should find the sum with reference, first, to the pecuniary loss of Phoebe Ann Noell, the mother of said Charles L. Noell, by the death of said Charles L. Noell, fixing the same at such sum as would be equal to the probable earnings

†Carriage of Passengers—Degree of Care.—See also Va. Cent. R. R. Co. v. Sanger, 15 Gratt. 230; 9 Am. & Eng. R. Cas., N. S. note, 652, *et seq.* The principle case is distinguished in *Gregory v. Ohio*, etc., R. Co., 37 W. Va. 621.

†Death by Wrongful Act—Elements of Damage.—See also 11 Am. & Eng. R. Cas. N. S., *extensive note*, 750 *et seq.* And in *Simmons & Winch v. McConnell*, 86 Va. 494; *Couch v. Chesapeake*, etc., R. Co., 45 W. Va. 55, citing the leading case.

†Same—Same—Solatium for Wounded Feelings.—See 11 Am. & Eng. R. Cas., N. S., *extensive note*, 755 *et seq.* See also *Turner v. Norfolk*, etc., R. Co., 40 W. Va. 688; *Matthews v. Warner*, 29 Gratt. 576; *Anderson v. Hygeia Hotel Co.*, 92 Va. 692.

†Same—Evidence—Mortality Tables.—See also 11 Am. & Eng. R. Cas., N. S., note, 600.

of the said Charles L. Noell, taking into consideration the age, business capacity, experience, habits, energy and perseverance of the deceased during what would probably have been his lifetime and the lifetime of said Phoebe Ann Noell, if he had not been killed. Second. In ascertaining the probability of life, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third. By adding thereto compensation for the loss of his care, attention and society to his mother; and Fourth. By adding such sum, as they may deem fair and just, by way of solace and comfort to his said mother, for the sorrow, suffering and mental anguish occasioned by his death—Held: There was no error in either of the instructions.

396 *VII. **Same—Pleading—Statute.**—In an action under chap. 145, §§ 7-9 of the Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted. *Balt. & Ohio R. R. Co. v. Wightman's Adm'r*, 29 Gratt. 431.

This case was heard at Staunton, but was decided in Richmond. It was an action of trespass on the case by Charles L. Noell's administrator against the Baltimore and Ohio Railroad Company, lessees of the Washington City, Virginia Midland and Great Southern Railroad Company from the town of Strasburg, in Shenandoah county, to Harrisonburg, in Rockingham county, to recover damages for the death of said Noell upon the said railroad in the county of Shenandoah. On the trial of the cause there was a verdict and judgment in favor of the plaintiff for the sum of \$4,925; and the defendant obtained a writ of error and supersedeas to this court.

The defendant took two exceptions to rulings of the court. The first was to the refusal of the court to remove the cause to the United States court, on the ground that the Baltimore and Ohio R. R. Co. was a foreign corporation; and the second was to instructions given by the court on the motion of the plaintiff. The grounds of these exceptions are stated in the opinion of Judge Christian.

H. W. Sheffey and Williams & Bro., for appellant.

Moses Walton for the appellee.

CHRISTIAN, J. This is a writ of error to a judgment of the circuit court of Shenandoah county.

The action was brought by the personal representative of Charles L. Noell, who was killed on the cars of the Baltimore and Ohio Railroad Company, at "Narrow Passage" bridge, in the county of Shenandoah. There was a verdict and judgment for the

397 plaintiff for the sum of \$4,925, with interest from the date of the verdict, April 30th, 1878; and to this judgment a writ of error was awarded by one of the judges of this court.

Several specific grounds of error are alleged in the petition and relied upon in argument at the bar. Each will be duly considered, though not in the precise order presented in the petition.

The first question raised in the bills of exception filed is, whether the circuit court

erred in refusing to remove the case, on motion of the plaintiff in error, to the circuit court of the United States for the western district of Virginia. This question was determined by this court in the case of the *Balt. & Ohio R. R. Co. v. Wightman's adm'r*, 29 Gratt. 431. The plaintiff in error in that case was the same corporation against whom suit was brought and damages recovered in the case at bar. It was a suit, too, brought by the personal representative of a party killed at the same time and place at which the intestate of defendant in error was killed—both having lost their lives in the fearful calamity known as the "Narrow Passage bridge disaster."

In that case it was held that where a railroad company which was incorporated in another state leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad company in the courts of this state; and such company has no right to remove the suit to the federal courts.

It was further held that, while the Baltimore and Ohio railroad, as a corporation of the state of Maryland, could have no legal existence outside of that state, yet, as the lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations, and that, so acting, it must be treated as a Virginia corporation quoad hoc the line of railroad under its control, so far, at least, as its liability to its own citizens is concerned.

398 *The company derives all its powers and privileges from the charter of the company which owns the road; it must be subject to all the duties imposed on that company, and among these is the obligation to answer in our own courts to our own citizens for any damage resulting from its conduct.

Without any further discussion of this question, it is sufficient to refer to the well considered opinion of Judge Staples in this very recent case against the same defendant, and to the cases cited in that opinion.

I am, therefore, of opinion that the circuit court did not err in refusing to remove the case to the circuit court of the United States.

I am further of opinion that the circuit court did not err in overruling the demurrer to the plaintiff's declaration. The questions raised by the demurrer are the same as those decided by this court in the case of *Balt. & Ohio R. R. Co. v. Wightman's adm'r*, and reaffirmed in *Mathews v. Warner's adm'r*, 29 Gratt. 570; which cases are conclusive in support of the judgment of the circuit court upon the demurrer.

Having disposed of these preliminary questions, we now proceed to consider the more important and difficult questions affecting the merits of the case.

And at first it is to be noted, that there was in this case no motion to set aside the verdict as contrary to the evidence; consequently we have no certificate of the facts proved, but only of so much of the evidence

as may be necessary to give application to the instructions asked for on both sides. These were numerous, and very fully presented the legal propositions contended for by the counsel on each side.

The defendant in the court below (plaintiff in error here) asked for eleven specific instructions; all of which were given by the circuit court, and of course need not be considered by this court.

399 *The questions we have to determine arise upon the instructions given at the instance of the plaintiff in the court below, and which were assailed here as not expounding the law correctly.

The instructions are as follows:

1. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or breaking down of a bridge or wheel or axle, or by any other accident occurring on the road, the presumption prima facie is, that it occurred by the negligence of the railroad company; and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

2. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

3. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noell upon his journey.

4. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

5. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

400 *6. Therefore if the jury believe from the evidence, that such prudence, foresight and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noell was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under the circumstances of the case, such damages not to exceed ten thousand dollars.

7. In ascertaining such damages the jury should find the sum with reference, first:

To the pecuniary loss sustained by Phœbe Ann Noell, the mother of said Charles L. Noell, by the death of said Charles L. Noell,

fixing the sum at such sum as would be equal to the probable earnings of the said Charles L. Noell, taking into consideration the age, business capacity, experience, habits, energy and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of said Phœbe Ann Noell, if he had not been killed.

Second. In ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention and society to his mother. And

Fourth. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering and mental anguish occasioned to her by his death.

To the giving of which instructions, and each of them, the defendant by its counsel objected; but the court overruled the objection and gave the said instructions to the jury; to which action and ruling of the court the defendant, by its counsel, excepted, and prayed that this, its bill of exceptions, be signed, sealed and enrolled, which is done accordingly.

401 *Now it is to be noted, that these instructions, from the first to the fifth inclusive, are in totidem verbis those which were passed upon, and declared by this court as correctly expounding the law in the case of Balto. & Ohio R. R. Co. v. Wightman's adm'r (supra). With reference to them, this court said in that case, "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers, and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Wharton on Negligence, §§ 627, to 661, inclusive; also § 422, and the notes to these sections; Redfield on Carriers and Bailees, § 346. See also Farish & Co. v. Reigle, 11 Gratt. 697."

Upon mature consideration of the arguments addressed to us by the learned counsel in the case before us, and upon a careful review of the authorities, we have no hesitation in affirming, that the first five instructions were properly given, as correctly declaring the law upon the facts proved in this case, respecting the duties and liabilities of common carriers.

The seventh instruction, on the second, third and fourth propositions therein affirmed, raises questions which were not raised or passed upon by this court in the case above referred to.

That instruction is in these words:

VII. In ascertaining such damages the jury should find the same with reference—

1st. To the pecuniary loss sustained by Phœbe Ann Noell the mother of said Charles L. Noell, by the death of said Charles L. Noell, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Noell, taking into consideration the age, business capacity, experience, hab-

its, health, energy and perseverance of the deceased during what would probably have been *his lifetime, and the lifetime of Phoebe Ann Noell, if he had not been killed.

2d. In ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

3d. By adding thereto compensation for the loss of his care, attention and society to his mother.

4th. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering and mental anguish occasioned to her by his death.

To the first and second clauses of this instruction there can be no valid objection. The first clause affirms a proposition which has received the sanction of nearly all the appellate courts of this country where the question has been considered, and was specifically affirmed by this court in *Balt. & Ohio R. R. Co. v. Wightman's adm'r* (supra). It simply informs the jury that in ascertaining the damages, they shall assess the same with reference to the peculiar loss sustained by the mother of the deceased, by fixing the same at such sum as would be equal to the probable earnings of the deceased; taking into consideration the age, business capacity, experience, habits, health, energy and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of his mother, if he had not been killed.

The only difference, in this respect, between this part of the seventh instruction and that given in *Balt. v. Ohio R. R. Co. v. Wightman's adm'r* is, that in that case the damages were to be assessed in reference to the pecuniary loss sustained by the wife and children of the deceased, while in this case the instruction, by the first clause thereof, pointed to that pecuniary loss sustained by the mother of the deceased. The deceased in this case was not a married man; his mother, with whom he lived, and whose farm he managed was a widow, and he
403 her only son; and it was proved that his services and earnings, as manager and cattle dealer, were worth from \$1,000 to \$1,400 per year; and she, at the time of his death, caused by the "Narrow Passage bridge disaster," was fifty-eight years of age, and in sound health.

Although, therefore, the party for whose benefit the suit is brought is the wife and children in the one case, and the mother in the other, the instructions in this respect affirm the same principle in regard to the assessment of damages for the pecuniary loss sustained.

Nor is there any valid objection to the second clause of the seventh instruction, which declares that "in ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life."

This, as an abstract proposition of law, is

certainly true. See *Field on Damages*, § 632, and cases cited in note. Neither the facts proved, nor all the evidence, were certified, and we are not informed by the record whether any such tables of the expectation of life were exhibited. It would certainly have been more regular if the court had specifically referred to the mortuary tables which are recognized by the courts of this commonwealth relating to expectation of life, and to have placed such tables before the jury. This may have been done, so far as the record shows, but whether done or not, it stated correctly an abstract proposition of law, which could not affect the verdict of the jury, and was not even to the prejudice of the plaintiff in error.

We come now to consider the last two clauses in the seventh instruction, which present a question of much more difficulty. By these it is affirmed that the jury may estimate the damages—

"3d. By adding thereto compensation for the loss of his care, attention and society to his mother.

404 "4th. By adding such further sum as they may deem *fair and just by way of solace to his said mother for the sorrow, suffering and mental anguish, occasioned to her by his death."

Now, I am free to admit that, but for the peculiar provisions of our statute and its phraseology, differing from those of all the other states in the Union, and differing in most essential particulars from the English statute, upon which most—indeed, nearly all—of the statutes of other states are founded, the instructions given in the clauses quoted would be plainly erroneous; for it must be admitted that in construing the English act, and all those of the American states founded upon it, the courts have very uniformly held that the damages provided for and recoverable under them are only such as are pecuniary and actual. Nor can anything be allowed as damages under these statutes (i. e., the English act and those which substantially follow it) in actions by or for the benefit of the persons entitled thereto, on account of the physical or mental sufferings of the deceased, or for the sorrow, suffering or grief of the surviving relatives who may be entitled to recover. See *Field on Damages*, § 630, and cases and statutes there cited.

The English act, and nearly all those of the American states, limit the recovery of damages for the death or injury caused by negligence or wrongful act, either in express terms or by necessary implication to such damages as are pecuniary or actual.

Now, the seventh section of our statute is totidem verbis with the corresponding section of the English act.

But the Virginia statute differs in a most material particular from the English act and those modeled after it, and, indeed, differs from the statutes of all the states.

In the sections which define the character of the damages recoverable under those statutes, the English act declares that "in every such instance the jury may give such damages as they may think proportioned to the injury resulting *from such death
405

to the parties respectively for whose benefit such action shall be brought." In New York and all other states in which their statutes are modeled after the English act, the following terms, or those of like import, are used: "The jury may give such damages as they may deem fair and just compensation with reference to the pecuniary injuries resulting from such death," &c. In our statute, instead of these words, or words of like import, being employed, it is declared that "the jury in any such action may award such damages as to it may seem fair and just," * * * in no case the sum recovered to "exceed the sum of ten thousand dollars."

Certainly, in the Virginia statute, there are no words of limitation (except as to the amount of recovery), as in the English act and those modeled on it, confining the jury in the assessment of damages to merely pecuniary injury, but by the very terms of the statute the damages are "such as to the jury may seem fair and just."

We are bound to presume that the Legislature was familiar with the English statute and that of the other states of the Union, and of the English and American decisions under them. And it is a most significant fact that, with the English and American statutes before them, and familiar, as we must presume they were, with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be "proportioned to the injury," and in the other "with reference to the pecuniary injuries resulting from such death," at that point discarded these terms, and in lieu thereof adopted the language, "Such damages as to the jury shall seem fair and just." It is impossible to conceive that the omission of such language and the adoption of other terms meaning the very reverse, could have been accidental. We must conclude that it was done with a design, and that design

was plainly, by all the recognized
406 rules of construction,*to declare that in an action for the death of a party caused "by the wrongful act, neglect or default of any person or corporation," the damages so recovered shall not be "merely 'pecuniary injuries' resulting from such death," but "such damages as to the jury may seem fair and just" under circumstances of each particular case.

One thing is certainly plain and palpable, under the true construction to be given to our statute, and that is, that the jury in assessing damages in such a case are not confined to the pecuniary injury merely resulting from such death. This precise point was decided by the unanimous judgment of this court (the President being absent) in *Mathews v. Warner's adm'r*, 29 Gratt. 570. In that case one error assigned was the refusal of the court to give the following instruction asked for by the defendant, as follows: "If the jury, from the evidence, should find for the plaintiff, then the measure of damages in this action is the pecuniary loss sustained by the mother of the

plaintiff's intestate, by reason of the death of said Warner; and the jury, in assessing the damages, must confine themselves to injuries of which a pecuniary estimate can be made in reference to a reasonable expectation of pecuniary benefit as of right or otherwise to his said mother from the continuance of the life of said Warner; and cannot take into consideration the mental suffering occasioned by his death to his said mother."

This court held that there was no error in the judgment of the circuit court in refusing to give this instruction, and affirmed the verdict and judgment for the damages assessed by the jury. By this decision, in which this court reviewed the English act, and the statutes of the American states, and carefully construed our statute, the negative proposition was certainly affirmed, that the jury in assessing damages were not confined to injuries of which only a pecuniary estimate can be made in reference to a reasonable expectation of pecuniary benefit from a continuance of life of the deceased.

407 *I think this case is conclusive of the case before us. If, as was held in that case, the jury is not confined in assessing their damages to the mere pecuniary loss to the survivors by the death of the deceased, certainly they may be governed by other considerations than the mere pecuniary loss. It is fair to presume, indeed the conclusion is irresistible, that the legislature, familiar with the statutes of other states, and cognizant of the decisions under them, that the damages under such statutes were confined by the courts to mere pecuniary loss, changed the phraseology of our statute so that the damages should not be proportioned to the pecuniary injuries only, but such "damages as to the jury may seem fair and just" under the circumstances of the particular case.

We must presume that the legislature knew the force and effect of its own enactments as compared with those of other states and the judicial construction given these statutes. The words used, not by accident, but with evident design, as already construed by this court in *Mathews v. Warner's adm'r* (supra), certainly extended the statute beyond the scope of the English statute, and of all the American statutes, in declaring, in effect, that the jury, in estimating the damages in cases of the death of a party caused "by the wrongful act, neglect or default of any person or corporation," should not be confined to the mere pecuniary loss of the survivors for whose benefit the action may be brought.

It was no doubt the intention of the legislature, by this enactment, differing so essentially from the English and American statutes, to cut the gordian knot of the decisions which tied the jury down to a consideration of the mere pecuniary loss suffered by the survivors of the deceased; and to declare, in effect, that where any person's "death is caused by the wrongful act, neglect or default of any person or corporation," even if such person be one whose life conferred no

pecuniary benefit; if such person be an
 408 *aged or infirm father, or husband, or
 an invalid wife, or afflicted child (often
 dearer to its parents because it is afflicted),
 the death of such a person, so caused, should
 be the subject for a recovery of damages.

It follows that there being no pecuniary
 loss in such cases, and the jury not being
 confined by the statute (as already con-
 strued by this court in *Mathew's adm'r v.*
Warner) to mere pecuniary loss to the sur-
 vivors for whose benefit the action may be
 brought, it follows, I say, that mental suffer-
 ing and anguish, want of comfort and solace,
 may be taken into consideration in the com-
 putation of damages sustained in the partic-
 ular case. In other words, it is plain that un-
 der our statute, the jury, not confined to mere
 pecuniary loss, "may award such damages as
 to them may seem fair and just," according
 to the facts and circumstances of each case.
 The only limit which the statute imposes is
 to confine the recovery in every case to a
 sum not exceeding \$10,000.

It is earnestly insisted that such a con-
 struction of the statute will result in great in-
 justice, and turn the jury in every case loose
 to award damages according to their own un-
 restrained notions as to compensation for the
 mental suffering and agony, and loss of com-
 fort and solace in the case of a mother losing
 her child, or of a wife losing her husband, and
 kindred cases, unchecked by statutory enact-
 ments confining them to the actual pecuniary
 loss resulting from death. The answer to this
 view is—first, that there is in cases of this
 kind, as in all others, the same supervising
 power of the courts to correct verdicts ren-
 dered under manifest prejudice or passion, or
 grossly excessive, or obtained by fraud or
 corruption. But the better and all prevailing
 answer is, "ita est scripta lex." The legisla-
 ture certainly had the right so to declare what
 the law is. And if in guarding human life as
 so sacred that, when it is destroyed "by the
 wrongful act, neglect or default of any person
 or corporation," it holds such person

409 *or corporation to a strict accountabil-
 ity, and makes them liable in damages,
 not alone for the pecuniary loss (to the sur-
 vivors entitled to the benefit of the action),
 but to "such damages as to the jury may seem
 fair and just" in the particular case, surely
 no one can gainsay the power of the legisla-
 ture so to declare the law. If the law as it is
 written is unjust and oppressive, and con-
 trary to the better statutes (as contended)
 of the other American states and of Eng-
 land, it is for the legislature to change the law.
 This court can neither amend or annul the
 statute law, unless it be unconstitutional.
 That is the province of the legislature. We
 can only interpret the law as we find it; and
 so interpreting it, we find no error in the
 construction given to it by the circuit
 court in its instructions.

It is proper to notice, before concluding
 this opinion, another objection very strenu-
 ously insisted on by the counsel for the
 plaintiff in error to the instructions given by
 the court to the jury, in which the court
 says: "In ascertaining such damages, the

jury should find the same with reference,"
 &c. It is insisted that this is an imperative
 command to the jury that they must, in
 making up this verdict, consider certain facts,
 &c. I think this is a strained construction of
 the language of the court. The word as used,
 taken in connection with the other numer-
 ous instructions asked on both sides, plainly
 means that it is proper that the jury should
 take into consideration the matters indicated
 in the instructions.

Upon the whole case, I am of opinion
 that there is no error in the judgment of the
 circuit court, and that the same ought to be
 affirmed.

STAPLES, J., said he did not concur
 entirely in the opinion of the majority in *Mat-
 hews v. Warner*, nor did he express any ac-
 tual dissent. He then had, and still enter-
 tains, doubt whether the jury are authorized
 to award vindictive or exemplary damages
 in cases like the present. In other
 410 *words, whether they are not confined
 to awarding damages with reference
 to the pecuniary loss sustained. A major-
 ity of the court have decided otherwise in
Mathews v. Warner and in the present case.
 He, therefore, yielded his doubts, and con-
 curred in the opinion just delivered.

ANDERSON and BURKS, J's., concurred
 in the opinion of Christian, J.

MONCURE, P., concurred in the results
 and most of the opinion of Christian, J.; but
 only because the question was decided by
 this court in *Mathews v. Warner*, 29 Gratt.
 576, when he was not present.

Judgment affirmed.

411 *Irvine & als. v. Greever & als.

November Term, 1879, Richmond.

I. By deed of February 16, 1849, K conveyed to L
 two acres of land in M, in trust for the exclusive
 use of E and her children by her husband I. In
 a suit in equity in which these were the parties,
 it was decreed that I should sell the land and invest
 the proceeds. I reports the sale and investment,
 and the court by its decree of March 3, 1863, con-
 firms the report, and decrees that I shall take a
 deed from the vendor to I, conveying the lands
 purchased upon the same trusts as those delivered
 in the deed from K to L. The vendor in fact con-
 veyed the land to I absolutely. On a bill filed by G,
 a judgment creditor of I, in June, 1871, to subject
 the land to the payment of I's debts—Held:

1. **Deeds—Equitable Trusts.**—The deed to I
 must be held in equity to be upon the same
 trusts declared in the deed from K to L, and the
 land is not liable to satisfy the debts of I.

2. **Laches.**—The fact that E was a married
 woman, that the children, except perhaps one,
 were infants when the suit of G was brought,
 and the disturbed state of things in March, 1863,
 when the deed was made, will excuse any laches
 of E and her children in not filing their bill to
 have the deed corrected.

II. By deed bearing date the 21st of January, 1849,
 F conveyed 2¼ acres of land to E the wife of J,
 in consideration of \$200 paid by J to F. In June,
 1871, G filed his bill to subject it to the payment of

the debts of J. It appeared that all the debts of J were contracted after this deed was executed, except one of very small amount, and it was doubtful if this had not been paid—HELD:

1. **Husband's Gift—Wife's Separate Estate—Husband's Debts.**—There being no pretence of fraud in procuring the deed, the creditors of J upon debts contracted since its execution cannot subject the land to the payment of their debts.

2. **Same—Same—Advancement to Wife—Presumptions.**—Though it is true generally that where land is conveyed to one person, and is paid for by another, the presumption is that there is a trust in favor of the person paying the money; in the case of a conveyance to the wife, where the money is paid by the husband, the presumption is that it is intended by him to be an advancement to his wife.

This case was heard at Staunton, but was decided at Richmond. It was a suit in equity brought in the county court of Amherst in June, 1871, but afterwards transferred to the circuit court of the county, by H. M. Greever against William A. Irvine and William C. Mays, to subject a tract of one hundred and thirteen acres of land to satisfy a judgment for \$233.34, with interest from the 10th of August, 1866, and \$8.78 costs, recovered by said Greever against said Irvine. The plaintiff afterwards filed an amended bill to subject another lot of ground of two and three-fourth acres, to satisfy said judgment, which had been conveyed by William L. Fair and wife to Elizabeth A. Irvine, the wife of William A. Irvine. To this amended bill Mrs. Irvine and her four children—two of whom were infants—were parties, as well as William A. Irvine and Mays.

In the progress of the cause the court directed a commissioner to report upon the fee simple and annual rental value of the land, and also to take an account of the debts which were liens upon the land; and the commissioner reported that there were three judgments—one rendered in February, 1859, in favor of Smithson, Statham & Co. v. Irvine, for \$47.75, and docketed February 15th 1866, upon which there was a balance due on the 10th of December, 1871, of principal, \$30.98, and interest, \$22.98. The judgment of the plaintiff Greever was rendered in June, 1866, and docketed August 17th.

413 The third was a *judgment in favor of William A. Simpson, rendered in 1867, for \$80, with interest from May 3d, 1866, docketed November 27th, 1867.

***Husband's Gift—Wife's Separate Estate.**—The rule sustained by the holding that the presumption was that the money paid by the husband was intended by him to be an advancement to his wife is supported in *Beecher et al. v. Wilson, Burns & Co.*, 84 Va. 819; *Dugger's Children v. Dugger et al.*, 84 Va. 144. See also 2 Min. Inst. (4th Ed.) 222; 1 Am. & Eng. Ency. of Law p. 773.

In *Jones v. Jones*, 96 Va. 753, it was held, that where land was conveyed by a husband to his wife it would be presumed to have been intended as an advancement; and, that the husband did not even take an estate as tenant by the curtesy in land so conveyed. See also *Sayers v. Wall*, 26 Gratt. 354.

As to the tract of one hundred and thirteen acres, it appeared that, by deed bearing date the 16th of February, 1849, George W. Kyle conveyed to Luther G. Irvine two acres of land in the town of Madison, in the county of Amherst, in trust for the exclusive use of Elizabeth A. Irvine and her children by the said William A. Irvine. It appears further that in a suit pending in the hustings court of Lynchburg, in the name of Irvine, by, &c., v. Irvine, the court, by a decree made in October, 1856, appointed William A. Irvine a commissioner to sell the said lot of ground in the town of Madison, and to invest the proceeds of sale in other real estate. And by another decree, made on the 3d of March, 1863, reciting the sale made by Irvine, ratified the conveyance made by said Irvine to George W. Burnett; and reciting further that Irvine having, in pursuance of said order, invested the purchase money of said lot in the purchase of a tract of land in the county of Amherst, containing one hundred and thirteen acres and twenty poles, the location, quantity and boundaries of which are set out in a deed of conveyance from the said George W. Burnett and wife to the said William A. Irvine, ratified and confirmed said instrument; but the said William A. Irvine is to hold the same in trust to the uses and purposes set out and contained in the deed of trust of the 16th of February, 1849, from George W. Kyle to Luther G. Irvine. William A. Irvine, in his answer, stated that the deed from Burnett to him was prepared and executed by Burnett in the city of Richmond, and forwarded to defendant, who supposed, until this controversy, that it was a proper conveyance.

As to the $\frac{3}{4}$ acres referred to in the amended bill, it appears that by deed bearing date the 21st of January, 1859, William L.

414 Fair and wife conveyed it to Elizabeth A. Irvine, wife of William A. Irvine, in consideration of the sum of \$200, paid by the said William A. Irvine to the said Fair.

The cause came on to be heard on the 16th of April, 1875, when the court confirmed the report of the commissioner, and decreed a sale of the lands in the bill and supplemental bill mentioned, and appointed certain commissioners named to make the sale. There were afterwards several reports by these commissioners; and a decree on the 14th of October, 1876, directing the commissioners to proceed to sell the land in the mode and terms stated, and if it could not be sold, to rent it out. And in April, 1877, the commissioners reported the sale of a part of the property. And by a decree of the 11th day of April, 1877, the court confirmed the sale, and appointed a receiver to collect the purchase money, and apply the same to the judgment liens according to their priorities.

At the October term, 1877, Mrs. Irvine and her children—the infants by their next friend—presented their petitions to the court for a bill of review, in which they asked that the sale which had been made might be set aside, that the proceedings in the suit might be reviewed, and that the court would decree

that neither the lot conveyed by Fair and wife to Elizabeth A. Irvine, nor the one hundred and thirteenth acres, was subject to the judgment liens of the creditors of William A. Irvine. But the court denied the petition. And thereupon Mrs. Irvine and William A. Irvine, her trustee, and their children, applied to a judge of this court for an appeal; which was awarded.

Edward S. Brown, for the appellants.

There was no counsel for the appellees.

STAPLES, J., delivered the opinion of the court.

415 *It is conceded that the lot conveyed by George W. Kyle on the 16th February, 1849, to a trustee for the benefit of Mrs. Irvine and her children, was sold and the proceeds invested under a decree of the hustings court of Lynchburg, in the 113 acre tract. That decree directed that William A. Irvine, the husband, should hold the 113 acre tract in trust to the uses and purposes declared in the deed of 16th February, 1849.

It would seem, however, that Burnett and wife, in whom the title to the 113 acre tract was vested, did not conform to the provisions of the decree in this respect, but conveyed the tract directly to the husband without mentioning the trusts in favor of the wife and children. Whilst, therefore, the deed vests the naked legal title in the husband, the real beneficial ownership is in Mrs. Irvine and her children. The only question we have to deal with in this connection is whether the land is liable to the claims of the husband's creditors.

This court has repeatedly decided that the judgment creditor can occupy no higher ground than his debtor; that he may take the debtor's interest, but nothing more; and that a court of equity will so limit the lien of the judgment as not to interfere with the equitable interests of third persons claiming bona fide under the debtor. The only qualification of this rule is found in the Registry statutes, which declare every deed and written contract for the sale of land void, as to the creditors of the grantor, unless duly recorded. In this case the grantors are Burnett and wife, against whom no claim is asserted. The real debtor is William A. Irvine; and the effort to subject the land to the payment of his debts is based wholly upon the idea that the legal title is vested in him by the deed of Burnett and wife.

It is obvious the registry acts have no sort of application to the case. The simple inquiry is, whether the deed is to preclude

416 Mrs. Irvine and her children from asserting their *beneficial ownership of the land. Had they filed their bill to correct the mistake in the deed immediately after its execution, no one could have controverted their right to relief, even against the husband's creditors; for the plain reason they could not be prejudiced by the fraud or even innocent mistake of parties over whom they exercised no sort of control. If Mrs. Irvine and her children are now without remedy, it can only be because they have been guilty of laches in asserting their demands.

The deed was executed in 1863—a period of great confusion and disorder—when, it is fair to presume, but little attention was paid to the character of the instrument. It was at once placed on record, and was no doubt lost sight of by all the parties concerned in it. At all events, there is every reason to believe that Mrs. Irvine and her children were not apprised of the mistake until this suit was instituted by the appellees. But had she known it, the law would not impute to her, a married woman, laches in failing to bring suit against her husband to have the deed corrected; there being no pretence of fraud in the case. The case of *Justis v. English*, 30 Gratt. 565, is ample authority upon this point.

So far as the children are concerned, all of them—with, perhaps, a single exception—were infants down to the time of bringing this suit. Under all these circumstances, it seems to be clear that the parties cannot be affected by the mere lapse of time. Whether the appellees gave credit to the husband upon the faith of her supposed title to the property does not appear. Conceding that they did, their equity is not superior or equal to that of Mrs. Irvine and her children, whose funds were invested in the land, and who, without fraud on their part, have been divested of their estate. Besides, it is a universal rule that all who take a trust estate, except purchasers for valuable consideration without notice, take it subject to the trust; and this rule applies to creditors of the trustee as to others. 1 Perry on Trusts, 346.

417 *In *Mauzy v. Sellars & als.*, 26 Gratt. 641, the question was presented, whether a deed which conveyed to the vendee by mistake of the draughtsman, certain property not intended to be conveyed, could, at the instance of the vendor, be reformed as against the creditors of the vendee. It was held that, as it was competent between vendor and vendee, to correct the mistake, it was also competent to do so between the vendor and the judgment creditors of the vendee; that the creditor, not being bound by the deed, could not rely upon it as an estoppel, and the lien of his judgment could extend no further than the actual interest of the debtor. We are, therefore, of opinion that the tract of 113 acres is not subject to the debts of William A. Irvine due the appellees.

The next question is as to the operation and effect of the deed executed by Fair and wife, the 21st of January, 1859, to Mrs. Irvine. The purchase money was not paid out of any funds belonging to Mrs. Irvine, but was paid by William A. Irvine, the husband, as is recited in the deed. The question is, whether this creates a resulting trust in favor of the husband, or is to be considered an advancement by him to the wife. The learned judge of the circuit court seems to have thought it a resulting trust; and the land embraced in the deed is, therefore, liable to the creditors of the husband. It is not necessary, at this day, to enter into an investigation of the principles of law governing resulting trusts. The doctrine generally, if not universally recognized is, that when a conveyance

of real estate is made to one person, and the consideration paid by another, it is presumed that the party advancing the money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. But when the conveyance is taken to a wife or child, or to any other person for whom the purchaser is under an obligation to provide, no such presumption attaches. On the contrary, the inference in such case is that the purchase

418 chase was designed as *an advancement to the person to whom the conveyance is made. It is, however, always a question of intention, and the trust in favor of the wife or child may be rebutted by parol proof, showing that the party intended the purchase for his own benefit exclusively. 1 Perry on Trusts, § 143-4-5, and numerous cases there cited.

When, therefore, William A. Irvine made the purchase from Fair and caused the deed to be made to his wife, it is to be presumed he designed it as a settlement upon her, and not for his own benefit. There is nothing in the record to rebut this presumption. It will be understood, of course, that the husband cannot by a voluntary postnuptial settlement upon his wife, place his estate or any portion of it beyond the reach of his creditors. As to all existing debts the deed would be void, however honest the motive with which it was executed. As to the subsequent creditors, however, it would be valid unless made with an actual fraudulent intent. Johnston & als. v. Gill & als., 27 Gratt. 587.

In the case before us fraud is not pretended. There is not a particle of testimony in the record tending to show it. It is not even charged in the pleadings. All the debts of William A. Irvine were contracted long after the execution of the deed to his wife, with a single exception; and that is a small claim of \$47.75, alleged to be due Statham & Co., which was contracted in 1852. As to that claim the deed must be held to be void, and so much of the property as is necessary applied to its payment. A preliminary question, however, arises, and that is whether this debt has not been already paid. The commissioner to whom it was referred to take an account of William A. Irvine's debts reported it as a judgment debt. Statham & Co. have not, however, attempted in this suit to enforce its collection. Mr. Statham, being appealed to, has filed an affidavit, which may be treated as his answer to the bill, in which he says he makes no claim

419 *to the debt, but that he has heard it is claimed by George Dameron. Dameron is not before the court, and it does not appear what is the nature or extent of his interest. Upon this point there must be an inquiry with a view to ascertain whether the debt is still due, and, if so, who is the owner.

There is but one other subject of consideration, and that is, whether William A. Irvine has any interest as tenant by the courtesy or otherwise in the land conveyed by Fair to Mrs. Irvine, which can be subjected to his debts. The deed from Fair does not profess to convey to or vest in Mrs. Irvine a separate estate. No words are used appropriate to

convey or create such an estate. A distinction has, however, been taken between a deed by a stranger and a deed by the husband to the wife.

In the former case the deed must contain proper words, or by implication equally plain show an intent to confer a separate estate, otherwise the marital rights will attach. No particular form of words is necessary to create a separate use for the wife. Whenever it appears from the proper construction of the instrument, or from the nature of the transaction, she is intended to take the separate use, effect will be given to the intention. And therefore it is, when the conveyance is by the husband to the wife, it will be construed generally as operating to her separate use, although no such words are used as would be necessary to the creation of a separate estate in a conveyance by a stranger. The reason is said to be, that otherwise the deed will be wholly inoperative. It was so held by this court in *Sayers v. Walls & als.*, 26 Gratt. 354, and *Leake, trustee v. Benson*, 29 Gratt. 153; and the point is fully sustained by the authorities elsewhere.

In the case before us the principle would seem to apply in all its force. The husband in requiring the deed to be made to his wife must have designed some personal benefit to her, not subject to any contingency 420 whatever. If *the deed is to be construed as clothing him with a life estate as tenant by the courtesy, the wife would not derive any advantage from the estate, unless she happened to be the survivor.

The courts will be slow to adopt a construction of the deed which would thus defeat the main objects of the settlement upon the wife.

For these reasons, we are of opinion, there is error in the decree appealed from; that the same must be reversed and annulled; that the bill of the appellee, H. M. Greever, be dismissed, and the lands of the appellants held exempt from the debts of William A. Irvine, except the debt reported as due Statham & Co., with respect to which an inquiry must be directed whether the same has been paid, and if not who is entitled to the payment of the same; and if upon such inquiry the said debt is ascertained to be due, a decree is to be entered charging it upon the land embraced in the deed from Fair and wife to Mrs. Irvine.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the tract of one hundred and thirteen acres of land conveyed by Burnett and wife to William A. Irvine, is trust property belonging to Mrs. Elizabeth A. Irvine, held by the said William A. Irvine, to the uses and purposes set out in the deed of February 16, 1849, from George W. Kyle to Luther S. Irvine; and consequently that said tract of 113 acres is not properly chargeable with the debts of the said William A. Irvine; and the circuit court erred in not so holding.

The court is further of opinion, that the lot or parcel of land conveyed by William

L. Fair and wife, on the 21st January, 1859, to Mrs. Elizabeth A. Irvine, is to be regarded as a settlement to the separate use of the latter, and consequently said property is not chargeable with any debts of said William A. Irvine contracted since the execution

421 of said deed; and the circuit court erred in not so holding. It is, therefore, decreed and ordered, that for the errors aforesaid, the decree of the 13th October, 1877, be reversed and annulled; and the appellees, the creditors of the said William A. Irvine, except Statham & Co., pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

And this court, proceeding to render such decree as the said circuit court ought to have rendered, it is decreed and ordered that upon the petition for a rehearing, styled in the proceedings a bill of review, the decree of the 14th of October 1876, and the decree of the 11th April, 1877, be reheard; and it is further decreed and ordered that so much of the said decree of October, 1876, as directs a sale of the real estate therein mentioned, or a lease of the same, be reversed and annulled, and the decree of April, 1877, confirming said sale, be also reversed and annulled; that the sale made by said commissioner be vacated, and the bonds given for the purchase money be cancelled or restored to the purchaser; and the original and amended bills filed by the appellee, H. M. Greever, be dismissed, with costs as to the said H. M. Greever, but that Statham & Co., or any person claiming to be the assignee or owner or the judgment recovered by said Statham & Co., against William A. Irvine, have leave further to prosecute the suit in their own name, for the purpose of enforcing said judgment; and if upon due inquiry it shall appear that said judgment is still unpaid, the same may be enforced by a proper decree against the lot or parcel of land embraced in the deed from Fair and wife to Mrs. Elizabeth A. Irvine, or against the rents and profits thereof, as may seem to the circuit court just and proper.

And the cause is remanded to the circuit court for further proceedings therein to be had in conformity with this decree.

Decree reversed.

422 *Milliner's Adm'r v. Harrison, Register, &c.

November Term, 1879, Richmond.

1. *Mandamus*.—A writ of *mandamus* only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be performed, and where there is no other specific and adequate legal remedy.

2. *Same*—Land Office—Land Warrants.—In 1830, an allowance of bounty land was made to

the heirs of M, as an officer in the Virginia navy. The warrants were issued, but were returned to the land office in 1833, where they have remained uncanceled ever since. Upon an application by the representative of the heirs of M for a *mandamus* to the register of the land office to deliver to him these warrants, he produces from the files of his office the copy of a letter from the secretary of the commonwealth to the register of the land office, dated in September, 1833, in which he says he returns the warrants by the order of the governor, the order making the allowance of the bounty having been rescinded—*Held*: There being doubt upon the case, the *mandamus* will not be issued.

This was an application by Robert Milliner's administrator to the supreme court of appeals, for a rule upon Randolph Harrison, register of the land office, to show cause why a *mandamus* should not issue commanding him to deliver to the petitioner certain land warrants which had been made out in favor of the heirs of Robert Milliner, deceased, and on file in his office. The register filed his answer to the rule; and the case was submitted to the court. The case is fully stated by Judge Christian in his opinion.

423 *Marshall & Johns, for the petitioner.

The Attorney-General, for the register.

CHRISTIAN, J., delivered the opinion of the court.

The petition in this case is filed by John Milliner, the administrator de bonis non of Robert Milliner, deceased, invoking the original jurisdiction of this court by way of its writ of *mandamus*, to compel Randolph Harrison, Esq., the register of the land office, to issue and deliver to petitioner certain land warrants.

The petition alleges that on the 7th December, 1830, an order was entered on the executive journal of Virginia, by the governor and council, allowing land bounty to Robert Milliner as a lieutenant in the Virginia navy; that the amount so allotted and granted was four thousand acres of land; that said order of allowance was sent to the register of the Virginia land office, and entered on the records of that office; and that thereupon certain warrants were issued by the state of Virginia, to the infant heirs of said Robert Milliner, deceased, and duly delivered to their (the infants') attorney and agent.

It is further alleged that subsequently, without any lawful authority, these warrants were returned to said land office, where they now remain uncanceled; that the heirs of Robert Milliner, deceased, whose ancestors were infants when these occurrences took place, were not aware, until within a very recent period, of their rights and interests in the premises; that they are very poor and ignorant; that petitioner represents all the heirs of Robert Milliner, who are very numerous; and that he is the proper party to whom these warrants should be delivered; that he has applied to the register of the land office for these warrants, who admits the justice of petitioner's claim, and his right

**Mandamus*.—See also *Supervisors v. Powell*, 95 Va. 637; *Taylor v. Tyler*, 29 Gratt. 765; *Poindexter v. Greenhow*, 84 Va. 441; *Lewis v. Whittle*, 77 Va. 415; *Parker v. Anderson*, 2 Pat. & H. 38; *Justices v. Munday*, 2 Leigh. 165, 21 Am. Dec. 604; *Ex parte Goolsby*, 2 Gratt. 575; 4 Min. Inst. (2nd Ed.) 304.

to receive these warrants, but declines to deliver them unless *under an order of court; he regarding himself as a ministerial officer, and desiring to be protected by such order.

The petitioner then prays for a rule upon said register of the land office, to show cause why a writ of mandamus should not be issued by this court commanding him to deliver said land warrants to petitioner.

There is filed with this petition a paper marked "Ex. A." in these words:

"In Council, 7th December, 1830.

"It is advised that Robert Milliner be allowed land bounty as a lieutenant in the Virginia state navy for services during the war.

(Signed) "John Floyd.

"Attest, J. H. Pleasants."

Appended to this paper is a certificate from S. H. Boykin, former register of the land office, that "the foregoing is a true copy from the records."

This is the only evidence produced by the petitioner in support of his claim.

A rule was awarded upon this petition, against Col. Randolph Harrison, register of the land office, to show cause why a writ of mandamus should not be awarded by this court, commanding him to deliver to the petitioner the land warrants described in said petition.

To this rule the register of the land office filed his answer.

In that answer, while he admits that the order filed with the petition is upon the records of his office, and that there is no order revoking and annulling the order of December 7th, 1830, to be found upon the executive journal, and that the warrants still remain in his office uncanceled, he further avers that the register of the land office was notified by the secretary of the commonwealth, that such *an order was directed to be entered, and that in consequence of such notification said warrants were returned to the register, and have remained in the office ever since, a period of nearly forty years. That under these circumstances, and under the advice of the Attorney-General, he has declined to deliver said warrants to the petitioner. That he is willing to do whatever his duty and the law requires him to do.

He produces, to be read with his answer a copy taken from the files of the land office, the following letter, written by the late General William H. Richardson, bearing date September 25th, 1833, at which time he was secretary of the commonwealth. That letter is addressed to Wm. Selden, Esq., register of the land office, and is in these words:

"Executive Department,

"25th September, 1833.

"I am instructed by the governor to transmit to the register of the land office the enclosed warrants, which were issued to the heirs of Robert Milliner, pursuant to an order of the executive of the 7th December,

1830, for the land bounty of a lieutenant in the state navy, and to inform the register that the order allowing the claim of the heirs of the said Rob. Milliner has been subsequently rescinded, and the claim rejected upon evidence filed in this department that the said Milliner was not entitled to land bounty. The warrants are returned to the land office at the request of the gentlemen who represented the heirs, with the view, as the governor is informed, to an application on his part to have the tax refunded.

(Signed) "Wm. H. Richardson,
"Secretary of the Commonwealth."

The case is submitted to this court upon this petition and exhibit filed therewith, and the answer of the register of the land office, with the letter of Gen. Richardson, late 426 secretary *of the commonwealth, produced by the respondent to be read with his answer. This is the whole record presented to us; and upon this record, the original and extraordinary jurisdiction of this court, by way of mandamus, is invoked to compel the register of the land office to deliver these warrants to the petitioner, which had been returned to his office nearly forty years ago, upon notification by the secretary of the commonwealth that the order upon which they were issued had been rescinded, and the claim rejected, upon evidence filed in the executive department. The court is of opinion that the rule must be discharged.

The writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must, therefore, be clearly established and the writ is never granted in a doubtful case. Where the law enjoins upon a public officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by mandamus.

But to warrant the court in granting this writ against a public officer, such a state of facts must be presented as to show that the petitioner has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. See *Tyler, sergeant, v. Taylor, auditor*, 29 Gratt. 763, and cases there cited. See also opinion of Judge Burks in *Page v. Clopton*, Judge, 30 Gratt. 415.

Applying these principles to the case before us, it is plain that the record presents no case for the exercise of the original and extraordinary jurisdiction of this court by way of mandamus. On the contrary, the public officer whom we are asked to compel a performance of his duty, we think, discharged his duty in refusing to deliver the land warrants in the petition mentioned to the petitioner.

427 *We think it is clear, upon the record presented, that he was at least justified in withholding warrants which, for forty years, had remained in his office, and, though uncanceled, were proven from the

records of the executive department to have been rescinded and annulled, and the claim upon which they were founded rejected upon evidence filed with that department. The court is therefore of opinion that the record presents no case for a mandamus, and that the rule must be discharged. Mandamus refused.

**428 *Hoskinson & als. v. Pusey & als.
White & als. v. King & als.**

November Term, 1879, Richmond.

1. Churches—Rights of Seceding Conference.—The Baltimore conference of the Methodist Episcopal Church having, in its meeting in 1845, declared its adherence to the Methodist Episcopal Church, could not afterwards, in 1861, secede from that church so as to entitle it to the benefit of the plan of division adopted in the general conference of the church in 1844; though in 1866 it united with the Methodist Episcopal Church South.

2. Same—Division in Congregation—Right to Property.—Except as to the border circuits of the church, the division of the churches of which is provided for by the plan of 1844, the property in the churches, &c., of the congregation within the bounds of the Baltimore conference properly belongs to the churches in connection with the Baltimore conference, composed of those members of that conference who refused to concur in the action of the conference in 1862, and continued to adhere to the Methodist church.

3. Same—Same—Same.—The Harmony church, in Loudoun county, was not a border church, and the plan of division of 1844 did not apply to it, and though a majority of the members of that church decided to go with the Baltimore conference south, the other party, remaining in connection with the Baltimore conference, are entitled to the possession of the church property.

By deed bearing date the 30th December, 1833, Richard Travener and wife conveyed to James Tippitt and seven other persons one and a half acres of ground in the county of Loudoun, upon trust that they shall erect and build, or cause to be erected and

429 built thereon, a house or place of *worship for the use of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which, from time to time, may be adopted by the ministers and preachers of said church, at their general conference in the United States of America; and in further trust and confidence that they shall, at all times forever hereafter, permit such ministers belonging to the said church as shall, from time to time, be duly authorized by the general conference of the Methodist Episco-

pal Church, or by the annual conference, to preach and expound God's holy word therein. And the deed then provided for supplying a vacancy in the board of trustees and their qualifications; and further, that if the trustees, or their successors, were obliged to pay any money on account of said premises, they should be authorized to raise the same by mortgage or sale of the premises.

And by deed bearing date the — day of —, 1847, William W. Butts and wife conveyed to J. B. White and five others, and their successors, a parcel of ground in trust that they shall, at all times, permit such ministers belonging to the Methodist Episcopal Church as may be appointed by the annual conference within the bounds of which the said lot of ground may be included, to enter and occupy, during the time of such appointment, the house situated thereon as a parsonage, with the use of the out-buildings attached. And the deed then provided for the mode of filling a vacancy in the board of trustees.

The church built on the land mentioned in the first deed was called Harmony church; and the parsonage mentioned in the second deed was in Hillsboro', and was also in the county of Loudoun.

It appears that the churches for which this property was given divided—one part of them going with the Methodist Church South and the other part with the Methodist Church—and that the trustees of the part going with the Methodist Church South took possession of the buildings, and excluded the other part.

430 *In March, 1871, George Pusey and six others, suing in behalf of themselves and the other members of the congregation of the Methodist Episcopal Church entitled, as they claimed, to worship in the Harmony church, brought their suit in equity in the circuit court of Loudoun county against Robert Hoskinson and others, trustees of the Harmony church, connected with the Methodist Episcopal Church South, to recover possession of the church property.

And at the same time Charles King and William J. Bain, ministers in charge of the Hillsboro' circuit by appointment from the Baltimore conference, brought their suit in equity in the same court against James B. White and others, trustees of the church in connection with the Baltimore conference south, to recover the aforesaid parsonage.

Both the cases came on to be heard on the 30th of October, 1873, when the court held that the plaintiffs were entitled to the possession of the church and the parsonage, and decreed that the defendants deliver possession thereof to the trustees of the other party. And the defendants in each case thereupon applied to this court for an appeal; which was awarded. The grounds on which the parties respectively rest their claims are stated in the opinion of Judge Burks.

Powell Harrison, for the appellants.
W. Willoughby, for the appellees.

BURKS, J., delivered the opinion of the court.

***Division in Religious Congregation—Right to Property.**—The principal case is cited, and its holding that the seceding majority of the congregation were not entitled to the benefit of the plan of division adopted in the general conference of the church in 1844 is sustained in *Boxwell et al. v. Affleck et al.*, 79 Va. 402; *Finley et al. v. Brent et al.*, 87 Va. 103. See also *Hardy et al. v. Wiley et al.*, 87 Va. 125, and 2 Min. Inst. (4th Ed.) 253, where the principal case is cited.

The controversy in these cases relates to church property. In the one case, the right to the use of a building as a house of public worship is the matter in dispute; in the

other, the right to the use of a parsonage or residence *for a minister; both pieces of property situated in the county of Loudoun. The respective claimants belong to separate and distinct religious organizations. On the one side, they are members of the Methodist Episcopal Church, on the other, members of the Methodist Episcopal Church South.

I propose to consider the case in relation to the church building first. This building was erected as a house of public worship, pursuant to the provisions of the deed of December 30, 1833, from Taverner and wife to the trustees therein named, on the land thereby conveyed, situate within the territorial limits of the Baltimore conference of the Methodist Episcopal Church South.

The deed is the same in substance as the deed in *Brooke & others v. Shackett*, 13 Gratt. 301, and the construction must be the same. According to that construction, the conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term—that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected to use it for that purpose. Such a conveyance is valid under our statutes. See Code of 1873, ch. 76, § 8.

Who, then, are the cestuis que trust under the deed in question, the beneficiaries entitled to the control and use of the "Harmony" church building? Looking to the deed alone, the answer would be, those who are members of the congregation or local society, and, as such, members of the Methodist Episcopal Church. According to the test applied in *Den v. Bolton*, 7 Halst. (N. J.) 215, cited with approbation in the opinion of Judge Daniel in *Brooke & others v. Shackett*, supra, "to constitute a member of any church, two points at least are essential, without meaning *to say that others are not so, a profession of its faith and a submission to its government."

Although a question is raised in the record as to the membership of the appellees, the evidence satisfies me that they are, and some of them have been for many years, members of the Methodist Episcopal Church. Their names are on the church records as members, and although their attendance on public worship appears to have been, at one time, interrupted from causes incident to the war, they never ceased to be members of the church. They profess its faith, receive the pastors assigned by it, and submit to its discipline and government. On the other hand, it is not pretended that the appellants, and those they represent, are members of that church. They neither recognize its authority, nor submit to its government, but deny and resist both. The proof is clear, and the fact is

not disputed, that they are and claim to be members of another and distinct organization, the Methodist Episcopal Church South, recognizing its authority, submitting to its government, and asserting for themselves, and the ministers assigned by this church, a claim to the exclusive use of the church building.

The grounds on which this claim is rested will be better understood after a brief statement of facts deduced from the record.

The Baltimore conference was not represented in the convention held in Louisville, Kentucky, in May, 1845, which organized the Methodist Episcopal Church South, and being a border conference, under the plan of separation agreed upon by the general conference of the Methodist Episcopal Church in 1844, it had the right to determine for itself its future ecclesiastical relations by electing to continue its connection with the old organization, or attach itself to the new. Accordingly, at its first annual session after the convention at Louisville—to wit: in the year 1846—it adopted the following resolution:

433 **Resolved, 1. By the Baltimore annual conference in conference assembled, that we still continue to regard ourselves a constituent part of the Methodist Episcopal Church in the United States."

At the same time, another resolution was adopted, in the following words:

"Resolved, 2. That this conference disclaims any fellowship with abolitionism; on the contrary, while it is determined to maintain its well known and long established position by keeping the traveling preachers composing its own body free from slavery, it is also determined not to hold connection with any ecclesiastical body that shall make non-slaveholding a condition of membership in the church, but to stand by and maintain the discipline as it is."

The journal of this conference, containing these proceedings, it seems was submitted, according to the requirements of the discipline, to the next general conference of the Methodist Episcopal Church, and was approved, it is claimed, or at least no objection was made to the proceedings referred to.

The Baltimore conference continued its connection with the general conference of the Methodist Episcopal Church until the annual conference held at Staunton in March, 1861, when, in consequence of the incorporation in the discipline by the general conference at Buffalo, in May, 1860, of what is called the "New Chapter" on slavery, the following resolution, among others, was adopted:

"Be it resolved by the Baltimore annual conference in conference assembled, that we hereby declare that the general conference of the M. E. Church, held at Buffalo, in May, 1860, by its unconstitutional action, has sundered the ecclesiastical relation which has hitherto bound us together as one church, as far as any act of theirs could do so. That we will not longer submit to the jurisdiction of said general conference, but hereby declare ourselves *separate and independent of it, still claiming to be,

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notwithstanding, integral part of the M. E. Church."

This resolution was adopted by a very large majority of the members of the conference. Of the votes cast, only one being in the negative, the other members, disapproving the action of conference, not voting.

The new and independent position thus assumed by the majority of the members of the Baltimore conference was continued for several years. They held annual conferences during the war at different places in Virginia under the name and style of the "Baltimore annual conference;" and at an annual conference of this body, held in Alexandria in February, 1866, it was resolved to unite with and adhere to the Methodist Episcopal Church South.

In the meantime, the members of the conference held at Staunton in 1861, who disapproved the action taken by the majority there as without authority and of no binding force, adhering to the old organization of the Methodist Episcopal Church, and claiming to be the lawful Baltimore annual conference, held an annual conference at Baltimore in 1862, and annual conferences successively thereafter, being represented in the general conference of the Methodist Episcopal Church wherever held, and recognized by that body as the duly constituted Baltimore annual conference.

After the action of the conference at Alexandria, precisely when does not appear from the record, a vote was taken by the members of the congregation worshipping at "Harmony" church, on the question whether they would unite with the Methodist Episcopal Church South, and the vote was unanimous in favor of such union; but it appears that none of the members who adhered to the Methodist Episcopal Church were present when this vote was taken, or, if any were present, they did not vote.

After this action, it would seem, by the members of the congregation, or rather the greater part of them, on application to

435 *the circuit court of Loudoun county, the appellants and others were appointed trustees of "Harmony" church, and, it seems, they at once took control of the church building, admitting to the use thereof the ministers assigned by the conferences of the Methodist Episcopal Church South, and excluding from such use those assigned by the conferences of the Methodist Episcopal Church. This admission of one class of preachers and exclusion of the other continued until 1871, when the appellees filed their bill in this case for relief.

The appellants base their claim thus to control and apply the use of the building on several grounds.

1. They claim that the plan of separation agreed upon by the general conference of the Methodist Episcopal Church in 1844 was within the scope of the powers of that body, and therefore valid; that the action of the Baltimore conference at Baltimore in 1846, at Staunton in 1861, and of the conference at Alexandria in 1866, was, in each instance, authorized by that plan; that the Baltimore

conference, being a border conference, had the right, under the plan, to annex a condition to the continuance of its connection with the general conference of the Methodist Episcopal Church; that in 1846 it did annex such condition, with the acquiescence, if not approval, of the general conference; that this condition was broken by the general conference in 1860, and the Baltimore Conference was thus left free to dissolve its connection, as it did, with the general conference, and unite itself with the Methodist Episcopal Church South.

It was decided by this court in *Brook & others v. Shacklett*, supra, that the plan of separation, as also the actual separation under the plan, and the organization of the church in the south, were all valid acts. Like decisions have been made by the supreme court of the United States and the appellate tribunals of other states.

The error of the appellants consists, **436** I think, in the assumption *that under the plan of separation the border conferences were to be at liberty to impose terms and conditions in declaring their adherence to the old organization, and in the further assumption that the Baltimore conference, in the resolutions adopted in 1846, made the continuance of its connection with the general conference dependant on conditions which were accepted by the latter, the non-observance or breach of which conditions should authorize the Baltimore conference to terminate the connection and unite itself with the Church South.

I find nothing in the plan devised in 1844 giving countenance to the idea that after the contemplated separation had been carried into effect, a border conference should have the right to do more than merely make choice between the two churches—either to continue its connection with the church north, or attach itself to the church south. After the southern conferences had organized themselves as a separate and distinct ecclesiastical body, it could hardly have been designed by the general conference of the Methodist Episcopal Church to sanction and provide for a further disintegration to take place in some emergency that might arise in the indefinite future. The object was a peaceful, speedy, and permanent settlement of the pending difficulties. This object would have been defeated, partially at least, if the general conference had allowed the border conferences, in electing to continue their ecclesiastical connection, to make the continuance of such connection dependent on future contingencies. As before stated, the Baltimore conference was not represented in the convention of delegates from the southern conferences at Louisville in 1845. The action of that convention did not change the existing relation of the Baltimore conference to the general conference of the Methodist Episcopal Church. It left the Baltimore conference in full connection with that general conference, with the right to dissolve that connection, if it chose to do so, and adhere to *the Methodist Episcopal Church South. Unless, therefore, the Balti-

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more conference meant to adhere to the southern division, no action at all on its part would seem to have been necessary. Having determined not to change its ecclesiastical relations, the resolutions adopted were unnecessary. This would seem to be the fair construction of the resolutions of 1844, which looked to action of such only of the border conferences, stations, and societies, as desired to adhere to the church south. When the Baltimore conference in 1846, declared that it still regarded itself "a constituent part of the Methodist Episcopal Church in the United States," it only announced what would have been the result in any event, if no such declaration had been made. The resolutions did not put it in any new relation to the general conference, with which it stood already connected. The declaration, that it was "determined not to hold connection with any ecclesiastical body that shall make non-slaveholding a condition of membership in the church, but to stand by and maintain the discipline as it is," was in substance the declaration of a purpose to dissolve the existing relation in certain contingencies which might arise in the future. Such declaration added no new term to the existing union between the two conferences, and must have been so understood by both. It might have been made as well before as after the separation of the churches in 1845. The effect would have been the same.

The subsequent conduct of the Baltimore conference shows, that it did not regard its action in 1846 as modifying its pre-existing relation to the general conference and as deferring its choice of ecclesiastical relations under the plan of 1844, to be exercised in accordance with that plan on the happening of a contingency in the future. The action at Staunton in 1861, after the lapse of fifteen years from the adoption of the resolutions in Baltimore, was not based on any claim of right under the plan of separation **438** devised in 1844, but, as has been seen, in the alleged "unconstitutional action" of the general conference at Buffalo, in May, 1860. As, in the view I take, there was no new condition imposed by the action of the Baltimore conference in 1846, it is unnecessary to consider the action of the general conference in May, 1860.

So, as it seems to me, the first position taken by the appellants in support of their claim, cannot be maintained.

2. But it is further contended, that independently of the action at Staunton in March, 1861, the war which ensued ipso facto dissolved and put an end to all ecclesiastical connections between the people of the northern and southern states, and that the congregation of "Harmony" church was left free to form new church relations, and that the property rights of the congregation followed these relations.

I do not think the war, resulting as it did, had any such effect. One of the consequences was a suspension during hostilities of all intercourse between citizens not subject to the dominion of the same belligerent party. Between such citizens, also, while all legal

remedies on existing contracts and obligations were suspended, yet the contracts and obligations themselves, as a general rule, were not abrogated, but continued in force after the war terminated. The property rights of the members of the Methodist Episcopal church worshipping or entitled to worship at the Harmony church building were not extinguished or impaired by the war. They were the same at the close of the war and afterwards as at and before its commencement, and the test by which the title to the use of the building is to be determined remains the same. The congregation, although within the territorial limits of the Baltimore conference, which was a border conference, was not a "border society," within the meaning of the resolution of 1844, as was the case in *Brooke & 439 others v. Shacklett*, and *hence had no authority under these resolutions to determine by a majority of its members its adherence to the church south.

3. It is also insisted that the action of the congregation of "Harmony" church, after the conference at Alexandria held in 1866, operated to transfer the title and control of the property to that portion of the congregation which adhered to the Methodist Episcopal Church South. That action has already been adverted to, and is claimed to have been had under an act of the general assembly, passed February 18th, 1867 (acts of 1866-7, ch. 210, pp. 649, 650; Code of 1873, ch. 76, § 9), which had the effect, as contended, to transfer the control and use of the property as aforesaid. It is not clear, from the evidence, whether this action of the congregation was had before or after the passage of the act referred to. I should rather infer that it was in 1866, before the act was passed. If that were so, of course there would be nothing in the point made by the appellants on the operation of the act. But suppose it was after the passage of the act. It is a sufficient answer to the claim of the appellants based on this statute, that it does not appear by the record that the provisions of the statute have been fully complied with. The portion bearing on this case reads as follows: "And whereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall, in any such case, be lawful for the communicants and pewholders over twenty-one years of age, by a vote of a majority of the whole number, as soon as practicable after the passage of this act, or whenever such division shall occur, to determine to which branch of the church or society such congregation shall thereafter belong; and which determination shall be reported to the said court, and, if approved, shall be so entered on the minutes, and shall be conclusive as to the title to and control of any **440** property held in trust for *such congregation, and shall be respected and enforced accordingly in all the courts of this commonwealth."

A vote of the members of the congregation was taken at some time, as already stated,

but there is no evidence that the determination of the congregation manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes. Compliance with these requirements is essential to the effect given by the statutes. It seems, from the certificate of the judge, that he had before him as evidence in this cause, when he rendered the decree appealed from, the record of the appointment of the trustees, but that record is not before us, and it is not essential that it should be, in order to show the appointment of the trustees, as the appointment is not controverted.

It is to be observed, further, that the claim of title, based on proceedings under the statute, is not made by the appellants in their answer to the bill. It should have been so made, if intended to be relied on.

If this had been done, and the provisions of the statute had been complied with in every particular, the question would have been presented, whether the act does not encroach upon vested rights in putting it in the power of a majority of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority; and the further question, how the operation of the statute is affected, if at all, by the provision of the state constitution on "church property," art. II.

These are questions of interest and great practical importance. It is not necessary, however, to decide them in this case, as it is presented by the record, and I express no opinion upon them.

4. After the appeal had been allowed in this case, the appellants filed a supplemental petition alleging that a joint commission, appointed by the general conference, invested *with the power and charged with the duty of hearing and adjudicating cases in which there were adverse claims to church property on the part of the two churches, had, at Cape May, in New Jersey, on the 21st day of August, 1876, and while this case was pending here on appeal adjudicated the claim in the case in favor of the Methodist Episcopal Church South (what is represented as the original written adjudication being filed with the petition), and the prayer is, that this court will take notice of the adjudication and give effect to it.

While the christian spirit that prompted the appointment of this joint commission cannot be too highly commended, there is one reason all-sufficient why the prayer of the petition cannot be granted. The court is asked to pass on matters not in the record, and which, in fact, have arisen since the appeal was allowed. No issues have been made on the supplemental petition, and we cannot assume facts which are neither admitted nor proved. Moreover, this court, exercising appellate jurisdiction, cannot take original cognizance of matters which have never been litigated by the parties in the court below. If the petitioners have any remedy touching these matters, it is in that forum

in the first instance, not in this, and they will not be precluded from resorting to it by the decree which will be entered here.

The objection that the appellees are not members of the congregation, and therefore cannot maintain this suit, is answered by what has been said in the first part of this opinion.

One other objection only remains to be noticed.

It seems that several of the appellants, while acting as trustees of the church building before the war, and when their authority was not questioned, advanced money for repairing the building, and on a bill filed for the purpose in the county court of Loudoun, a decree was rendered in

442 *their behalf, ordering the building to be sold to pay for the advances, which decree has never been executed.

They now complain that this decree has been disregarded by the circuit court and their rights prejudiced thereby.

The record in the county court was before the judge of the circuit court when he rendered his decree, and it is a part of the record now before this court. In his decree he does not notice the decree of the county court, nor specifically the claim of the appellants for their alleged advances. which claim is set up in their answer to the bill, and proofs were taken in support of it. But I do not regard the decree of the circuit court as rejecting the claim for the alleged advances. On the contrary, an account is ordered to ascertain the value of the use and profits of the building, and "of the improvements made by the defendants." I apprehend, in taking the account ordered, if, for any reason, the decree of the county court should not be executed, the claim for advances may be brought in. A lien is expressly given by the terms of the deed to the trustees making advances for repairs, and in the case of Lynn, trustee, v. Carson's adm'r, decided by this court recently at Staunton, (supra 170), it was held that trustees of a church building for the use of a congregation of members of the Methodist church, making advances for repairing the building, have a lien, under the discipline of the church, on the building for such advances; which lien may be enforced in a court of equity.

The views presented on the main points in the case, which has been considered, apply as well to the case touching the parsonage property, and need not be repeated. If those views are sound, there is only one question of any difficulty in the latter case, and that grows out of the trusts declared in the deed of conveyance to the trustees. The trusts are rather more indefinite than those declared in the deed in the other case, and at first view appeared too vague to be brought within the operation of our statutes

443 *authorizing conveyances to the use of religious congregations. But a careful examination of the provisions of the deed, in connection with the discipline to which it refers, warrants, I think, the construction that the uses created are for the congregations or local societies within the circuit in

which the building is located. This would seem to be indicated by the reference in one case to "the duty of the minister or preacher in charge," which must mean the minister in charge of the circuit and the congregations or local societies within that circuit. So the trustees are authorized to sell the property for advances made by them, "after due notice to the preacher in charge," and, after paying the debt or debts, to "place the remainder of the proceeds of sale, if any, in the hands of the stewards of the church," &c.; the stewards being officers in the local societies. I think, upon the principles applied in *Brooke & others v. Shacklett*, the deed should receive a liberal construction, with the view to give effect to the trusts; and, although quite general in its terms, I am of opinion that it is a valid conveyance under our statute.

Objection is made that the complainants in the bill had no legal or equitable interest in the subject, and therefore could not maintain the suit. They were the preachers, duly assigned to the circuit, and had the right, under the deed, to be admitted to the use of the parsonage building through the medium of the trustees and the congregation. The bill is filed, not only on their behalf, but also on behalf of the congregation interested in the building, and such a bill, I think, may well be maintained.

In conclusion, it is urged that John R. White, one of the trustees, not being a party to the suit, the decree, for that reason, should be reversed. There was a demurrer to the bill for want of equity, and the fact that White was a trustee, and not a party, is stated in the answer of the appellants, but they did not ask that he should be made a party. All of the other trustees were

444 parties, and made *full defence. It is not perceived how they or those they represented could have been either benefited by White's presence, or prejudiced by his absence. He cannot be deemed an indispensable party for the purposes of the suit, when it is apparent that every defence he could have made might have been made and was made by his co-trustees.

Upon the whole matter in both cases, I am of opinion that there is no error in either of the decrees of the circuit court, and that they should be severally affirmed, without prejudice, however, to any rights and remedies to which the appellants and those they represent may be entitled under the action of the joint commission aforesaid.

I will only add, that it is matter of regret, that there should ever be a necessity for bringing controversies between religious bodies to the civil courts for decision. They are pre-eminently proper subjects for private adjustment, and this court therefore deemed is not improper, after these causes were submitted, to delay its decision awhile, indulging the hope, reasonably, we think, that the parties themselves would, in the meantime, come to some terms of settlement, so as to render a decision by this court unnecessary. After this delay, receiving assurance that no adjustment would or could be made by the parties, the court, in the exer-

cise of its only proper functions, has proceeded to dispose of the cases on legal principles.

Decree affirmed.

445 *Cowardin & als. v. Universal Life Ins. Co.

November Term, 1879, Richmond.

1. Foreign Insurance Company—Residence—Attachment.—An Insurance company, incorporated by the laws of New York, having its principal place of business in that state, which had complied with the laws of Virginia in relation to foreign insurance companies doing business in this state, by making the deposit, and appointing a citizen of Virginia an agent, by power of attorney, &c., as required by the statute of Virginia (Code of 1873, ch. 36, § 19), is *not a resident* of this state, within the meaning of the foreign attachment laws of Virginia, and the property of said insurance company is liable to such attachment as a *non-resident*.

2. Same—Same.*—Whilst a corporation may, by its agents, transact business anywhere, unless prohibited by its charter, or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter.

W. L. Cowardin and several others filed their bills in the chancery court of the city of Richmond against the Universal Life Insurance Company, to recover back certain premiums they had paid upon policies issued by said company. The bills charged that the company was a foreign corporation and had failed. And the plaintiffs sued out attachments, which were served on certain real estate in the city of Richmond, owned by the said insurance company.

The several bills were consolidated, and the Universal Life Insurance Company demurred to the bills and also answered. It is only necessary to state that they claimed that though the company was incorporated

446 by the laws of *New York, they availing themselves of the privileges conferred by the state of Virginia, appointed by written power of attorney, a citizen of Virginia resident here—to wit: L. W. Rose—its agent and attorney to accept service of all lawful process against it in this state, and cause an appearance to be entered in like manner as if it had existed and been served under process in this state, and also made the deposit with the treasurer of Virginia required by law, and in every other respect accepted and complied with the laws of Virginia in that behalf.

The facts being agreed that the Universal Life Insurance Company was incorporated under the laws of New York and had their principal place of business in that state, and that it had complied with the statute of Vir-

***Foreign Corporations—Citizenship.**—See also *U. S. Bank v. Merchants Bank of Baltimore*, 1 Rob. 573; *Connect't Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 643; *Bergner, etc., Co. v. Dreyfus*, 10 Am. & Eng. Corp. Cas., N. S., 590, and note, 602; 2 Min. Inst. (2nd Ed.) 1063.

ginia in relation to foreign insurance companies doing business in this state, by making the deposit with the treasurer of the commonwealth, and appointing an agent with the powers prescribed by the statute, the cause came on to be heard on the 2d of May, 1878, upon the demurrer to the bill, and the motion of the defendant to abate the attachments, when the court dissolved the demurrer; and ordered that all the attachments be abated. And thereupon Cowardin and two of the other plaintiffs applied to a judge of this court for an appeal; which was awarded.

Richard L. Maury, Johns & Bloomberg, Sands, Leake & Carter, John Hunter, F. M. Conner, and R. O. Stiles, for appellants.

Ould & Carrington, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on appeal from a decree of the chancery court of the city of Richmond.

447 *As the case is presented by the record before us, we are not required to pass upon the merits of the controversy.

The only question we have to determine is, whether the chancery court erred in abating the attachment sued out by the appellants (the attaching creditors) against the appellee, the "Universal Life Insurance Company."

This question, elaborately and ably argued by the counsel on both sides, is, we think, on examination of the record, a very narrow one. It is simply this—whether the Universal Life Insurance Company, a company incorporated by the state of New York, but doing business in this state, and complying with the requisitions of the statutes of this state respecting foreign insurance companies, is liable to suit in foreign attachment.

The solution of this question depends upon the further and sole question whether, in view of our statutes authorizing such companies to transact business in this state, they are to be regarded as residents of this state within the meaning of the foreign attachment laws.

If the appellee was, at the time of suing out the attachments in this case, resident in the state of Virginia, then the chancery court properly abated the attachment.

If, on the contrary, the appellee was non-resident of this state, it was error in the chancery court to abate the attachments sued out by the appellants.

Nothing is better established by all the cases and textwriters on the subject of corporations, than that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created. While it may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter. As was said by Chief Justice Taney, in *Bank of Augusta v. Earle*, 13 Peters' R. 519, "It exists by force of the law (creating it), and where that ceases to operate,

448 the corporation can have *no existence. It must dwell in the place of its

creation, and cannot migrate to another sovereignty." In *ex parte Schollenberger*, 6 Otto, 377, Chief Justice Waite said, "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws."

In Drake on Attachments (3d ed.), § 80, the proposition is stated, on abundant authority, as follows: "The foreign character of a corporation is not to be determined by the place where its business is transacted, or (even) where the corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered as an inhabitant of the state in which it was incorporated."

These general principles, respecting the residency or inhabitancy of corporations, cannot be denied or questioned.

But it is earnestly contended, with much ingenuity by the learned counsel for the appellee, that the case before us is taken out of the operation of these acknowledged rules of law applicable to corporations generally, by the provisions of our statutes respecting foreign insurance companies doing business in this state, and the decisions of this court construing such statutes. It is necessary, therefore, to refer to the statutes of this state, and to the decisions of this court construing these statutes, to determine whether these statutes and these decisions, remove this case out of the operation of the general legal principles above declared.

The 19th section of Chapter 36, Code of 1873, provides that no insurance company, unless incorporated by the legislature of the commonwealth, shall make any contracts of insurance within this state, until such insurance company shall comply with the provisions of the act as therein declared. One

of these provisions is, that every **449** such insurance *company shall, by a written power of attorney, appoint some citizen of this commonwealth, resident therein, its agent or attorney, who shall accept service of all lawful processes against such company in this commonwealth, and cause an appearance to be entered in any action, in like manner as if such corporation had existed and been duly served with process within this state. And the statute further provides, that every foreign insurance company, carrying on business in this state, shall first obtain a license for that purpose; and the conditions upon which such license shall issue is declared to be a deposit with the treasurer of the commonwealth, certain bonds therein named, to the amount of at least ten thousand dollars.

It is plain that these provisions of our statute simply grant to foreign insurance companies the privilege of doing business in this state, upon the conditions prescribed in the statute.

The decisions of this court relied on by the appellees counsel as construing this

statute and as declaring in effect that such foreign insurance companies are residents of this state, are the two cases of *Continental Ins. Co. v. Kasey*, 25 Gratt. 268, and *Connecticut Mut. Life Ins. Co. v. Duerson's ex'or*, 28 Gratt. 630. It is insisted that these cases determine that foreign insurance companies doing business in this state, and who have complied with the provisions of the statute above referred to, are residents of this commonwealth, and therefore no foreign attachment can be issued against them, they being residents and not nonresidents of this state.

In the first named case—*Continental Ins. Co. v. Kasey*—the only question was the right on the part of the company to remove the cause from the state court, where it was pending, to the circuit court of the United States. Whatever was said in that case was, of course, said with reference to the question of removal, and to that question only.

450 *That case was an action on a policy of fire insurance issued by the Continental Insurance Company, a corporation chartered by the state of New York, but doing business under a license granted by this state, after complying with the provisions of the statute in appointing its agent to acknowledge service of process, and depositing the required amount with the treasurer of the commonwealth. The question, as presented by the record in that case, did not involve the merits of the controversy, but, as stated in the very first sentence of the opinion, presented the single question, whether the company had the right to remove its case from the state court to the federal court.

Upon that question this court, after carefully reviewing the statutes respecting foreign insurance companies, said: "The plain object of these provisions of the statute is to give to our citizens the privilege of suing these foreign corporations in the courts of this state. It would be in the last degree a futile and incongruous provision of the law if the privilege to sue in the state courts is to be at once defeated; if the corporation, as soon as suit is brought, may remove the case to another and foreign jurisdiction. This would be to defeat the very object of the statute. These corporations are placed by our statute on precisely the same footing quoad hoc as home corporations, and when they come into this state and accept the provisions of our statute law, they become domiciled here; and as to all contracts and obligations made and assumed under the provisions of our laws, they are no longer citizens of another state, but are subject to the laws, to sue and be sued as citizens of this state. The Continental Insurance Company, though chartered by the state of New York, when it commences business in this state, and complies with the terms of the statute of Virginia, by making the necessary deposit and appointing an agent to accept process, becomes, as to all contracts with citizens of Virginia, domiciled here, and in conten-

451 tions with our citizens growing *out of

policies of insurance must sue and be sued in our state courts, and do not come within the terms or spirit of the act of congress relating the removal of causes from a state court to a federal court."

Now the general language here used must of course be explained with reference to the subject before the court; and the principles declared in general terms must be understood only with reference to the facts before the court and the case in hand.

In that case (*Continental Ins. Co. v. Kasey*), the only and single question (stated in the first sentence of the judge who delivered the opinion) was, whether the court below erred in refusing to remove the cause to the federal court.

To this proposition to remove the cause to another jurisdiction on motion of the foreign insurance company, this court (affirming the judgment of the circuit court) simply said to the company: "No; you cannot do this. You have come into this state to transact business upon the conditions which the statute laws of this state has plainly prescribed. You have accepted the privilege, from which the state had a right to exclude you altogether, and that privilege—to carry on business in this state—was upon the express condition that you should have an agent here to accept service of all the process in suits brought by citizens of this state on contracts made with you with reference to insurance. By accepting the conditions imposed by the statute, you have submitted to the jurisdiction of the state courts, and you cannot evade that jurisdiction by claiming that you are resident in another state. Quoad hoc you are a resident of this state, and domiciled here, so far as the right to sue you here, on all contracts of insurance made here, is concerned. Coming here, and availing yourself of the privilege to do business in this state, you accepted the provisions of the statute and waived quoad hoc your rights as a non-resident."

This is all the court meant to declare 452 and did declare in *the case of *Continental Ins. Co. v. Kasey*, and the language of the court, when construed with reference to the case in hand, means this and nothing more.

Certainly it was never intended in that opinion to declare the broad proposition that a foreign insurance company doing business in this state has its residence and inhabitancy in this state.

As was well said by Chief justice Campbell, in the Michigan case above cited, "Where a foreign insurance company submits itself to the exclusive jurisdiction of the courts of this state as a condition of doing business here, it waives any right it may possess as a quasi citizen of another state to remove its case to the courts of the United States"; and this was all this court decided in *Continental Ins. Co. v. Kasey*.

Nor is the more recent case of *Connecticut Mut. Ins. Co. v. Duerson's ex'or*, 28 Gratt. 630, at all in conflict with the views above expressed. Upon an incidental question raised in that case, on the plea of the statute

of limitations, Judge Anderson said, in careful and guarded language, "The company having a local existence and domicile in this state, for the purpose of being sued, the statute of limitations may be relied on just as if the company had been chartered by an act of the Virginia legislature." I understand the opinion in this case simply to declare that with respect to suits brought on contracts of insurance made in this state, the company complying with the terms of the statute has a local existence and domicile here with respect to such cases; and when sued in our courts may, like other defendants, plead the statute of limitations, or make all the defenses which any other defendant may make.

I am of opinion, therefore, that neither the statute law, nor the decisions of this court construing those statutes, changes the status of foreign insurance companies with respect to their residence and habitat. Under 453 the law, well established by the authorities above referred to, a foreign insurance company cannot change its residence or its citizenship. In the language of Chief Justice Waite, in *ex parte Schollenberger*, 6 Otto. 377, "it can have its legal home only at the place where it is located by or under the authority of its charter."

I am, therefore, of opinion that the Universal Life Insurance Company is a non-resident of the state of Virginia, and may be proceeded against as any other non-resident under our foreign attachment laws, and that the decree of the chancery court abating the attachment must be reversed.

The decree was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel is of opinion, for reasons stated in writing and filed with the record, that the decree of the chancery court of the city of Richmond abating the attachments sued out in these causes was erroneous; it is therefore decreed and ordered that the said decree of the said chancery court be reversed and annulled, that the appellants recover against the appellees, the Universal Life Insurance Company, their costs by them expended in the prosecution of their appeal here. And this court, now proceeding to enter such decree as the said chancery court ought to have rendered, doth decree and order that the said attachments were properly sued out against the said Universal Life Insurance Company; the said company, in the opinion of this court, being a non-resident within the meaning of the foreign attachment laws of this state.

Decree reversed.

454 *Roudabush v. Miller & als.

November Term, 1879, Richmond.

1. Judicial Sales—Reopening Biddings.—

The English practice of—as a matter of course—opening the biddings of a sale made by the master under a decree of the court, upon the offer of a

reasonable advance bid, has not been adopted in Virginia.

2. *Same—Same.*—Whether the court will reopen the bids after such a sale, is a question addressed to the sound discretion of the court, subject to the review of the appellate tribunal; and the propriety of its exercise depends upon the circumstances of each case, and can only be exercised when it can be done with a due regard to the rights and interests of all concerned—the purchaser as well as all others.

3. *Same—Same.*—When a sale has been fairly made, and for a fair price, it should never be set aside when there is good reason to believe that the upset price has been offered to gratify ill will towards the purchaser.

4. *Same—Rights of Bidders.*—Where two or more persons desire to acquire different parts of a tract of land which is offered for sale at public auction by commissioners under a decree of the court, with respect to the convenience of the several parcels to their own lands respectively, it is not unlawful or improper for them to bid for the whole tract when it is offered to the highest bidder, with the understanding that they will divide it between themselves, and how they will divide it, if they should become the purchasers, and that each one shall be bound to comply with the terms of purchase as to his own part, as agreed between themselves.

This is a sequel of the case of *Jennings & als. v. Shacklett & als.*, reported 30 Gratt. 765. The case was heard at Staunton, but was decided at Richmond.

455 *When the cause went back to the circuit court of Rockingham county, a commissioner reported an account of the liens existing upon the lands of the defendant Jennings, and their priorities, dividing them into eleven classes, and making the whole amount, principal and interest, up to January 1st, 1879, \$10,871.27. And the court, confirming the report, decreed that unless, &c., J. S. Harnsberger and Robert Johnston, appointed commissioners for the purpose, were directed to sell the lands of said S. B. Jennings, and his interest in lands, or so much, &c., at public auction on the following terms, viz: cash in hand sufficient to pay costs of suit and expenses of sale, the residue in four equal annual payments, with approved personal security, and lien retained as ultimate security; but not until four weeks' notice of the time, terms, and place of sale shall be given by advertisement in one or more newspaper of said county, and by like notice posted near the land.

The commissioners reported that, after advertising as directed in the decree, they

*Judicial Sales—Reopening Biddings.—

The principal case is cited, and its principles applicable to the reopening of biddings is sustained in *Berlin v. Melhorn*, 75 Va. 639; *Hansucker et al. v. Walker et al.*, 76 Va. 753; *Effinger v. Kenney*, etc., 79 Va. 553; *Todd v. Gallego*, etc., Co., 84 Va. 590. See also *Moore v. Triplett*, 96 Va. 609; *Hudgins v. Lanier*, 23 Gratt. 494; *Beach v. Rice*, 27 Gratt. 812; 2 Min. Inst. (4th Ed.) 380, where the doctrine and practice of reopening biddings, upon the offer of an advance bid before the confirmation of the sale, is explained and deprecated.

sold the several parcels of land owned by Dr. S. B. Jennings, or in which he had an interest, and they set out the different parcels sold, the purchasers, price, &c.; but the controversy in this case relates only to one of the tracts. Of this tract they report: The one hundred and forty-three acre tract and the fifty acre tract, which are known respectively as the Home farm, upon which the mill is situated, and the Baugher or Roudabush tract, constituting one tract of cleared land of one hundred and ninety-three acres, was knocked off to Dr. S. P. H. Miller, as the agent of Mrs. Sallie C. Miller, Dr. Joseph H. Wolfe and Charles W. Harnsberger, with the understanding that each wanted certain parts or parcels of the same—as the same was situated contiguous to their other lands—and that each should comply with the terms of sale for their respective parts at the price of \$25 per acre; that is to say, the 193 A. at \$25 per acre, amounting to

456 \$4,825. *They then state that these parties have satisfactorily complied with the terms of sale as follows, viz, &c.

The commissioners further report that in selling the one hundred and ninety-three acres of cleared land, they first offered it as a whole, and received a bid of \$24 per acre—\$4,632. They then held this bid, and offered the whole one hundred and ninety-three acres, less the mill and ten acres therewith, and all necessary water privileges for the mill; and they were offered, for the one hundred and eighty-three acres, bid of \$19 per acre, and \$700 for the mill, ten acres and water rights. They then offered the land in two other parcels, which they set out. That the highest bid was given upon the first offer as a whole, so the tract as a whole was re-offered at \$24 per acre, and was run up to \$25 per acre; and this being considered over the assessed value for taxation for the year 1878, they knocked the same off, as before stated.

In June, 1879, John H. Roudabush presented his petition in the cause, in which, expressing the belief that this tract of land did not bring an adequate price and could be sold for more, he offered a bid of ten per cent. advance upon said bid, and binds himself to make good the said bid if the said land is exposed again to sale. He offered, as his sureties to make good the said obligation. Hiram A. Kite and William E. Kite. And they signed the petition with Roudabush.

A number of affidavits were filed with reference to this application. Their substance is sufficiently set out in the opinion of the court delivered by Judge Anderson.

The cause came on to be heard on the 30th of June, 1879, when the court refused to open the bidding; and, among other things, decreed that the sale of the tract to Mrs. Miller, Wolfe, and Harnsberger, be confirmed. And thereupon Roudabush applied to a judge of this court for an appeal; which was awarded.

457 *Robt. Johnston and John E. Roller, for the appellant.

Wm. B. Compton and G. E. Sipe, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The sale which is sought to be set aside in this case was made by commissioners under a decree of the circuit court of Rockingham county, reported to the court and confirmed. The sale was made upon full notice to the public, and upon the terms required by the decree, and was conducted by the commissioners with fairness, and evidently with the view of getting the best price for the land it would command.

They first sold Dr. S. B. Jennings' life interest in the twenty-five acres of land, which had been assigned to the heirs of Mrs. Ann Jennings, and which was purchased by her children, and the sale to them was confirmed, and there is no objection made to its confirmation. The tract of one hundred and ninety-three acres of cleared land, consisting of a tract of one hundred and forty-three acres, and a tract of fifty acres, known as the Home farm, upon which the mill is situated, were offered together, and were knocked off to Dr. S. P. H. Miller, the agent of Mrs. Sallie P. Miller. Dr. Joseph H. Wolfe and Charles W. Harnsberger, at the price of \$25 per acre, with the understanding that they would divide it between themselves, and each one comply with the terms of the sale as to their respective parcels, as they should agree amongst themselves. Accordingly, Sallie C. Miller took 111 acres, 3 roods and 37 poles thereof, at \$31.51 per acre, amounting to \$3,528.70, and complied with the terms of the sale as the purchaser thereof; Dr. Wolfe took 20 acres off the east side of the 193 acres, at the price of \$16 per acre, amounting to \$320, and complied with the terms of the sale as the purchaser thereof; and C. W. Harnsberger took 61 acres and 3 poles off the south

458 side of the *193 acre tract, at the price of \$16 per acre, amounting to \$976.30, and complied with the terms of sale as the purchaser thereof—the whole aggregating four thousand eight hundred and twenty-five dollars: the sum for which it sold at \$25 per acre. This sale was reported to the court and confirmed.

There was another tract sold, which, on account of the insufficiency of the security, in the opinion of the commissioners, was not confirmed; and there was a tract sold to George W. Harnsberger which was not confirmed. There is no question upon this appeal as to the correctness of the decree in respect to the said two tracts, and it need not be further noticed in that regard.

The commissioners first offered the 193 acres as a whole, and received a bid of \$24 an acre—\$4,632. They held this bid, and then offered the mill with ten acres and water rights, and the residue of the 193 acres, separately. For the latter the highest bid they received was \$19 an acre, and for the former—the mill with ten acres and water rights—\$700. They then offered the land in two other parcels; and the bids not together equaling the highest bid which had been made for the tract as a whole, they again offered the 193 acre tract as a whole at \$24 an acre, when

it was run up to \$25 an acre, at which it was knocked off, as before stated.

Where two or more persons are desirous of acquiring different parcels of a tract of land, which is offered for sale at public auction by commissioners, under a decree of court, with respect to the convenience and advantage of the situation of the several parcels to their own lands respectively, it is not unlawful or improper for them to bid for the whole tract where it is offered to the highest bidder, with the understanding, that they will divide it between themselves, and how they will divide it, if they should become the purchasers, and that each one shall be severally bound to comply with the terms of purchase as to his own part, as agreed between themselves.

459 *And when the sale of it as a whole is suspended by the commissioners, and the same is offered in parcels, with the view of getting a better price for it, those who bid for it as a whole, with an understanding to divide it amongst themselves, are not bound to bid for it when so offered, provided they do nothing to repress the bids of others. And when the commissioners, finding that it will not bring as much when sold in parcels as it will bring offered as a whole, offer it again as a whole, it is entirely competent for the said parties to bid for it, and to enter into the competition for its purchase as a whole, though they refrained from bidding for it when offered in parcels, with the understanding that they will divide it among themselves, and that each one will be responsible for the purchase of his part, provided such arrangement is fairly made, and they do nothing to repress the bidding of others. We can conceive of no good reason, when a tract of land is offered for sale, why parties who bona fide wish to purchase different parts of the same, and neither of whom wish to purchase the whole, may not agree to unite in the purchase of the whole, and then divide it between themselves, or why they should be required to bid for it in parcels, when the decree, as in this case, does not require it to be sold in parcels.

Where the land was put up for sale in parcels, there was nothing to prevent any of those present to bid for either parcel; and Hiram Kite, who, we concur in the opinion of the circuit court, is the prime mover in this proceeding to set aside the sale, and to reopen the bidding, had every opportunity to bid for either parcel, and to have purchased it, if he had been willing to have bid more than others were willing to pay for it, and others present were not willing to bid as much for the several parcels as would amount in the aggregate to the price at which the sale of the tract as a whole had been suspended, and consequently the commissioners offered it again as a whole

460 *to the highest bidder, and Dr. Miller, for and on behalf of the parties before mentioned, being the highest bidder for the tract of 193 acres, the same was knocked off to him.

The affidavit of Joseph H. Kite, as to what J. G. H. Miller said to him, is hearsay, and

is inadmissible as evidence against the appellees. And the same remark is applicable to the affidavit of Samuel C. Naylor, as to what William H. Marshall said to him. It is not evidence for the same reason. The affidavit of Hiram Kite, of the conversation between him and Dr. S. P. H. Miller, after the land was knocked off to said Miller, does not comport with what said Miller and C. W. Harnsberger testify as to that conversation, nor with the reply made by Dr. Miller to the inquiry of said Hiram Kite while the property was being cried at \$24 an acre—that is, “Who was in with him?”—that “he was bidding for his wife, C. W. Harnsberger and J. H. Wolf”—nothing said about J. G. Miller or William H. Marshall being in with him. If they were, there is no reason why he should not have disclosed the fact as to them, as well as to others; and the same statement, he testifies, he made to the commissioners before the sale began, that it was his intention to bid for his wife, C. W. Harnsberger and J. H. Wolf—nothing said about J. G. Miller or William H. Marshall. And this statement is confirmed by the commissioners in their report; that the 193 acres of land was knocked off to Dr. S. P. H. Miller as agent of Mrs. Sallie C. Miller, Dr. Joseph H. Wolfe and Charles W. Harnsberger, with the understanding that each wanted certain parts or parcels of the same, &c.; and the sale was reported as made to these parties severally of parcels of the 193 acres, which included the mill property—no part of it reported as sold to J. G. H. Miller or William H. Marshall. If such was the fact, it could have been proved by them. They were competent witnesses, and the appellant might have taken their affidavits or deposi-

461 tions. *Certainly proof of their hearsay declarations, upon such vague and unsatisfactory evidence that they were associated or united with Dr. Miller in the purchase, could not be relied on against Mrs. Sallie C. Miller, Dr. Joseph H. Wolfe and C. W. Harnsberger, as evidence against them to set aside a sale, which the commissioners reported to the court was made to them, and which was confirmed by the court, and to the confirmation of which no objection was made by the said J. G. H. Miller and William H. Marshall. But suppose that it had been agreed by them and Dr. Miller, that if he purchased the whole they would take the mill and ten acres of land, part and parcel, of the purchase, it was an agreement which they had a right to make, and could not vitiate the sale; the sale having been for the full value of the property, according to the decided preponderance of the testimony, and there being no evidence or even an imputation of fraud or unfairness.

But the appellant, John H. Roundabush, objected to the confirmation of the sale of the Home farm—the 193 acre tract—and offered to the court a bid of 10 per cent. advance upon the price at which it was knocked off to Dr. Miller, agent as aforesaid, if the land should be again exposed to sale, and tendered as his sureties Hiram A. Kite and William E. Kite, who in fact signed his petition. There was

no objection to the sufficiency of the security. But the court declined the offer and confirmed the sale; and assigned as its reason, "that the evidence proves that the land sold for its fair value, and that H. A. Kite, the real party who put in an advance bid, was present at the sale, and was then just as able to purchase as he is now. The upset bid, nominally made by Roudabush, ought not to be accepted, because it is proved that he owns no property except what is exempt by law, and as a consequence will not be able to comply with the terms of sale, if he should become the purchaser. Kite is the real party, and Roudabush, who is wholly irresponsible, is his surety. *Whether a resale of property should be directed depends upon the circumstances of the particular case. If the sale was fairly made, and the terms of sale have been complied with by the purchaser, it ought not to be set aside, except upon the strongest grounds. The purchaser is frequently subjected to considerable inconvenience in making his arrangements to purchase, and has the right, after he has made the purchase at a fair price, and has complied with the terms of the sale, to expect the court to confirm the sale." The foregoing reasons assigned by the court for its ruling are, we think, in the main, sound. Its refusal to accept the offer of an advance bid, to set aside the sale, and reopen the biddings, is assigned as error, and is the only remaining ground, and in fact the main ground upon which the appellant seeks to reverse the judgment. It raises the question, whether the court is bound to set aside a sale made by commissioners under its decree, when an advance bid is offered and well secured? The practice in England, was, formerly, to refuse a confirmation of the sale, and to reopen the biddings, whenever an advance bid was made of sufficient amount and the money deposited or well secured.

In *Duncan & als., trustees, v. Dodd*, 2 Paige's R. 100, the chancellor said, by the practice of the English court of chancery it is almost a matter of course to open the biddings on a master's sale, before the confirmation of his report, upon the offer of a reasonable advance on the amount bid and the payment of the costs and expenses of the purchaser. As a general rule, an advance of 10 per cent. is sufficient to authorize a resale. * * * The English practice as to opening biddings has not been adopted in this state (New York), and it is probably not desirable that it should be introduced here. In *Williams v. Atkenborough* (Tur. & Rus. R. 70), Lord Eldon says, "During a period of nearly half a century which I have passed in this court, and in which Lord Apsley, 463 Lord Thurlow, the *lord's commissioners, with Lord Loughborough at their head, then Lord Loughborough as chancellor, and after him the lord's commissioners, with Chief Baron Eyre at their head, have presided, I have heard one and all of them lament that the practice of opening biddings was ever introduced." And the chancellor goes on to say, "If such are the opinions of English chancellors as to the dangerous tendency of the practice in that country, where real estate has, comparatively, a fixed and certain value, a resale ought not to be granted here except in very special cases." And again he says, "It is essential to the interests of those whose property is thus sold, that purchasers should continue to retain full confidence in the safety of such purchases; and that they will not, as a matter of course, be disturbed, merely because a good bargain has been obtained."

From a long experience, the English government became so well satisfied of the evils resulting from this practice, that it has been abolished by an act of the British parliament during the present reign. 30 and 31 Vict. c. 48, cited 1 Snyd. Vendors, p. 161 note (a).

Chancellor Kent says, "The English practice of opening biddings, on a sale of mortgaged premises under a decree, does not prevail, to any very great extent, in this country." (4 Kent. Com., p. 191-2.)

Judge Lomax says, "We are not warranted by any reported decision of the highest tribunal in Virginia, to pronounce positively what is the course of practice in this particular in this commonwealth." And he cites the opinion of Chief Justice Marshall, in *Ross v. Taylor*, to the effect that it is not a doctrine of equity, but a practice established by particular courts. But in Virginia he says, "the courts have established a different practice. The purchaser is entitled to his purchase, and cannot recede from it. The benefit or loss is largely his, and it requires some impropriety, which vitiates the transaction, to set it aside." Since the above was written by Judge Lomax there has been some expression of opinion in this court on the subject. In *Effinger v. Ralston & als.*, 21 Gratt. 430, Judge Moncure, after stating what were some of the rules of the English practice on this subject, expresses the opinion that the same practice and rules substantially exists in this state, though not in all the states of the Union. But he said they did not apply to that case. The question was not involved in that case, and was not decided.

In *Hudgins v. Lanier, Bro. & Co.*, 23 Gratt. 494, an advance bid was tendered. But the circuit court declined it, and confirmed the sale, and the decree was affirmed by this court. Judge Staples delivering the opinion of the court said: "It is obvious that this is no such substantial and material advance upon the price obtained by the commissioners as would justify the court in annulling the sale already made, and exposing the creditors to all the delays and hazards attending a resale. There is no doubt the property was sold at a very advantageous price; the sale was fairly conducted, and the terms of the decree fully complied with. * * * It would be a bad precedent, leading to most pernicious consequences, to vacate a sale made under such circumstances, because the owner may be able to find some one willing to advance a small sum in excess of the commissioner's sale. Such has not been the practice in Virginia."

It has never been decided by this court how

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far the English practice has been adopted in this commonwealth. It has been held that the commissioner of sale is the agent of the court, and that his proceedings are subject to revision and control, and whether the court will confirm the sale will depend upon the circumstances of the particular case. It has never been held that for mere inadequacy of price the court should set aside the sale. That question has not been decided by a full court. *Curtis v. Thompson*, 29 Gratt. 474. "If there is reason to believe that fraud

465 *or mistake has been committed, to the detriment of the owner or purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty to the injury of the parties interested, the court will withhold a confirmation." *Brock v. Rice & al.*, 27 Gratt. 812. Judge Staples speaking for the whole court in that case, said, "The court, however, in acting upon a report of sale, does not exercise an arbitrary but sound discretion in view of all the circumstances. It is to be exercised in the interest of fairness, prudence and with a just regard to the rights of all concerned. That is not done when no respect is had to the rights and interests of the purchaser. That is not the case when the court seeks to extort every dollar it can get from the purchaser, and refuses to confirm a sale fairly made, because he has gotten a good bargain.

In a proper case, where it would be just to all the parties concerned, this court may be understood as having sanctioned a practice in the circuit courts, in the exercise of a sound discretion, of setting aside a sale made by commissioners under a decree, and reopening the bidding upon the offer of an advanced bid of sufficient amount deposited or well secured; and to that extent the former English practice has been allowed in this state. But it has never been held that it is imperative upon the courts to set aside the sale, and reopen the bids. It is a question addressed to the sound discretion of the courts, subject to the review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case, and can only be rightfully exercised when it can be done with a due regard to the rights and interests of all concerned—the purchaser as well as others. Where the sale has been fair and for a fair price, it should never be set aside, when there is good reason to believe that the upset price has been offered to gratify ill will or malice towards the purchaser.

In this case the decided preponderance of evidence proves that the land in question sold for a fair price, at a *fair sale; that John A. Roudabush, the appellant, had really no interest in setting it aside; that though, at one time, a creditor of Dr. Jennings, the judgment in his name was for the use of another; but if the debt were still due to him, that the prior liens were greater in amount than any price for which the land could be resold, upon any reasonable calculation, and would leave nothing to be applied to his judgment; that he was not the owner of any property over and

above his homestead, or what he would be entitled to hold under the poor law, and was wholly unable to take the land at his advanced bid and pay for it, and that the advanced bid he offered of 10 per cent. is the precise amount which Hiram Kite threatened Dr. Smith he would offer, and set aside the sale to him, if he did not let him have fifty acres of the land he had purchased, and is ostensibly surety for Roudabush in the offer he made. We are of opinion that the circuit court was warranted in its conclusion that the offer was made for Hiram Kite, and that he was really the principal, and the appellant, though nominally the principal, was really surety, and that it was merely a contrivance to defeat the sale, which has been fairly made and for a fair price, and the purchasers were entitled to their bargain, and that the circuit court was right in rejecting the offer of an advanced bid and confirming the sale. We are of opinion, therefore, to affirm the decree, with costs.

MONCURE. P., concurred in many of the views expressed in the opinion of the court and in the decree; but he thought the English practice was settled, and that was our law, and can only be changed by legislation. Decree affirmed.

467 *Great Falls Manuf'g Co. v. Henry's Adm'r.

November Term, 1879, Richmond.

Appeal—Review.—In an action of covenant upon a lost instrument, there is a verdict and judgment for the plaintiff. On a motion by the defendant to set aside the verdict and grant him a new trial, which is overruled, the exception sets out all the evidence. If the evidence of the plaintiff is believed, the verdict is correct. If the evidence of the defendant is believed, it is erroneous. An appellate court cannot reverse the judgment.

The case is stated by Judge Moncure in his opinion.

S. F. Beach, for the appellant.
Claughton, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Fairfax county, rendered in an action of covenant brought by James M. Stewart, sergeant of the city of Alexandria, and as such committee administrator of William Henry, deceased, against the Great Falls Manufacturing Company. The action was brought on the 27th day of July, 1872. In the declaration the plaintiff averred that "on or about the 5th day of December, 1853, the said Great Falls Manufacturing Company, by its certain writing obligatory, signed by the president of the said company, and sealed with the corporate seal of 468 the said *company, which said writing obligatory has been lost or destroyed,

***Appeal—Review.**—See also *Dean v. Com.*, post, 812, and foot-note; 4 Min. Inst. (2nd Ed.) 978 et seq.

and therefore cannot now here be shown to the court, the date whereof is the day and year aforesaid, did covenant, promise and oblige itself as follows—that is to say, that it, the said defendant, would pay to the said William Henry, for the board of the employees of the said defendant, \$2.50 per week for each white employee, and \$2 per week for each colored employee of said defendant, and did further promise and oblige itself to pay to the said William Henry, for supplies of clothing, groceries, tobacco, and whiskey, to be supplied to said employees of said defendant by the said William Henry, to the amount of ten dollars per month to each employee; and the plaintiff further averred, “that the said William Henry, in his lifetime, did furnish and supply the said employees of the said defendant with board, clothing, groceries, tobacco and whiskey, in the manner and form provided for in the writing obligatory aforesaid, to the amount of twenty-one hundred and fifteen dollars—to wit: for and during the months of December, 1853, and January, February and March, 1854—and that an accurate account and bill of particulars of the same was rendered to the said defendant, which the said defendant acknowledged to be just and correct.”

Then follows an averment, in due form, of a breach of the said covenant, by the non-payment of the said sum of money or any part thereof, to the said William Henry in his lifetime or to his personal representative aforesaid since his death, and by the defendant's refusal to pay the same to them or either of them.

Various proceedings were afterwards had in the case, which need not be here mentioned, and only such will be mentioned as are deemed material to a proper decision of the case.

Issue was joined by a general replication to a plea of “covenants performed.”
 469 That issue was tried by a jury *on the 10th day of June, 1876, which jury found a verdict in the case in these words: “We, the jury, find the issue joined for the plaintiff, and assess his damages, by reason of the breach of covenant, at eleven hundred and eighty-eight dollars, with interest thereon from the first day of May, 1854.” Whereupon, it was “considered by the court that the plaintiff recover of the said defendant the damages by the jurors aforesaid assessed, also his costs by him in his behalf expended.”

In the course of the proceedings in the court below, two bills of exceptions were taken to opinions given by the said court, one of which was taken by the plaintiff and the other by the defendant. The former need not be further noticed. The latter embraces the only question presented for the decision of this court, and will now be stated, considered and disposed of.

The jury having returned the verdict aforesaid, the defendants moved the court to set aside the verdict and grant them a new trial, which motion the court overruled. To this ruling of the court the defendants ex-

cepted, and prayed that their bill of exceptions might be signed, sealed and enrolled, which was accordingly done; and that is the bill of exceptions which presents the only question now remaining to be considered.

In that bill of exceptions, all the evidence which was given on the trial of the issue in the case, on either side, is fully set out just as it was given by the witnesses; and there is in the record no certificate made by the court below of the facts proved on the trial. In fact, no such certificate was made. In the first place, there is set out in the said bill, the testimony introduced on the trial in behalf of the plaintiff, consisting of the depositions of six witnesses, which are very long and full, viz: 1st. The widow of the plaintiff's intestate; 2d. Wm. M. Hubbell; 3d. Joseph O'Donnahue; 4th. Oscar Lee; 5th. Richard F. Jackson; and 6th. Pat-

rick Kelly. In the second place, *there is set out in the said bill the testimony introduced on the trial in behalf of the defendant, consisting of the depositions of two witnesses, which are also very long and full—viz: 1st. Richard Hirst, including the exhibits referred to and filed with his deposition; and 2d. John Carroll Brent; and also the oral testimony which is set out in said bill of exceptions of two other witnesses named, Anderson and Wm. Dickey, introduced by the defendant.

The question which this court has now to decide is, whether it will affirm the said judgment of the circuit court or reverse it for the supposed error of the said court in overruling the motion of the defendants in the court below to set aside the verdict and grant them a new trial.

Nothing seems to be clearer than that the testimony introduced by the plaintiff, taken by itself and regarded as true, establishes beyond all controversy the right of the plaintiff to the verdict and judgment obtained by him in the court below; while it may no doubt be said with equal truth, that the testimony introduced by the defendant, taken by itself, and regarded as true, establishes, just as clearly, the right of the defendants to a verdict and judgment in the cause.

But the question now before us is, what are the rights of the parties respectively, after a jury has rendered a verdict in favor of the plaintiff upon the testimony in the cause, and the learned judge who presided at the trial and saw the witnesses and heard them testify, was satisfied with the verdict, and overruled the motion of the defendant to set it aside? Can the appellate court undertake to decide that the jury and the judge who presided at the trial, erred in believing to be true a material part of the testimony necessary to maintain the plaintiff's right of action, and therefore reverse the judgment, set aside the verdict, and remand the cause to the court below for a new trial to be had therein.

That an appellate court has no such
 471 power, or, at least, *ought not to do so in such a case, is clearly shown by authority, as will fully appear by reference to

cause of action, it is a sufficient compliance with the aforesaid section of the statute, need not be decided, as the case turns upon other questions; and no objection to the judgment on this ground was made by the defendant in his petition to the court which rendered the judgment, under § 5 of ch. 177 of the Code of 1873, to set it aside. Nor was it set aside and annulled by the circuit court upon this ground but upon the ground that the special count did not show that the plaintiff had any cause of action. The court reversed and set aside the judgment upon that ground, and ordered the cause to be redocketed, with leave to the plaintiff to amend his declaration. But the plaintiff refused to amend, and the court thereupon dismissed his action; to which rulings of the circuit court the plaintiff filed a bill of exceptions, and obtained a writ of error from this court.

Whether the special count in the declaration sets out a cause of action for the plaintiff depends upon the question whether it was unlawful for the defendant to require each package of the plaintiff's tobacco intended for export to be stamped, and to collect from the plaintiff 25 cents for each stamp so affixed to each package? The plaintiff contends that the act of congress requiring and authorizing it is in conflict with the constitution of the United States, which ordains by the 5th clause of § 9, article 1, that "no tax or duty shall be laid on articles exported from any state;" and he contends that this is a tax on the exportation. If it is a tax or duty, it is clearly unconstitutional.

The learned counsel for the plaintiff has argued with ability, and cited numerous authorities and several decisions of the supreme court, to show that the charges to which the plaintiff was subjected for export stamps were taxes on exportation. He argued with much force to show that the stamps in this case were not necessary to segregate the tobacco which was for
476 exportation from that which was *for home consumption, as under the regulations of the treasury department, which have, by the revised statutes, the force of law, every exporter, as the plaintiff here, had to sign a bill of lading and give an export bond in double the amount of tax, conditioned that he will return a landing certificate from abroad, with consul's certificate, &c.; the expenses of which the exporter had to pay, with the addition of 12 cents per 100 pounds, to the officers for seeing to the affixing and cancellation of the export stamps. It would seem, therefore, that the export stamps were not necessary to segregate the tobacco, nor to protect the government against fraud, as the government held the bond of the exporter for the entire tax, which could not be cancelled until the return of landing certificates as aforesaid.

These are certainly heavy burdens upon the article of tobacco exported from a state, in addition to the enormous revenue collected from this article, when intended for domestic consumption; a burden of taxation upon the producer, which acts unequally in different sections of the Union, and it is be-

lieved with great harshness on the producer. And the inquiry has been suggested, whether the levying of such a tax by congress is an assumption of power warranted by the constitution? But this is not the tribunal whose authority is effectual to remove the burden, in either case, if it be an unconstitutional imposition.

We do not mean to deny the jurisdiction of the state court to construe and pass upon the constitutionality of a revenue act of congress, when it becomes necessary in the decision of a cause which is rightfully before it, just as the supreme federal court may construe a state law and decide whether it is consistent with the constitution of the state, when it has not been judicially determined by the supreme court of the state; but if it has been judicially construed and determined by the supreme tribunal of the state, will be governed by its adjudication. So, we think, whilst the supreme court of the state

477 has jurisdiction to construe and *to pass upon the constitutionality of a revenue act of congress, when it is necessary to the decision of the cause before it, yet if the same act and its agreement with the constitution of the United States has been judicially determined by the supreme court of the United States, its decision is conclusive and final, and must be respected by the state tribunal. And since the supreme court of the United States, by authority of an act of congress, with the acquiescence of the states, is in the daily practice of exercising jurisdiction to review and revise decisions of the supreme tribunals of the states, in such cases, it would be vain and futile, and would not subserve any useful purpose, for the state court to be governed by a different principle. If it were an original question, which had not been passed on by the supreme court of the United States, we should find it difficult to hold that the money so collected from the exporter, by authority of an act of congress, which requires it to be paid into the United States treasury, was not a tax, and a tax in disguise upon the exportation of the article from a state. But under our mixed form of government federal in some of its features, and national in others, it is important to preserve the line of separation between the jurisdiction of the state and federal courts; and it will be as inimical to the harmony of the system for the state courts to encroach upon the jurisdiction of the federal as for the latter to encroach upon the former; though the danger is from the latter and not from the former. If the burden, in either case referred to, be an unconstitutional imposition, this tribunal has not the power to afford effectual relief. The only tribunal that can give judicial relief which will be effectual is the supreme court of the United States. And if it cannot be obtained by a resort to that tribunal, the only means of redress which is left to those who are oppressively burdened is by an appeal to congress to repeal the obnoxious laws.

The precise question involved in this
478 case was decided *by the supreme court of the United States since the institu-

tion of this suit, in *Pace v. Burgess*, collector, 92 U. S. R. 372, which affirms the constitutionality of the act of congress—holding that the collection of 25 cents on each package of tobacco for exportation, from the exporter, is not a tax on the exportation of the article. In that case *Pace* was required to pay for the stamps affixed to the packages of tobacco he exported the sum of \$5.090. The question raised in this case is a *res adjudicata*, and is no longer an open question, so far as that tribunal is invested with power to determine it.

It is essential to every government that it should have the power to enforce its own revenue laws; and that the decisions of its court of last resort, and of highest judicial authority, as to their constitutionality, should be final and conclusive. It is important that the administration of the revenue laws should be uniform in every part of the United States, which would be impracticable if the state courts were clothed with co-ordinate powers to pass upon the constitutionality of such laws. It is not likely that there would be uniformity of decision by the several state courts, and consequently a revenue law of the United States would be in force in one state and disregarded in another. We are of opinion that the final and conclusive adjudication of the constitutionality of a revenue law of congress, and its construction, belongs to the jurisdiction of the supreme court of the United States, just as the adjudication of a state law—its construction, and whether it is consistent with the constitution of the state—belongs to the jurisdiction of the supreme court of the state, and is final and conclusive; and an encroachment by the state court upon the jurisdiction of the federal court would be as unwarrantable as an encroachment by the latter on the former. It is important to the states, as well as to the United States, that the jurisdiction of both courts should be well defined and sacredly observed. With

479 these views, we must regard *the decision of the supreme court of the United States, in *Pace v. Burgess*, collector, as decisive of the same question as it is raised by the first count of the declaration in this case, and feel bound to hold with the circuit court, that said count does not set out any legal cause of action.

But the learned counsel for the plaintiff contend, admitting that to be so, that the general counts show good cause of action. Suppose they do; did the account filed, and a copy of which was served on the defendant, warrant the entering of a judgment, without a writ of inquiry, under § 44 of ch. 167 of the Code above cited? We have seen that said account was unintelligible except as explained by the special count of the declaration, unless by the defendant who was cognizant of and an actor in the transaction to which it refers; and it would be understood by him just as the claim is set out in the special count, which, as we have seen, does not set out any cause of action, under the decision of the federal court. And if the service of a copy of that account on the defendant is relied upon to give notice of the character of the

plaintiff's claim on the common counts, it would be notice to him of just such a claim as is set out in the special count, which we have seen, under the decision in *Pace v.* the same defendant, gives no cause of action.

To warrant the judgment by default without a writ of inquiry upon the common counts under § 44, supra, it was just as necessary that the defendant should be served with a copy of the account distinctly stating the several items of the plaintiff's claim, in those counts, as it was to warrant a judgment by default on the first count; and the only notice he had of the character of the plaintiff's claim in the common counts was the service of a copy of the account, which it has been held gave him no cause of action. Consequently the judgment by default, whether on the special count, or the common counts, was illegal, and the court below did not err in reversing it and setting it aside.

480 *The court did not then dismiss the plaintiff's action, but redocketed the case and gave the plaintiff leave to amend his special count, in order that he might, if he could, set out a case which would give him good cause of action. But he declined to amend his declaration; from which the necessary inference was, that he had no cause of action different from that which he had set out in his special count. And the common counts, supported, as he claimed them to be, by the account, a copy of which had been served on the defendant, it was utterly futile and vain for him to prosecute his suit further. The court below did not err in dismissing the suit. We are of opinion, therefore, to affirm said judgment. Judgment affirmed.

481 *Shackelford's Adm'r v. Shackelford & als.

November Term, 1879, Richmond.

1. **Partnership Estate—Rights of Social Creditors.**—*Ordinarily a partnership estate is liable to the payment of the debts of the firm in

***Partnership Estate—Rights of Social Creditors.**—The court said in *Pettyjohn's Ex'ors v. Woodruff's Ex'or et al.*, 86 Va. 479: "Whatever may have been the rule in other states, independently of statute law, the law of Virginia is, that the legal effect of the partnership is, to set apart or dedicate the social assets as a fund for the payment of the social debts, for the mutual protection of the partners *inter se* (Subject to the rights of the partners, while all are alive, to vary that dedication, as in *Shackelford v. Shackelford*, 32 Gratt. 481), and for any unpaid balance due them the social creditors come in as general creditors, *pari passu*, with the separate creditors of the same class upon the separate estate of the deceased partner." See also *Frank Wolfe & Co. v. Pringle*, 96 Va. 459. And where the surviving partner has not parted with his equity to have the firm assets applied to the firm debts before suit to have such assets so applied, he can not after such suit release such equity without the consent of the social creditors. *Robinson v. Allen*, 85 Va. 729.

Purchase by One Partner.—See *Darby v. Gilligan*, 33 W. Va. 249, citing the principal case.

preference of the individual debts of the partners. This is the right of the partners *inter se*. The creditors of the partnership have no such right of priority over the creditor of the partners individually; but only by substitution to the rights of the partners *inter se*. The partners may release this right, and the creditors of the partnership can not complain; for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs.

2. Same—Sale of Partnership Interests—

Rights of Retired Member.—When one partner sells out to another the former's interest in the partnership, the question, whether the former has a right after the sale to require the partnership estate to be applied to the partnership debts in his exoneration, depends upon the true meaning of the contract of sale in this respect. Under the contract in this case, the vendor has a right to have all the assets of the partnership so applied.

3. Same—Same—Same.—S, the partner who

purchased the assets, and bound himself to pay the debts of the partnership, dies, leaving debts unpaid, and leaving assets of the former partnership, which go into the hands of his administrator c. t. a.; and this administrator files his bill against the widow and children to have a construction of the will, and to administer the estate under the control of the court. The outgoing partner may file his petition in the cause, to have the assets of the partnership which have gone into the hands of said administrator, applied to the payment of the partnership debts; and for this purpose to have an account of said assets.

4. Same—Administrator of Deceased Partner—Insufficient Security—Partnership Assets—Appointment of Receiver.—The

security of the said administrator not being sufficient, the court may appoint a receiver to

482 receive from said administrator *the partnership assets in his hands, and to proceed to collect the same.

5. Removal of Receiver.—If the security of the receiver is not sufficient, the court may make a rule upon him to show cause why he should not give other sureties, and upon his failure to show cause, may remove him. And it must very plainly appear that the court below erred before the appellate court will reverse its action.

6. Same.—An account of the assets collected by the receiver having been ordered and taken, showing the amount collected, after deducting an amount claimed by the receiver for fees as counsel in collecting the assets, the court, without deciding on his right to a credit for the fees, directs him to pay the amount after deducting the fees into bank. Another account is taken showing a further amount collected by him. And it appearing that he had not complied with the previous decree, the court may set aside that decree, remove him from his office of receiver, and appoint another in his place, and direct him to pay to the second receiver the amount he has collected, and to deliver to the second receiver all partnership assets in his hands. And may further direct that if he does not so pay over the funds in his hands, counsel named shall proceed to bring a suit against him and his sureties on his bond as receiver.

7. Evidence—Partnership Books.—The books of a partnership are competent evidence to show what are debts of the partnership as against the

partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts.

8. Rights of Vendor of Partnership Interest.—The administrator of the purchasing partner

is liable to the selling partner for all moneys of the partnership collected by his attorney at law, and for all payments made by such attorney by his direction or approval.

Statement of the Case.

This is an appeal from sundry decrees of the circuit court of Fauquier county, made in two suits pending in said court, in one of which B. H. Shackelford's administrator was plaintiff and R. B. Shackelford and al. were defendants; and in the other, R. B. Shackelford, guardian, &c., was plaintiff, and B. H. Shackelford's administrator and al. were defendants.

483 *The substance of the pleadings and proceedings in the said suits, so far as they appear in the transcript of the record before this court, is as follows:

In August, 1871, the bill was filed in the first named of the said two suits by the plaintiff therein, I. Catlett Gibson, administrator d. b. n. w. a. of B. H. Shackelford, deceased, in which it is stated, in substance, among other things, that said B. H. Shackelford died on the 18th of May, 1870, leaving a widow, Rebecca B. Shackelford, and six infant children surviving him—the names of the children being J. Green, Howard (over fourteen years of age), George S. Lucy, Annie and Muscoe G. Shackelford (the last four under fourteen years of age); that by the will of said B. H. Shackelford, which was duly admitted to probate in the county court of said county on the 23d of May, 1870, and of which an office copy, marked A, is filed with the bill, the said Rebecca B. was appointed sole executrix, and qualified as such at the May term of said court in 1870; that said Rebecca B. renounced her position as executrix at the February term of said court in 1871, and said plaintiff was appointed by said court administrator d. b. n. w. a. of said B. H. Shackelford, deceased, and qualified as such on the 27th day of February, 1871; that the plaintiff submits the construction of said will and all questions which may arise under it to the court; that at the time of the testator's death he was seized and possessed of a considerable estate, real and personal, but the same is greatly encumbered with debt—the real estate, though valuable, if sold in the then condition of the land market, would entail great loss on those interested in it. And the personal estate consisted mainly of choses in action, which required time and good management for collection, but which the plaintiff considered would be amply sufficient to discharge the debts of the estate in five years; and that for the protection of said plaintiff and the best interests of said estate, he desired that the assets and liabilities of said

484 *estate should be ascertained and reported to the court, and the said estate administered under its decree. He

therefore prayed that the said widow and children should be made defendants to the said bill; that the said will should be construed; that the creditors of said estate should be summoned, and the debts due to them, with their respective amounts and priorities, and the assets of said estate, should be ascertained and reported; that the said estate should be administered under the decrees of the court, and that such other and further relief might be granted as justice and equity might require.

The will, of which a copy is filed with the bill, is dated on the 18th day of February, 1860, and is very brief. It is in these words:

"The last will and testament of Benjamin Howard Shackelford, this 18th day of February, 1860. It is my will and desire that all the property, rights and interests of which I may die seized and possessed, shall pass to and belong to my dearly beloved wife Rebecca, for her sole and separate use, and for the maintenance, support and education of our children, for and during her lifetime, and after her death, the said property, rights and interests, and the natural increase thereof not consumed, shall pass to and belong to our dear children, equally to be divided between them. As witness my hand this day and year above written.

"B. H. Shackelford."

"I appoint my wife executrix of this my last will, and direct that she shall not give security. Witness my hand on the day and year aforesaid.

"B. H. Shackelford."

She was permitted to qualify on giving a bond as executrix in the penalty of \$20,000, without security.

485 *Exhibit "B," filed with the said bill, is an office copy of a deed of marriage settlement made the 14th day of June, 1852, "between Benjamin Howard Shackelford, of the first part, and Rebecca Beverly Green, of the second part." It is recited in the deed, "that whereas a contract of marriage has been entered into by said parties, which it is intended shortly to solemnize, and it being the desire of the said Benjamin Howard to convey certain property, rights and interests to the said Rebecca Beverly for her sole and separate use and behoof"; and then the deed "witnesseth that the said Benjamin Howard, for and in consideration of said contract of marriage, and of the further consideration of one dollar," &c., "has granted," &c., "and by these presents doth grant," &c., "unto the said Rebecca Beverly Green the house and lot in the town of Warrenton, now occupied by the said Benjamin Howard as a law office," &c., "and also the following negro property, &c.; also a certain promissory note 'executed to the said Benj. Howard for the sum of \$2,000, bearing date on the 1st day of June, 1852, and payable on demand, to have and to hold the said property and the said promissory note to the sole and separate use and behoof of her, the said Rebecca,' &c.; 'and it is agreed that the said Rebecca Beverly

shall receive, hold and enjoy whatever property or interests she now has, or may hereafter have, by gift, devise, descent, purchase or inheritance, to her own sole and separate use, notwithstanding the coverture," &c. "It is further expressly agreed, that in case the said Benj. Howard shall depart this life before the said Rebecca Beverly, leaving issue of this marriage, the property, rights and interests hereinbefore mentioned shall, after the death of the said Rebecca Beverly, descend and pass to such issue in parcenary. In testimony whereof," &c.

On the 19th of September, 1871, the cause, in which the bill was taken for confessed against the adult defendant, came on to be heard on said bill and exhibits and 486 answer *of the infant defendants, when the court decreed that one of its commissioners should take an account of the estate, real and personal, of which the said B. H. Shackelford died seized or possessed, together with the annual and fee simple value of said real estate, and the character, condition and value of said personal estate, &c.; also an account of the debts outstanding against the estate of said B. H. Shackelford, with their amounts and respective priorities; and that J. C. Gibson, administrator d. b. n. w. a. of said B. H. Shackelford, should settle his account before said commissioner, &c.

On the 19th of April, 1872, Edward M. Spilman, by leave of the court, filed his petition and an exhibit in the cause, and J. C. Gibson, administrator d. b. n. w. a.; as aforesaid, filed his answer thereto; and the cause came on again to be heard on the papers formerly read and said petition and answer, when the court decreed that one of its commissioners should take an account of the liabilities and of the assets, real and personal, of the late law firm of Shackelford & Spilman, on the 21st day of December, 1869, the date of the contract between B. H. Shackelford and E. M. Spilman, filed with the petition of said Spilman; and should ascertain and report to the court what amount of said assets have been collected since said date, and by whom, and what amount of the debts of said firm then outstanding have been paid, and by whom.

In the said petition of said Spilman, after referring to what had been done in the suit, the petitioner averred that for a number of years he was the law partner of said Shackelford, and a short time prior to his death—to wit: on the 21st of December, 1869—he and the said Shackelford entered into a contract, by which the petitioner surrendered to said Shackelford all his interests in the partnership assets of the law firm of Shackelford & Spilman, upon certain terms, the chief of which was the assumption by said Shackelford of all the debts due by the said 487 firm, the said *Shackelford binding himself to apply the said assets, as fast as collected, to the payment of said debts. The petitioner further stated that since the death of said Shackelford judgments and decrees had been rendered against him as surviving partner of said firm, and the

collection thereof is sought to be enforced against him, whilst the only means of payment of the same have passed, by said contract, beyond his control into the hands of said Shackelford's legal representatives. And he averred that the assets of Shackelford & Spilman, which consist of both real and personal estate, are amply sufficient to pay all the debts of said firm, and should, in pursuance of said contract, be first applied to that purpose. And he therefore prayed that J. C. Gibson, administrator d. b. n. w. w. a. of B. H. Shackelford, deceased, might be required to answer the said petition; that an order might be made in said suit directing one of the commissioners of the court to take an account of all the assets of said firm, both real and personal, that were surrendered as aforesaid; that said administrator might be required to apply the same first to the payment of the debts of said firm; that an account might be taken showing what portion of said assets had been collected, and by whom, and what disposition had been made of the same; and that an account might be also taken of all debts due by said firm at the date of said contract.

Exhibit "A," filed with said petition, is as follows:

"Memorandum of an agreement made and entered into this 21st day of December, 1869, between B. H. Shackelford and Edward M. Spilman—witnesseth: That the said Shackelford agrees to take the entire assets of the late law firm of Shackelford & Spilman, except the real estate belonging to said firm in the state of Arkansas, and pay off and discharge all the debts of said firm of every nature and description, upon the following terms, stipulations and agreements: The said Shackelford agrees to wind up all

488 *the business of said firm, applying the assets, as fast as realized, to the payment of its debts, all of which he assumes to pay, hereby discharging said Spilman from all liability for the same; the surplus remaining after the payment of said debts to belong exclusively to the said Shackelford.

"In consideration of which, the said Shackelford agrees and binds himself to purchase and have conveyed to John A. Spilman, as trustee for Eliza C. Spilman, the wife of the said Edward M. Spilman, the lot of land immediately in the rear of his premises, in the town of Warrenton, purchased by H. A. White of Fisher & Ingram, containing ——— acres.

"It is further agreed and understood that in the settlement of the business of said firm, neither partner is to be treated as debtor to the same, each being deemed to have received equal amounts, and not to account for what has been received heretofore.

"And it is further agreed that said Shackelford is to surrender to the said Spilman his bond for the hire of negro man, Ben, and Mrs. Lucretia Day's bond for the hire of girl Patsey.

"The said Shackelford will keep an account of all receipts and disbursements by

him in the books of the late firm, so that the said Spilman may at any time know the condition of said business, should its settlement be by any accident devolved on him; and the said Shackelford has the right to call on said Spilman for assistance and explanation in regard to any of the business of said firm that he may find himself unable to settle. "Witness the following signatures and seals.

"Edw'd M. Spilman, [Seal.]

"B. H. Shackelford, [Seal.]"

The said J. C. Gibson, administrator as aforesaid, answered the said petition at or about the time it was filed, simply saying in his answer: "Respondent is willing to
489 *do what is legal and equitable in the premises, and submits his interests and duties to the court."

On the 9th of April, 1873, the defendant, Rebecca B. Shackelford, filed her answer to the said bill, stating, in substance, among other things, that although she qualified as executrix as aforesaid, she trusted the entire settlement of said estate to her attorney at law, H. R. Gardner, and only knows of his acts and doings from the account which he rendered her, and which she has laid before the commissioner appointed to take the accounts herein ordered; that before her intermarriage with her said husband, they entered into a marriage settlement, whereby he settled upon her and the issue of the marriage two lots and houses in the town of Warrenton, and several slaves, and whereby it was provided that all property to which she might become entitled by devise or descent should be subject to the provisions and conditions of said marriage settlement. She charged that under the will of her father, Jones Green, she became entitled to a number of slaves and a large and valuable personalty and realty; that her husband collected moneys due her as a portion of this estate, and used the same for his own purposes, sold a number of slaves and other personalty devised as aforesaid, and converted the proceeds of such sales to his own use; and that her husband collected certain moneys devised to her from the estate of her grandfather, John Scott, under his will, and converted the same to his own use. She claims that her husband, by collecting the aforesaid funds embraced in their marriage settlement, became her trustee as to such, and that his estate is liable to her trustee and children for such debts as fiduciary debts of the first character, and prayed that an account might be taken of the acts and doings of her said husband in regard to the said funds. She expressed her willingness that the court should construe the said will, but thought
490 it too plain to require the aid of a court of equity to construe it, and insisted that it vests all the estate of her husband in her in fee simple.

On the 22d of April, 1873, the cause came on to be again heard on the papers formerly read, the report of Commissioner Shepperd, returned 20th September, 1872, to which there were sundry exceptions, and the answer of R. B. Shackelford; when the court, without

passing on the said exceptions, recommended the said report to the same commissioner to enquire further into the matters of said report, and also to enquire whether B. H. Shackelford, in his lifetime, collected any money belonging to R. B. Shackelford as her separate estate, and the amount thereof; whether said Shackelford sold any, and if any, what property belonging to her as her separate estate, and if so, what became of the money so received by said Shackelford—whether it was invested, and if so, in what property and in whose name. And the court further decreed that J. C. Gibson, Eppa Hunton and H. R. Garden, who were appointed special commissioners for the purpose, should sell the real estate of which said B. H. Shackelford died seized, consisting of many tracts of land described in the decree, containing together 942 acres, on the terms therein mentioned. Said commissioners were required to give bond, with good security, before receiving any money as such, conditioned for the faithful performance of their duty as such, and to report their proceedings to the court.

On the 15th of April, 1874, Edward M. Spilman, by leave of the court, filed his supplemental petition in the cause, and it was ordered that R. B. Shackelford, in her own right and as administratrix of her husband and guardian of her children aforesaid, and the said children and the said Gibson, administrator as aforesaid, and the said Eppa Hunton, H. R. Garden and J. C. Gibson, commissioners in Gibson *v.* Shackelford as aforesaid, and Micajah Woods, H. R. Garden and J. C. Gibson, commissioners in Shackelford, guardian, *v.* Shackelford, be summoned to *appear on the 22d of April, 1874, and answer said petition, and show cause why the prayers thereof and restraining orders therein specified should not be granted.

In the said supplemental petition of said E. M. Spilman, after setting out the substance of the original petition and the proceedings had under it, the said petitioner stated in substance, among other things, as follows: that the commissioner had not completed the account he had been ordered to take. Since the filing of said petition, facts have come to the knowledge of said petitioner, which he is advised it is important to present to the court, in order to protect him and the creditors of Shackelford & Spilman in their just and legal rights. He is advised that by the terms of said contract, it was contemplated, that as surviving partner, in case of the death of the said Shackelford, the duty of settling the affairs of said firm might devolve on him, and that even if no such provision had been inserted therein, he is advised that no arrangement made between him and his co-partner would bar the rights of the creditors of said firm to be paid out of the social assets, nor relieve said petitioner from any individual liability of duty to such social creditors. He therefore asks leave to file this supplemental petition, in which he avers that the administrator aforesaid, of said Shackelford, denies the right of the creditors of Shackelford & Spilman to any priority in payment of their debts over the

individual creditors of said Shackelford out of these said assets and the property of said firm, and refuses to apply them to the payment of the partnership debts, and claims that by said contract they have passed to said Shackelford as his individual property, exclusive of all rights of the social creditors and of any rights of this petitioner as surviving partner to have them thus applied. He further avers that Mrs. R. B. Shackelford has filed a claim against her said husband's estate, which claim the administrator aforesaid maintains to be the first lien

492 on said estate, *including the assets of said Shackelford & Spilman, which, if allowed, will absorb the greater part of all thereof. In pursuance of this idea bills have been filed in the circuit courts of Albemarle and Fauquier counties to sell all the real estate belonging to said Shackelford at the time of his death, including certain real estate owned by the late firm of Shackelford & Spilman, thus ignoring the partnership and treating the social property as the individual property of said Shackelford. In the suit in Albemarle, styled Shackelford, guardian, *v.* Shackelford (which has been removed to the circuit court of Fauquier), a lot belonging to B. H. Shackelford individually has been sold, and realty owned by Shackelford & Spilman has been decreed to be sold in the suit in Fauquier county, as the individual property of said Shackelford. The proceeds of the sale of the lot in Charlottesville have been treated as a fund to be invested for the benefit of Mrs. Shackelford and her children, and have been decreed to be paid to said Gibson, as receiver in said suit of Shackelford, guardian, *v.* Shackelford. In the original bill filed in the circuit court of Albemarle county as aforesaid, it is averred that the personality of said B. H. Shackelford, deceased, is totally insufficient to pay his debts, which averment is admitted to be true in the answer of J. C. Gibson, administrator as aforesaid. In the said supplemental petition the petitioner further avers that by the accounts settled before Commissioner Shepperd, by R. B. Shackelford, executrix of B. H. Shackelford, it appears that she is credited to her testator's estate in a balance of \$3,199.31, with interest from 27th February, 1872, and by the account of J. C. Gibson, administrator as aforesaid, settled before said commissioner, he is charged with \$897.67, as balance due the estate by him, after turning over to the widow and children of said B. H. Shackelford about \$2,000 as advancements to them. In addition to this, the said administrator has collected of the assets of said Shackelford

493 *& Spilman about \$2,500, of which petitioner has knowledge and of which no account has as yet been taken as far as he has seen, though he does not doubt that said administrator intends to credit the same in his accounts. Petitioner avers that all these sums were mainly derived from the assets of Shackelford & Spilman, amounting in round numbers to \$8,000, which have been collected by the representatives of the estate of B. H. Shackelford and not applied, as the law requires, to the payment of the

partnership debts. He further avers that the security in the official bond of the said Gibson, administrator as aforesaid, is wholly insufficient, the sole security being Mrs. R. B. Shackelford, who has only a life estate in the property settled on her by her husband, as petitioner is advised; and that she qualified as his executrix without giving security as such. Under these circumstances, petitioner is advised that he has a right in protection of his own interest and those of the creditors of said firm, to have a receiver appointed to take charge of the uncollected assets of said firm, and collect and apply them to the discharge of its debts, some of the creditors of which are suing said petitioner and the sureties of himself and his late partner to enforce against them the liabilities of said firm. The petitioner therefore prayed, that the persons named as defendants in the said decree of the 15th April, 1874, be made defendants accordingly; that certain specific relief might be given by injunction, the appointment of a receiver, &c., as set out in said petition, and that he might have general relief.

On the 25th of April, 1874, the said J. C. Gibson, administrator as aforesaid, filed his answer to the said supplemental petition.

On the same day—to wit: the 25th of April, 1874—the cause came on to be again heard on the papers formerly read, the original and supplemental petitions of E. M.

Spilman and exhibits filed therewith, 494 and upon the answer *of said J. C.

Gibson, administrator as aforesaid, and exhibits filed therewith (though none are copied in the record in this case), when the court, being of opinion that the social assets of the late firm of Shackelford & Spilman should be first applied to the discharge of the debts of said firm, and that the petitioner hath a right to have them so applied, and that the same are not protected by the surety of said J. C. Gibson, administrator as aforesaid, in his bond as such administrator, the said surety having only a life estate, as it appears to the court, in any property owned and held by her, and that the petitioner hath a right to have said assets secured for the purpose of discharging the debts and liabilities of said firm, decreed that said J. C. Gibson be appointed a receiver of the social assets and property of said firm, and that said Gibson, administrator as aforesaid, forthwith deliver to said receiver all the choses in action, evidences of debt, moneys in his hands, property and assets, with papers or memoranda belonging to said firm and pertaining to their business, whether kept during the existence of said firm or by B. H. Shackelford since its dissolution, or by his personal representatives since his death. But before receiving the same the said receiver was required to give bond, with approved security, in the penalty of \$20,000, conditioned for the faithful discharge of his duties as such receiver, &c. And the court further ordered that a commissioner of the court should convene, by publication in a newspaper printed in the town of Warrenton,

all the creditors of or claimants against the firm of Shackelford & Spilman; and should ascertain the amounts due by said firm, to whom due, and the priorities thereof, and the receiver to make no payments of any funds that may be collected by him under said decree except by the order of the court. And the said commissioner and receiver was directed to report their actings and doings under the said decree to the court.

On the 1st of January, 1875, the 495 commissioner filed his *report under decrees of 19th of April, 1872, and 22d April, 1873.

On the 2d of January, 1875, on the motion of John A. Seaton, administrator d. b. n. w. w. a. of John Fox, deceased, he was made a defendant to the suit. And the cause came on again to be heard on the papers formerly read and the report of Commissioner Shepperd, filed January 1st, 1875, and the exceptions thereto, filed by said administrator; when the court decreed that said report be recommitted to said commissioner, with instructions to enquire further and report more fully the liens on said Shackelford's estate, and especially the judgments in favor of the administrator, &c., of John Fox, deceased.

The said exceptions are copied in the record.

On the 19th of April, 1875, the said commissioner filed his report under the decree of the 2d of January, 1875.

On the 22d of April, 1875, the said commissioner filed his report of that date, containing a statement made at the request of J. C. Gibson, administrator as aforesaid, of moneys advanced by him to Mrs. R. B. Shackelford and two of her children, in addition to the amount theretofore reported.

On the 24th of April, 1875, the cause came on to be heard on the papers formerly read, the reports of Commissioner Shepperd, to which there are divers exceptions, and the affidavit of said Gibson, filed that day, when the court decreed that the said reports and the exceptions thereto should be recommitted to said commissioner, to reconsider the same with the said exceptions, and make report thereon, and upon any other matters theretofore committed to him by any former decree in the cause.

On the 25th of April, 1875, a copy of a decree of said court in the cause pending therein, in which Rebecca B. Shackelford, in her own right and as guardian of the infant children of B. H. Shackelford, deceased,

was plaintiff, and B. H. Shackelford's 496 administrator and al. were *defendants, was filed in the said cause of "Shackelford's administrator v. Shackelford and als.," showing that the said cause of Shackelford v. Shackelford's administrator came on to be again heard on the papers formerly read and the report of Commissioner Shepperd, filed April 12th, 1875, to which there was no exception: on consideration whereof the court decreed that J. C. Gibson, receiver, out of the corpus of the fund in his hands, pay to said R. B. Shackelford, in semi-annual instalments, from year to year, for the support, &c., of her minor children, a sum of

money which, together with the income of her separate estate, will amount to \$1,200.

On the 24th of August, 1875, the commissioner filed a report in obedience to the said decree of the 24th of April, 1875—which report is copied in the record in this cause—showing that the said commissioner took up and considered one by one the divers exceptions taken to the last report filed in the cause, which were 26 in number, and the exceptions filed 23d April, 1875, which were 7 in number. After stating his views upon them, he concludes thus: "From the foregoing it will appear that almost every exception was badly taken, and but few referred to the account of said exceptant as administrator or receiver, and that, let them be decided as they would, could not possibly affect said account of said exceptant. Your commissioner will state specially that the attorney, H. R. Garden, for said administrator and said estate, furnished your commissioner a regular statement of all moneys received by him and all payments made, with vouchers sustaining the same. From this statement—a copy of which is filed in the cause—it appears that the said attorney paid over to said administrator all sums left in his hands after paying costs of suit, debts, &c.; and the attorney holds his (the administrator's) receipts for the same, and they amount to a considerable sum," &c. The commissioner

then states sundry lists and accounts, 497 showing, among other things, *the debts against the firm of Shackelford & Spilman, the assets belonging to said firm, the balance due said firm by said J. C. Gibson, the receiver, and the balance so due by R. B. Shackelford, the executrix.

On the 15th of September, 1875, the said commissioner made a special report at the instance of J. C. Gibson, showing the estate of said Gibson's account as receiver of the firm of Shackelford & Spilman, after crediting him with a number of fees charged by said receiver for professional services rendered by him in the various suits mentioned in connection with each charge, from which it appeared that the receiver, after being credited with said fees, owes a balance of \$2,768.51—all principal.

On the 23d of September, 1875, the plaintiff, J. C. Gibson, administrator as aforesaid, and the defendant, R. B. Shackelford, presented their petitions to rehear the decree of the 25th April, 1874.

To the said report of August 24th, 1875, sundry other exceptions were filed by D. H. & A. D. Payne and J. C. Gibson, administrator of B. H. Shackelford.

On the 23d of September, 1875, J. C. Gibson, administrator as aforesaid, filed fifteen exceptions to said report of August 24th, 1875.

On the 22d of September, 1875, T. N. Latham filed two exceptions to said report.

On the 29th of December, 1875, an affidavit was made and filed in the case by E. M. Spilman that the security in the bond of J. C. Gibson, as receiver aforesaid, was insufficient, on grounds specially assigned in said affidavit.

On the 31st of December, 1875, the said two causes of B. H. Shackelford's adm'r v. R. B. Shackelford and al. and R. B. Shackelford, guardian, &c., v. B. H. Shackelford's adm'r and al. came on to be heard on the papers formerly read and the affidavit of Edward M. Spilman, filed on the 29th of

December, 1875, as aforesaid: on con- 498 sideration *whereof the court decreed that said Gibson, receiver as aforesaid, pay to the First National Bank of Alexandria, to the credit of these causes, the sum of \$2,768.51, being the amount appearing in his hands by the supplemental report of Commissioner Shepperd, filed on 16th September, 1875, after deducting the amount claimed by said receiver for his fees, &c., reserving for future consideration the amount so claimed, and that said receiver do also pay into such bank any moneys received by him as such receiver since the period embraced in said report, and also any moneys he may hereafter collect as such receiver, and file among the papers in this cause the certificate of said bank of such deposits, and settle before said commissioner a further account as such receiver; and that said commissioner ascertain and report whether the bond of said receiver, filed in said first named cause, is a good and sufficient bond to protect the interests of the parties who may be entitled to the funds, &c.; and that said Gibson be summoned to appear on the second day of the next term of the said court, and show cause why he should not be required to execute a new bond, with sufficient sureties, as such receiver.

The said Gibson, as late administrator d. b. n. c. t. a. of B. H. Shackelford, deceased, on the 24th day of May, 1877, applied to a judge of this court for an appeal from and supersedeas to the decrees rendered in the said causes, or one of them, on the 25th day of April, 1874, and the 23d of September, and 24th and 31st of December, 1875, which appeal and supersedeas were accordingly allowed and awarded on the 26th of May, 1877.

On the 17th and 22d days of April, 1876, two other decrees were rendered by the said circuit court of Fauquier county in the said two causes.

In the first of said two other decrees it is stated that the said two causes came on to be further heard upon the papers formerly read, and the report of Commissioner

499 Shepperd, *filed on the 1st day of April, 1876, and the affidavit of J. C. Gibson, filed 10th April, 1876, and the statement in writing of said Commissioner Shepperd, 10th April, 1876, and the original notice issued by said commissioner to J. C. Gibson, dated the 7th March, 1876, served on the 8th March, 1876, and the exceptions, seven in number, of said J. C. Gibson, filed 10th April, 1876, to said commissioner's report, and the exception of Thomas Green to said report, and the exception of Rebecca B. Shackelford thereto, and the exception of—Money thereto, the three last filed 10th April, 1876, and upon the rule against said J. C. Gibson, receiver as aforesaid, to show cause why he should not be required to execute a new bond as such

receiver, which rule was duly served, and was argued by counsel: on consideration whereof, and for reasons set forth in the written opinion of the court filed among the papers in said two causes (but not copied in the record before this court), the said court decreed in substance, that the exceptions of said Gibson, numbered 1, 2, 3, 4, 6 and 7, be overruled, and that the exceptions of—Money be overruled, and that said report be confirmed as to the several matters referred to in said exceptions thus overruled; and that said exceptions of said Gibson numbered 5, and the exception of Thomas Green, and the exception of Rebecca B. Shackelford, be recommitted to said commissioner for further enquiry; and the court further decreed that said J. C. Gibson be required, on or before the 22d of April, 1876, that being the last day of the then existing term of said court, to execute a new bond as such receiver, with sufficient surety, in the penalty of \$20,000, and with like conditions to those of his former bond; and the court further decreed that said Gibson, receiver in the last of said two causes of the funds arising from the sale of the "mansion house," in the town of Warrenton therein referred to, do, out of said funds, pay to Rebecca B. Shackelford, guardian of her infant children, the sum of

500 \$500 annually, until *the further order of the court, in semi-annual instalments of \$250, the first to be paid on the 1st of May, 1876, to be credited when paid on the reversionary interests of said children in said fund, they requiring the same for their maintenance and education.

In the other of said two decrees the court, in substance, decreed that so much of the report of said commissioner, filed 1st April, 1876, in the first named cause, as ascertains the total amount due by J. C. Gibson as receiver aforesaid to be \$5,384.84 on the 26th March, 1876, with interest on \$4,685.82, part thereof, from that day, be confirmed. And the court having, by decree theretofore entered, ordered said Gibson, receiver as aforesaid, to pay into bank to the credit of said causes the sum of \$2,768.75, and other moneys in said decree specified, and to file among the papers in said causes certificates of such deposits, with which order he hath failed to comply, and as the said sum of \$2,768.75 is part of said amount of \$5,384.84, the order directing said deposits was thereby rescinded, and it was decreed that said Gibson, receiver, do pay unto A. D. Payne (appointed receiver by a subsequent provision of said decree), the said sum of \$5,384.84, with interest as aforesaid. And said Gibson, having failed to execute a new bond as receiver, as required as aforesaid, it was thereby decreed that he be removed as receiver, and his powers as such be annulled. And it was thereby further decreed that said A. D. Payne be appointed receiver instead of said Gibson, and that said Gibson deliver to said Payne the assets, papers and books relating to the business of such receivership. But said Payne, before acting as such receiver, was required to execute a bond, with approved security, as mentioned in said decree. And he

was directed to file among the papers of said causes a statement of the assets he might receive under said decree, and to proceed to collect with diligence all debts due to said firm.

and was authorized to employ counsel

501 to aid him in so *doing if deemed proper by him, and was required to account as such receiver before a commissioner of the court in said causes. And unless said Gibson, receiver, should, within sixty days from the rising of the court, pay to said Payne as aforesaid, then the court appointed John M. Forbes a commissioner, who was ordered to withdraw the bond executed by said Gibson as receiver, and proceed to enforce the same against said receiver and his sureties, and make report to the court. But said Forbes, before receiving any money under said decree, was required to execute bond, with good security as therein mentioned, conditioned for the faithful performance of his duties under said decree. There were other provisions of said decree which seem not material to be here stated.

The said J. C. Gibson, administrator as aforesaid, after obtaining an appeal and supersedeas, as aforesaid, from prior decrees rendered in the said two causes, applied for an appeal and supersedeas from and to the said two decrees of the 17th and 22d days of April, 1876, which said last mentioned appeal and supersedeas were accordingly allowed and awarded by a judge of this court on the 5th day of March, 1878; which two cases were argued together as one case before this court.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

The first decree complained of in the first of the said two appeals is the decree of the 25th day of April, 1874, in which "the court, being of opinion that the social assets of the late firm of Shackelford & Spilman should be first applied to the discharge and satisfaction of the debts of said firm, and that the petitioner hath a right to have them so applied, and that the same are not protected by the surety of said J. C. Gibson, administrator d. b. n. w. a. of B. H. Shackelford,

deceased, in his bond as such adminis-

502 trator; *the said surety having only a life estate, as it appears to the court, in any property owned and held by her, and that the petitioner hath a right to have said assets secured for the purpose of discharging the debts and liabilities of said firm"—decreed that said J. C. Gibson be appointed a receiver of the social assets and property of said firm of Shackelford & Spilman; and that said Gibson, administrator as aforesaid, forthwith deliver to said receiver "all the choses in action, evidences of debt, moneys in his hands, property and assets, written papers or memoranda belonging to said firm of Shackelford & Spilman, and all the account books and other books," &c., "kept by or belonging to said firm and pertaining to their business, whether kept during the existence of said firm, or by B. H. Shackelford since its dissolution, or by his personal representatives since his death." But said receiver, before receiving any thing as such,

was required by said decree to execute bond, with surety as therein mentioned, for the faithful discharge of his duties as such; and he was directed to file among the papers in the cause a statement of all the assets he might receive under said decree, and to proceed to make collections, &c., and to present an account thereof to a commissioner of the court. And the court further ordered that a commissioner should take an account, as therein directed, of the debts due by said firm and the priorities thereof; that reports should be made to the court by said receiver and commissioner respectively, and that no payments of any funds, &c., be made by said receiver, except under the order of the court.

The main question presented by or raised upon the said decree is, whether that part of the estate of B. H. Shackelford, deceased, which was a part of the partnership estate of the late firm of Shackelford & Spilman, is first liable to the payment of the debts of the said firm before it is liable to the payment of the individual debts of the said B. H. Shackelford.

503 *We know that, ordinarily, a partnership, estate is liable to the payment of the debts of the firm in preference of the individual debts of the partners. This is the right of the partner inter se. The creditors of the partnership have no such right of priority over the creditors of the partners individually, but only by substitution to the rights of the partners inter se. The partners may release this right, and the creditors of the partnership cannot complain, for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs.

When one partner sells to another the former's interest in the partnership estate, the question whether the former has a right, after the sale, to require the partnership estate to be applied to the payment of the partnership debts in his exoneration, depends upon the true intent and meaning of the contract of sale in that respect. It is competent, of course, for a vendor in such a case to release the partnership estate from such a continuing liability. But whether he did so in fact or not is a question which depends upon the intention of the parties in the contract of sale in the particular case.

Whether, in the case of such a sale, where there is a total absence of anything in the contract of sale to indicate the intention of the parties on the subject, the presumption of law is in favor of or against such continuing liability, is a question which need not be decided in this case, if it appear by the terms of the contract of sale in the case that such a continuing liability was actually intended by the parties. If so, it will certainly continue to exist.

Let us now therefore enquire: whether, by the terms of the contract of sale in this case, such a continuing liability was actually intended by the parties?

The said contract of sale by Spilman to Shackelford was by deed executed by the parties on the 21st day of December,

504 *1869, only a few months before the

death of the vendee, Shackelford; the vendor, Spilman, being his survivor, and then still living. The only clauses of the contract which seem to be material to the question we are now considering are the following:

"That the said Shackelford agrees to take the entire assets of the late law firm of Shackelford & Spilman, except the real estate belonging to said firm in the state of Arkansas, and pay off and discharge all the debts of said firm of every nature and description, upon the following terms, stipulations and agreements: The said Shackelford agrees to to wind up all the business of said firm, applying the assets, as fast as realized, to the payment of its debts, all of which he assumes to pay, hereby discharging said Spilman from all liability for the same; the surplus remaining, after the payment of said debts, to belong exclusively to the said Shackelford."

"The said Shackelford will keep an account of all receipts and disbursements by him on the books of the late firm; so that the said Spilman may, at any time, know the condition of said business, should its settlement be, by any accident, devolved on him; and the said Shackelford has the right to call on said Spilman for assistance and explanation in regard to any of the business of said firm that he may find himself unable to settle."

Thus we see, the contract of said Shackelford was to discharge all the debts of said firm, of every nature and description, upon the following terms: "The said Shackelford agrees to wind up all the business of said firm, applying the assets, as fast as realized, to the payment of its debts, all of which he assumes to pay, hereby discharging said Spilman from all liability for the same; the surplus remaining, after the payment of said debts, to belong exclusively to the said Shackelford."

The said Shackelford was thus declared to be a trustee of the partnership estate, **505** which is of course a trust estate *for the payment of the debts of the partnership, the assets of which, as fast as realized, were to be applied by said trustee to such payment; and only "the surplus remaining, after the payment of said debts, to belong exclusively to the said Shackelford." And it was expressly agreed that "the said Shackelford will keep an account of all receipts and disbursements by him, on the books of the late firm; so that the said Spilman may, at any time, know the condition of said business, should its settlement be, by any accident, devolved on him; and the said Shackelford has the right to call on said Spilman for assistance and explanation in regard to any of the business of said firm that he may find himself unable to settle." The partnership was thus, in effect, continued until, and for the purpose of, the winding up of the concern. And the lien of the vendor, Spilman, on the partnership estate, for the payment of the debts of the partnership, which lien resulted from the existence of the partnership, was continued and preserved to him until the business of the firm should be fully settled; until which

event and for which purpose the partnership will, in effect, continue in existence.

It follows, therefore, from what has been said, that that part of the estate of B. H. Shackelford, deceased, which was a part of the partnership estate of the late firm of Shackelford & Spilman, is first liable to the payment of the debts of said firm, before it is liable to the individual debts of said B. H. Shackelford.

The court, without considering in detail the other objections taken to the said decree of the 25th day of April, 1874, in the appellant's assignment of errors, is of opinion and doth determine that the said objections are groundless and be overruled, and that there is no error in the said decree, and, therefore, that the said decree be affirmed.

The second decree complained of in the first of the said two appeals is, the decree of December term of said court, **506** *1875, whereby the petition of the appellant, J. C. Gibson, administrator d. b. n. w. a. of B. H. Shackelford, and of Rebecca B. Shackelford, widow of said B. H. Shackelford, for the review and reversal of the said decree of the 25th of April, 1874, was dismissed.

The court is of opinion, that for the same reasons for which the said circuit court did not err in making the said decree of the 25th day of April, 1874, as aforesaid, it did not err in dismissing the said petition for the review and reversal of the said decree.

The third decree complained of is, that of the 24th day of December, 1875; by which sundry exceptions taken to the report of Commissioner Shepperd, filed in the case of "Gibson v. Shackelford," on the 24th of August, 1875, were overruled. Sundry other exceptions taken to said report were recommended to said commissioner, who was directed also to make certain enquiries; but as those portions of the decree decided nothing, it will be unnecessary to notice them here, and only necessary to notice so much of said decree as overrules exceptions to said report. The said overruled exceptions are the 1st, 2d, 3d, 4th, the 5th in part, the 6th, 7th, 8th, 9th, 10th and 14th taken to the said report by the appellant, and the 1st taken thereto by Thos. N. Latham. The said exceptions taken by the appellants are as follows:

"1st. Said commissioner in said report undertakes to sever what were formerly the assets of the late firm of Shackelford & Spilman, from the assets of the estate of the testator, and to hold the same liable to the creditors of said late firm, to the exclusion of the creditors of said B. H. Shackelford."

The court did not err in overruling this exception, for the plain reason that the partnership estate of Shackelford & Spilman was liable to the payment of the partnership debts of that firm, before it was liable to the payment of the individual debts of said Shackelford, as has already been shown.

507 *2d. Said commissioner reports that in all cases in which debts and liabilities incurred and contracted by E. M. Spil-

man, a former member of the firm of Shackelford & Spilman, and the consideration for said debts and liabilities, were charged upon the books of said late firm to the said firm; that such entries converted said debts and liabilities into firm debts."

The court did not err in overruling this exception. The books of the firm were evidence against the firm; and were conclusive, in the absence of evidence to the contrary.

"3d. Because said commissioner reports, that the estate of B. H. Shackelford, deceased, is debtor to the late firm of Shackelford & Spilman for the amount of all assets of said late firm collected by the said B. H. Shackelford during his lifetime."

The court plainly did not err in overruling this exception.

"4th. Because said commissioner reports that the social creditors of the late firm of Shackelford and Spilman have a lien on what were formerly the social assets of said late firm, to the exclusion of the individual creditors of B. H. Shackelford, deceased, notwithstanding E. M. Spilman, one of the members of said firm, for valuable consideration already received in full, sold and assigned to B. H. Shackelford, deceased, the other member of the firm, during his lifetime, all the assets of said late firm, except the Arkansas land."

The correctness of the decision of the court in overruling this exception is conclusively sustained by the reasons already assigned in support of the correctness of the decree of the 25th day of April, 1874.

"5th. Because said commissioner, in said report, insists upon charging the administrator d. b. n. c. t. a. of B. H. Shackelford with all sums received by H. R. Garden, the attorney at law of said administrator, **508**

whether the same *were paid over to said administrator by his said attorney at law or not, and insists upon crediting said administrator with all payments and disbursements made by the said attorney, whether made with or without the authority of the said administrator. This exceptant denies that he is liable for any money collected by his said attorney at law, unless the same was paid over to him, or that he is liable or responsible for any payments or disbursements made by his said attorney at law, unless the same was made by his express authority."

The decree of the court in regard to this exception is plainly right. It is, "that the 5th of said exceptions last named be overruled, so far as the same pertains to the collections made by the attorney of said administrator, and so far as the same pertains to the disbursements made by said attorney, were made by authority or approval or were properly made, they shall be allowed, and when made without such authority or approval, or were improper to be made, they should be disallowed."

"6th. Because said commissioner recites in said report (page 6) that H. R. Garden paid this exceptant \$875 this year, meaning apparently 1875, when it appears from the stated account of said Garden with this

exceptant that the said attorney has paid over to him nothing this year, and only the sum of \$217 during the year 1874."

"7th. Because the said commissioner reports the debts of \$8,331.67, in favor of Thos. N. Latham, as due in the aggregate and not in detail, and there is not sufficient evidence to sustain said charge, and especially no evidence to sustain the charge of \$3,500 as of the 30th November, 1862, as contained in a memorandum filed herein as of the 1st January, 1875."

There is nothing in the record before the court to show that the circuit court committed any error in overruling the said 6th and 7th exceptions, or either of them. In regard to the remaining exceptions, referred to in the said *decree of the 24th of December, 1875—to wit: the 8th, 9th, 10th and 14th which were overruled by the said decree, and the 12th, 13th and 15th, which were recommended to said commissioner by said decree—it is unnecessary to insert them here, or to say more than that it does not appear from the record that the circuit court erred in regard to them or any of them.

The fourth and last decree complained of in the first of the said two appeals is the decree of the 31st of December, 1875, whereby the said J. C. Gibson was required to deposit in the First National Bank of Alexandria, to the credit of these causes, the sum of \$2,768.51, being the amount appearing to be in his hands as receiver of the assets of Shackelford & Spilman in the said causes, after deducting the amount claimed by said receiver, J. C. Gibson, for his fees, &c.; the amount so claimed being a matter reserved for future consideration.

It is unnecessary here to take any further notice of the said decree, or of the assignment of errors therein in the petition of appeal therefrom, as the said decree requiring the said sum of \$2,768.51 to be deposited in bank as aforesaid, with which the said receiver had failed to comply, was rescinded by the decree made in these causes on the 22d of April, 1876.

Having sufficiently noticed the assignments of error in the petition for the first appeal obtained in these cases, we will now notice those contained in the petition for the latter of the two appeals obtained in the said cases—to wit: the appeal from the two decrees of the 17th and 22d days of April, 1876.

In the petition for the last mentioned appeal there are seven assignments of error by the appellant, J. C. Gibson, which will be briefly noticed in the order in which they are made. They are as follows:

1st. In overruling his exceptions to Commissioner Shepperd's report, numbered 1, 2, 3, 4, 6, 7.

510 *2. In requiring him to give a new bond as receiver.

3. In removing him as receiver as aforesaid.

4. In appointing A. D. Payne as a receiver in his stead.

5. In requiring him to pay to said Payne, receiver as aforesaid, the sum of \$5,384.84, with interest on \$4,685.82, part thereof, from 26th March, 1876.

6. In appointing John M. Forbes a com-

missioner to sue for and collect said last mentioned sum of him.

7. In refusing to allow him any fees, &c., whatever, for his professional services as an attorney and counsellor at law.

1. As to the first of these assignments of error: "In overruling his exceptions to Commissioner Shepperd's report, numbered 1, 2, 3, 4, 6, 7." It is sufficient to say that there is nothing in the record before the court to show that the circuit court erred in overruling the said exceptions or any or either of them.

2. As to the second of these assignments: "In requiring him to give a new bond as receiver." We think that the security on the old bond was insufficient, and the circuit court did not err in this respect. If this court would reverse a decree of an inferior court for requiring a new bond in such a case, it would only be done where there was palpable error in making such requisition. Certainly there was no such error in this case if it were not perfectly proper to make the requisition.

3. As to the third of these assignments: "In removing him as receiver as aforesaid." If it was proper in the circuit court to require him to give a new bond as receiver, it follows, as a necessary consequence, that it was proper for said court to remove him as receiver in the event of his failure to comply with such a requisition. As the propriety of the former act will be inferred, at least in the absence of palpable evidence to the contrary, it follows, necessarily, that the propriety of the latter act will be also inferred in such a case.

511 *4. As to the fourth of these assignments: "In appointing A. D. Payne as a receiver in his stead." There is nothing in the record tending to show the impropriety of this appointment.

5. As to the fifth of these assignments: "In requiring him to pay to said Payne, receiver as aforesaid, the sum of \$5,384.84, with interest on \$4,685.82, part thereof, from 26th of March, 1876." When the said requisition was made, the said sum of \$5,384.84, was the amount of the partnership fund of Shackelford & Spilman then in the hands of the receiver, J. C. Gibson; and A. D. Payne being appointed receiver in the place of J. C. Gibson, who was removed from the said office, the fund of the partnership then in the hands of the old receiver was ordered to be paid by him to the new receiver. This transfer of the partnership fund from the hands of the old to those of the new receiver was a proper act, and the legitimate, if not necessary, consequence of the change of the receivership. The old receiver, J. C. Gibson, had a large claim against the fund in his hands, as such, for professional services claimed to have been rendered by him in regard to the partnership fund during the existence of his receivership. It was decreed by the circuit court in these two causes, on the 31st of December, 1875, that said J. C. Gibson, theretofore appointed receiver in the first of said two causes—to wit: that of B. H. Shackelford's adm'r v. R. B. Shackelford & al.—"do pay into the First National Bank of Alexandria, to the credit of said two causes

the sum of \$2,768.51, being the amount appearing in his hands by the supplemental report of Commissioner Shepperd, filed on 16th September, 1875, after deducting the amount claimed by said receiver, J. C. Gibson, for his fees, &c., reversing for future consideration the amount so claimed, and that said receiver do also pay into said bank any moneys received by him as such receiver since the period embraced in the said report of Commissioner Shepperd, and also any

512 *moneys he may hereafter collect as such receiver, and file among the papers in this cause the certificate of said bank of such deposits, and that said J. C. Gibson do settle before Master Commissioner Shepperd a further account of his actions and doings as receiver aforesaid, and that said commissioner do ascertain and make report, whether the bond of said receiver, filed in said first named cause, is a good and sufficient bond to protect the interests of the parties who may be entitled to the funds that have come or may come into the hands of said receiver, and that said J. C. Gibson be summoned to appear here on the 2d day of the next term of this court, to show cause why he should not be required to execute a new bond, with good and sufficient sureties therein, as receiver in said cause."

On the 17th of April, 1876, the said two causes came on to be further heard, upon the papers formerly read and sundry other papers, and the exceptions therein named, and upon the rule against said J. C. Gibson, receiver of the assets of Shackelford & Spilman, &c., to show cause why he should not be required to execute a new bond as such receiver: on consideration whereof the court overruled several of the said exceptions, and recommended others to said commissioner for further enquiry and investigation, and further decreed that J. C. Gibson, receiver as aforesaid, be required, on or before the 22d of April, 1876, that being the last day of the then present term of the said circuit court, "to execute a new bond as such receiver, with good and sufficient surety, in the penalty of \$20,000, with conditions as are in his former bond."

On the 22d of April, 1876, the said two causes came on to be further heard upon the papers formerly read: on consideration whereof the court confirmed "so much of the report of Commissioner Shepperd, filed on the 1st of April, 1876, in the first named cause, as ascertains the total amount due by J. C. Gibson as receiver of the assets of the firm of Shackelford & Spilman to be

513 \$5,384.84 on the *26th of March, 1876, with interest on \$4,685.82, part thereof, from 26th March, 1876; and the court, having by a decree entered on the — day of —, ordered said J. C. Gibson, receiver as aforesaid, to pay into the First National Bank at Alexandria, to the credit of these causes, the sum of \$2,768.75, and other moneys in said decree specified, and to file among the papers in these causes certificates of said bank of said deposits, with which said order said Gibson, receiver as aforesaid, hath failed to comply, and as the said sum of \$2,768.75 is part

of the said amount of \$5,384.84, the order directing said payments into said bank is hereby rescinded; and the court" decreed "that said J. C. Gibson, receiver as aforesaid, do pay unto A. D. Payne, who is appointed receiver of said assets of Shackelford & Spilman by a subsequent provision in this decree, the aforesaid sum of \$5,384.84, with interest on \$4,685.82, part thereof, from 26th March, 1876, until paid, and the said J. C. Gibson, receiver as aforesaid, having been required by the decree entered on the — day of this term of the court, to execute a new bond as such receiver, on or before this day, and having failed so to do, the court" decreed that the said J. C. Gibson be removed and displaced as receiver aforesaid, and his powers as such be annulled and revoked. And the court further decreed that Alexander D. Payne be appointed in the stead of said J. C. Gibson, receiver of the assets of said firm of Shackelford & Spilman, and of the amount decreed above to be paid by said Gibson, receiver, to him; and that said Gibson, heretofore receiver as aforesaid, do deliver to said Payne, "receiver hereby appointed, all the choses in action, &c., belonging to said firm and pertaining to their business, &c. But before said Payne, receiver as aforesaid, should discharge any duties as such, he was required by said decree to execute bond, with good security, payable to the commonwealth of Virginia,

in the penalty of \$15,000, conditioned **514** for the faithful discharge of his *duties as such receiver. And said A. D. Payne was directed to file among the papers in said two causes a statement of assets he may receive under said decree, and to proceed to collect, with reasonable diligence, all debts due to said firm, and was authorized to employ counsel to aid him therein, &c., and to present an account of his doings as receiver to a master commissioner of the court in said causes. And unless the said Gibson, receiver as aforesaid, should within 60 days from the rising of the said circuit court, pay to said Payne, appointed receiver in the stead of said Gibson, then the said court by said decree, appointed John M. Forbes a commissioner, who was ordered to withdraw the receiver's bond executed by said Gibson and his sureties therein, and filed in said causes, and proceed to collect the said sum and interest above decreed to be paid by said Gibson, heretofore receiver, by such legal proceedings as he may deem proper, and by suit upon his bond as receiver, and report to the court. But before said Forbes shall receive any money under said decree, he was required to execute bond, with good security, in the penalty of \$6,000, conditioned for the faithful performance of his duties under said decree; and leave was reserved to any party interested to apply for such further relief by way of the enforcement of said decree as may be determined to be proper and lawful."

Thus it appears that the said 5th assignment of error is not well founded.

6. As to the sixth of the said assignments: "In appointing John M. Forbes a commissioner to sue for and collect said last mentioned sum of him," said Gibson. There is

no good ground of objection to this part of the decree aforesaid. If the former receiver shall fail to make payment of the fund with which he is chargeable as such to the present receiver, then an action at law will no doubt become necessary against the former receiver and his sureties on his bond as such,

515 and that action must be brought *by an attorney at law. The commissioner appointed in this case to sue for and collect the amount of said bond is such an attorney, and the presumption is (what we all in fact know as a matter de hors the record) that he is well qualified to perform that duty and trustworthy in every respect. Besides, he is required by the decree appointing him commissioner as aforesaid, before receiving any money under said decree, to execute bond, with good security, conditioned for the faithful performance of his duties under the said decree.

7. As to the seventh and last of the said assignments: "In refusing to allow him any fees, &c., whatever for his (J. C. Gibson's) professional services as an attorney and counsellor at law." Now, this matter was expressly reserved for future consideration by the said circuit court in the said decree of the 31st of December, 1875, and there is nothing in the record to show that it has since been so considered. Whatever he may be entitled to on account of said claim may be asserted hereafter against the assets of the said partnership of Shackelford & Spilman. It was proper for the circuit court to take care of those assets, and keep them in the hands of a receiver bound by bond, with good security, until it can be ascertained who are entitled to them, and in what proportions, and to distribute and apply them accordingly.

Upon the whole, the court is of opinion that there is no error in the decrees appealed from, and that the same ought therefore to be affirmed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in any of the decrees appealed from in this case, to wit: the decrees of the 25th day of April, 1874; the 22d day of September, *1875; the 24th day of December, 1875, and the 31st day of December, 1875; to which four decrees an appeal was allowed by a judge of this court on the 26th day of May, 1877; and the 17th day of April, 1876, and the 22d day of April, 1876; to which last named two decrees an appeal was allowed by a judge of this court on the 5th day of March, 1878—which two appeals are embraced in and constitute this case. But the court is of opinion that there is not in the said decrees, or any of them, any decision of the said circuit court in regard to the claim of the receiver, J. C. Gibson, for his fees, &c.; the said court having, by its said decree of the 31st day of December, 1875, reserved for future consideration the amount so claimed; which question remains undecided and subject to the decision of the said circuit court, notwithstanding the said decree of the 22d day of April, 1876, whereby the said

court confirmed so much of the report of Commissioner Shepperd, filed on the 1st of April, 1876, as ascertains the total amount due by J. C. Gibson as receiver of the assets of the firm of Shackelford & Spilman, to be \$5,384.84 on 26th March, 1876, with interest on \$4,685.82, part thereof, from 26th March, 1876; and decreed that said J. C. Gibson, receiver as aforesaid, do pay unto A. D. Payne, who is appointed receiver of said assets of Shackelford & Spilman by a subsequent provision in said decree, the aforesaid sum of \$5,384.84, with interest on \$4,685.82, part thereof, from 26th March, 1876, until paid; the said sum of \$5,384.84 being the whole amount then due by said Receiver Gibson, without making any deduction for his fees, &c., as aforesaid.

Therefore, it is decreed and ordered that the said decrees appealed from in this case, subject to the explanation aforesaid, and without prejudice to the right of the said J. C. Gibson to recover any amount to which he may hereafter be held to be entitled for his fees, &c., as aforesaid, be affirmed, **517** *and that the appellant, J. C. Gibson pay to the appellee E. M. Spilman thirty dollars damages and his costs by him about his defence in this court expended.

Which is ordered to be certified to the said circuit court.

Decrees affirmed.

518 *Gerst v. Jones & Co.

[34 Am. Rep. 773.]

November Term, 1879, Richmond.

1. Vendor and Vendee—Implied Warranty.

—J & Co. were manufacturers of tobacco, and G a manufacturer of boxes for pressing tobacco in. G agreed to furnish J & Co., during the season of 1870, as many boxes as the latter would use in their business, at the price of sixty-five cents per box, and under this agreement did furnish said boxes in which J & Co. pressed their tobacco, and shipped a large quantity. Much of that shipped, and some which remained in the factory in the said boxes, moulded, in consequence of the use of green and otherwise unfit timber in the manufacture of the boxes, and J & Co.'s damages, arising from the moulded tobacco, thus caused, amounted to nine cents per pound of the tobacco contained in said boxes. On a suit brought by J & Co. against G to recover these damages—Held: That G was liable for the same.

2. Same—Same.—While it is an established rule of law that upon the sale of personal property there is no implied warranty as to its quality, and that the maxim *caveat emptor* applies in the absence of fraud or express warranty, yet there are several well recognized modifications of this rule; and one of them is, that where, on an *executory* contract of sale, goods are ordered for a particular purpose, known to the seller, he impliedly under-

***Vendor and Vendee—Implied Warranty.**

—Where goods are ordered for a particular purpose, known to the seller, he impliedly undertakes that they shall be reasonably suitable for such purpose. See 3 Min. Inst. (2nd Ed.) 268, where the principal case is cited. The principal case was distinguished in *Hood v. Black*, 29 W. Va. 254.

takes that they shall be reasonably fit for the purposes for which they are ordered, and especially is this so if the seller is also the manufacturer of the goods ordered.

3. Same-Same.—Where there is a warranty, either *express* or *implied*, neither the ignorance of the seller nor the exercise of care and diligence can exempt him from liability if the goods do not answer the purposes for which they were sold.

4. Same-Same—Latent Defects—Quære.—Would the seller be held liable for a latent defect, of which he was ignorant, and *against which human skill could not provide?*

519 *5. Same—Examination of Article—Effect of Warranty.—In cases like this, the question is not whether the purchaser has had an opportunity of examining the article; but whether he has in fact examined it, and whether the defect is one readily discoverable upon inspection. He is not bound to examine at all, for he has the right to rely upon the judgment of the seller, and to take for granted that the latter has furnished an article answering the terms of his contract.

6. Same—Pleading—Variance—Warranty.—While the *allegata* and *probata* must always agree, it is well settled that under a count in a declaration alleging a warranty, the plaintiff may prove an *express* or *implied* warranty, the legal effect of the two being the same. And so where a declaration would be good without an averment of a *scienter*, that averment may be treated as surplusage.

7. Appeal—Review.†—The general rule, that where improper evidence was admitted in the court below, the appellate court will set aside the verdict, because it is impossible to say what effect such evidence may have had on the minds of the jury, does not apply in cases where all the facts are certified, and the appellate court can clearly see that the prevailing party is entitled to the verdict independently of such evidence.

This was an action of trespass on the case, brought by D. Jones & Co. against Joseph S. Gerst, in the corporation court of Danville, but which was afterwards removed to and tried by the circuit court of the county of Pittsylvania. The objects for which the case was brought, and the facts of the same, sufficiently appear in the opinion of the court. A verdict and judgment were rendered in favor of the plaintiffs against the defendant for \$1,602.36, with interest from the date of the verdict, 14th of September, 1875, till paid, and the costs. And to this judgment the defendant obtained a writ of supersedeas from one of the judges of this court.

F. E. Bouldin, for the appellant.

Ould & Carrington and Cabell & Peatross, for the appellees.

520 *STAPLES, J. The plaintiffs in the court below were manufacturers of

tobacco in the town of Danville, and the defendant was at the same time engaged in the business of manufacturing boxes to press manufactured tobacco. The defendant agreed to furnish plaintiffs for the year 1870, during the manufacturing season, as many boxes as the latter would need, at the price of sixty-five cents per box. In accordance with this arrangement, defendant furnished the plaintiffs all the boxes they needed in the year 1870. Plaintiffs pressed their manufactured tobacco in these boxes, and they shipped a large portion of it to their commission merchants in Baltimore. Of the tobacco so shipped, one hundred and sixty-six half boxes, containing about ten thousand pounds, was moulded, in consequence of unseasoned timber having been used in making the boxes, and eight thousand pounds remaining in the factory were found, on examination, to be moulded from the same cause. The plaintiffs' damage arising from the moulded tobacco is nine cents per pound.

It is not claimed that the defendant expressly warranted the boxes, or that he knew they were not suited to the purposes for which they were ordered. The evidence shows, however, that the timber used in making the boxes for the plaintiffs had been unduly exposed to the weather, and there can be no doubt but that the defendant was apprized of the fact. It also appears that it was customary to rely on the manufacturer of boxes for the selection and use of proper box material and timber, and the manufacture of suitable boxes, and it is not customary for tobacco manufacturers to subject the boxes furnished them by box manufacturers to any test to see whether they are made of thoroughly seasoned or dry timber, but they rely upon the box manufacturer to do this, and that it is his business to do so.

Upon these facts two questions are presented. Is the defendant liable in damages to the plaintiffs for the injury *to the tobacco, and if so, what is the measure of recovery? In discussing these questions, I shall consider the subject without reference to the alleged usage or custom proved as a part of the plaintiffs' case.

According to a well known rule of the common law upon a sale of personal property, there is no implied warranty as to its goodness or quality. The maxim "caveat emptor" applies in the absence of fraud or express warranty. Several modifications of this rule have, however, been recognized by the courts, perhaps, as well established as the rule itself. One of these is, that upon an executory contract of sale, where goods are ordered for a particular use or purpose, known to the seller, the latter impliedly undertakes they shall be reasonably fit for the use or purpose for which they are intended. Such a case, according to the authorities, is plainly distinguishable from that of an executed sale of a specific chattel, selected by the purchaser, upon which no implied warranty arises. The distinction seems to be somewhat refined and technical at first view, but it is founded in sound reason, and is sustained by the authorities. Where the purchase is of a de-

†**Appeal—Review.**—In *Cluverius v. The Commonwealth*, 81 Va. 808, the court said: "This court has recognized the right to look to the whole record to determine whether any reversible error has been committed by letting in improper testimony. *Gerst v. Jones*, 32 Gratt. 518-529." And the principal case was followed in *Banks v. Rodcheaver*, 26 W. Va. 298. See also 4 Min. Inst. (2nd Ed.) 846 and 970. And see *Binns v. Waddill*, 32 Gratt. 588.

finer ascertained article, the vendor performs his part of the contract by sending the article, and in the absence of fraud or some positive affirmation, amounting to a warranty, he is not liable for any defect in the quality. The purchaser, in selecting the particular article, relies upon his own judgment, and takes upon himself the risk of its answering his purposes. If he desires to secure himself against loss, he ought to require an express warranty. In the absence of such warranty, the rule of caveat emptor must govern. Where, however, the purchaser does not designate any specific article, but orders goods of a particular quality, or for a particular purpose, and that purpose is known to the seller, the presumption is the purchaser relies upon the judgment of the seller; and the latter, by undertaking to furnish the goods, impliedly undertakes they shall

522 be reasonably *fit for the purpose for which they are intended; and he will be answerable for any defect in the material, or in the construction, by which the value is diminished. This rule applies with peculiar force where the seller is the manufacturer.

Whether the seller would be held liable for a latent defect of which he is ignorant, and against which human skill could not provide, is a question which does not arise here and need not be answered.

Numerous cases may be found in the books illustrating these principles. It is only necessary, however, to refer to two or three of these bearing upon the question. One of these is *Mason v. Chappell*, 15 Gratt. 572. There it appeared that the defendant sold the plaintiff one hundred and fifty barrels of an article manufactured by defendant called "Chappell's Fertilizer," to be used on plaintiff's land. The defendant recommended the fertilizer as a valuable manure, but there was no warranty and no allegation of fraud or deceit. The plaintiff, finding the alleged fertilizer unfit for use, brought his action for damages. This court held the action could not be maintained. The decision was placed upon the ground that the transaction was a sale of a specific ascertained article, upon which there was no implied warranty, and the seller could not be held answerable for a defect in the quality in the absence of fraud or an express warranty. Judge Robertson, in delivering the opinion of the court, said, "If the plaintiff, relying on the defendant's skill and judgment, had applied to him to furnish a manure which would produce the effect attributed to 'Chappell's Fertilizer,' without specifying what particular kind of manure he wanted, and the defendant had accordingly furnished an article which proved to be entirely worthless, there would be good ground for imputing an implied warranty. See also *Chanter v. Hopkins*, 4 Mees. & Welsby, 399; *Benjamin on Sales*, § 657, and cases cited; *Story on Sales*, § 372; 1 *Smith's L. Cases*.

523 *The case of *Brown v. Edgington*, 2 Man. & Gran. 279, is one of a contrary character. There the plaintiff, being in want of a rope for the purpose of raising pipes of

wine from his cellar, the defendant undertook to supply a rope for the purpose, but furnished a defective one, and the plaintiff brought his action for the damage sustained by the breaking of the rope and the consequent loss of a cask of wine. It was held that the defendant was liable upon the implied warranty. And where copper sheathing was ordered for the purpose of sheathing a vessel, to be manufactured by the seller, and it proved to be worthless for any such purpose, it was held that as the seller knew the purposes to which it was to be applied, a warranty was implied on their part that it was fit for the purpose intended. *Jones v. Bright*, 5 Bing. R. 533; 3 *Moore & Payne*, 155; *Story on Sales*, 376.

One of the most recent and best considered decisions on this subject is that of *Jones v. Just*, 3 Q. B. L. R. 197. Mellor, J., in delivering the judgment, reviewed the decisions with great clearness and ability. Among other things, he said, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own. See *Benjamin on Sales*, § 655, and numerous cases cited in notes.

These principles are decisive of the case in hand. The transaction was not a sale of an existing chattel selected by the plaintiffs, but an executory contract to manufacture and deliver, from time to time, as they might be needed, a number of tobacco boxes for a particular purpose, known to the defendant.

The defendant, in undertaking to furnish *the boxes, impliedly agreed they should be reasonably fit for that purpose. Had the plaintiffs gone to the defendant's factory, and themselves selected certain boxes, such as they believed would answer their purposes, it is very clear the defendant would not be liable, however worthless the boxes might be, because the plaintiffs in that case must have relied on their own skill and judgment exclusively. But the plaintiffs made no selections, they left that to the defendant; They relied upon his skill and judgment as a manufacturer to furnish an article suited to the business in which they were engaged.

"If (said *Tindall, C. J.*, in *Brown v. Edgington*), the purchaser relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

It is no answer to say that here the defendant was ignorant of the defect in the boxes, and that he used every proper precaution to guard against it.

Neither the ignorance of the seller, nor the

exercise of care and diligence on his part, can exempt him from liability, when there is a warranty, whether it be express or implied. In *Jones v. Bright*, 5 Bing. 533, Best, C. J., said: "It is the duty of the courts in administering the law to lay down rules calculated to prevent fraud, to protect persons who are necessarily ignorant of the qualities of a commodity they purchase, and to make it to the interest of manufacturers and those who sell to furnish the best article that can be supplied. By providing proper materials, a merchant may guard against defects in manufactured articles."

As a matter of fact, the defendant did not exercise due care in the selection of his materials. The evidence shows that red oak and white oak timber was used in the manufacture of these boxes; that it was a
525 long while exposed to *the weather, and that red oak is very porous and will absorb much moisture when so exposed. These facts, I think, show the defendant did not give proper attention to the preparation of the timber for his boxes, and they fully explain the cause of the damage to the tobacco.

It has been argued, however, that the plaintiffs were better judges of tobacco boxes than the defendant; that they had better opportunities of finding out the defect than he had, and they were grossly negligent in not examining the boxes.

Now, it is proved to be exceedingly difficult to detect moisture in timber after it is worked up into boxes. Suitable material is not obtained by merely inspecting the lumber—a very unsafe test in any case—but by properly seasoning and preparing it before it is converted into boxes. The defendant, as a manufacturer, knows, or ought to know, what sort of material is suitable for his business, and if he, in good faith, can claim that the defect escaped his attention, with what propriety are the plaintiffs to be charged with negligence in failing to discover it? In cases like the present, the question is not whether the purchaser has an opportunity of examining the article, but whether he has, in fact, examined it for himself, and whether the defect be one readily discovered upon inspection. He is not bound to examine, for he has the right to rely upon the judgment of the seller, and to take it for granted the latter has furnished an article answering the terms of the contract. 4 Chitty on Contracts, § 633; Story on Contracts, § 834; *Rodgers & Co. v. Niles & Co.*, 11 Ohio St. R. 48. In this case, the plaintiffs clearly acted upon that presumption, and they are not chargeable with negligence in so doing. They have, therefore, a right of action against the defendant for the breach of warranty.

The next question is as to the extent of their recovery. As already stated, the plaintiffs' tobacco was damaged to the extent of
526 nine cents per pound by the mould resulting from the *use of unseasoned timber in the boxes furnished by defendant, and upon this estimate the finding of the jury is based. It is insisted that the defendant cannot be held responsible for this

damage, which is merely consequential; that the measure of his liability is simply the difference between the actual value of the boxes and what they would have been worth had they conformed to the warranty.

Now, it is easy to see that if this measure of recovery be adopted, the plaintiffs are not entitled to anything. For if we look merely to the value of the boxes, without reference to the injury of the tobacco, the plaintiffs have, in fact, sustained no loss. Had they purchased from the defendant a machine intended for a particular purpose, which proved entirely worthless, no difficulty would occur in ascertaining the difference between a good and a bad machine, and fixing the loss accordingly. But here, apart from the injury to the tobacco, the plaintiffs have sustained no damage, because the boxes as made answered all the purpose intended as fully as if they had been constructed of the best material. It is not to be supposed that such a result was in the contemplation of the parties at the time they made the contract as the probable consequence of its breach.

It is well settled, that the plaintiff is entitled, as a general rule, to recover such damages as are a natural and proximate result of the wrongful act of the defendant. *Peshine v. Shepperson*, 17 Gratt. 472. 485.

Numerous cases hold that, in an executory contract of sale to furnish an article for a particular use, if the article is not fit for such use the purchaser is entitled to indemnity for the loss, which the non-performance of the contract has occasioned him, where the loss is the natural consequence of the breach complained of.

Thus, in *Brown v. Edgington*, already cited, where the defendant sold the plaintiff a rope to be used in raising heavy weights,

it was held that the plaintiff was entitled to *recover the value of the rope
527 and consequential damages for the loss of a cask of wine falling and lost from a defect in the rope.

The case of *Boradale v. Brunton*, 2 Moore R. 582, was an action for a breach of warranty in the sale of a chain cable. Through a defect in the cable, an anchor of the plaintiff, to which it was attached, was lost. It was held the plaintiff was entitled to recover the value as well of the lost anchor as of the cable.

It is, however, useless to multiply citations in support of this doctrine. The cases on the subject are very numerous, and may be found in *Field on Damages*, note to sec. 278; *Benjamin on Sales*, sec. 993, and notes; *Smeed v. Ford*, 102, Eng. C. Law R. 600; *Passinger v. Thorburn*, 34 New York, 634, and the authorities there cited.

These decisions, and the principles they announce, I think fully sustain the plaintiffs' right to recover special damages for the injury to their tobacco, as the natural and proximate result of the defendant's failure to comply with his contract. If the defendant did not intend to be bound by the rule of law which holds him to an implied warranty, he ought so to have provided, and thus put the plaintiffs upon their guard.

That rule (as was said by Park, J., in *Jones v. Bright*, 5 Bing. 533) is of great importance, because it will teach manufacturers that they must not undersell each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.

Another point has been raised, and is much relied on by the learned counsel for the defendant, which might have been noticed earlier, but may be properly considered here.

That is the *allegata* and *probata* do not correspond; that the declaration avers an express warranty, and a scienter in different counts, while the proof shows neither.

528 Nothing *however, is better settled than that under a count alleging a warranty, the plaintiff may show an express or implied warranty. For whether the warranty be express or be implied, the legal effect is the same, and an averment of warranty must, of necessity, be satisfied by proof of one or the other. And so if the declaration would be good without an averment of a scienter, that averment may be treated as surplusage, and the action sustained upon other sufficient grounds. *Williamson v. Allison*, 2 East. R. 446.

The first and fourth counts in the declaration before us are substantially the same as the tenth count of the declaration in *Jones v. Bright*. That count stated that the defendants, by falsely and fraudulently warranting the copper manufactured by them to be fit and proper for the purpose of sheathing the bottom of a vessel, sold the copper to the plaintiffs. The evidence did not show either fraud or an express warranty, and yet the plaintiffs were held entitled to recover upon the implied warranty. But if we endorsed this view, there is no difficulty in sustaining the verdict under the second count, which avers neither a warranty nor the scienter.

It only remains to inquire whether the circuit court erred in admitting the alleged usage or custom in the town of Danville.

The plaintiffs asked one of their witnesses whether or not it was customary in Danville, in the year 1876, among the manufacturers of tobacco, in ordering tobacco boxes of the manufacturer, to rely on the latter to make the boxes suitable and fit for the purposes for which they were ordered. To the answering this question the defendant objected; but the court overruled the objection, and the witness answered the question in the affirmative; to which ruling the defendant excepted. It is unnecessary here to enter into a discussion of the principles of law governing in the construction of contracts as

529 influenced by usage or *custom. It may be conceded, for the purposes of the argument, that the evidence adduced is illegal, and yet it does not follow the judgment must, therefore, be reversed. It is very true that, as a general rule, where improper evidence is admitted, the court will set aside the verdict, because it is impossible to say what effect the evidence may have had on the mind of the jury; but that rule does not apply where all the facts are certified, and upon those facts the appellate court clearly

sees the prevailing party is entitled to the verdict independently of such evidence.

If the court is satisfied that the testimony could not possibly have had any influence on the mind of the jury prejudicial to the objecting party, and that a verdict in his favor must have been set aside, there could be no sort of propriety in disturbing that verdict. 2 Gra. & Wat. on New Trials, pp. 635, 645, 651; see 9 vol. United States Digest, First Series, p. 638, § 635, 682, where numerous cases cited; see *Danville Bank v. Waddill*, 27 Gratt. 448.

In the case before us all the facts are certified, and it is apparent there was no sort of conflict in the testimony. Upon those facts, the plaintiffs are plainly entitled to recover without reference to the alleged usage or custom. The liability of the defendant grows out of his warranty on the sale of the goods for the purposes intended, and evidence of the custom would add nothing to the legal operation and effect of the warranty. Had the jury found for the defendant, this court would not hesitate to set aside the verdict as contrary to law. Under such circumstances, it would be a vain thing, as it would be unjust to the plaintiffs, to interfere with the verdict. My opinion is, therefore, to affirm the judgment of the circuit court.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

530 *Bank of the Old Dominion v. McVeigh.

November Term, 1879, Richmond.

These are two actions of debt by the Bank of O D against J, the maker, and W as the endorser, of the notes sued on, pending in the same court, at the same time, in both of which the defence and the evidence is the same. There is verdict and judgment for the plaintiff in one case; and the defendants propose to appeal. And then in the second case the following entry is made: "Bank of O D v. J & al.—judgment by consent in favor of plaintiff for \$10,760, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs. Execution on the judgment to be stayed for ninety days; and in the event of an appeal being obtained and perfected in the Bank of O D v. J & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case: provided the appeal bond in that case be sufficient to secure the amount of both judgments. C. p. q.; B & W, p. d. The writ of error was obtained, but the appeal bond was only in the penalty of \$200. The judgment was on the appeal reversed—*HELD*:

1. Judgment by Consent.—The entry in the second case, if a judgment at all, is a judgment by consent or confession, not absolute, but on the terms and conditions set out in the agreement annexed.

2. Same—Province of Court.—Under the agreement, which is a continuing one, it is competent for the court which rendered it to deal with it in a summary way, and see that its terms are complied with.

3. **Same—Validity.**—The entry, taken in connection with the record of the case in which it was made, has the requisite certainty of a judgment as to parties, amounts, dates, &c., and is a valid judgment.

531 *4. **Construction of Contracts.**—In construing the agreement, to ascertain the intention of the parties, the court will look to the language employed, the subject matter, and the surrounding circumstances at the time of its execution, and thus to place the court in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of words, and of the correct application of the language employed.

5. **Same.**—So considering the agreement, the true construction is, that the stipulation for the suspension of the execution for ninety days, and also that the judgment should abide the result of the decision by the court of appeals in the other case, was in each particular absolute; and the giving of the bond was required as a condition precedent only to the suspension of the execution on that judgment while the other case was pending in the court of appeals on writ of error.

6. **Supersedeas Bond—Execution—Equity.**—No supersedeas bond having been given, as provided in the agreement, if it was possible legally to give such bond, execution could have been sued out at any time, to subject the personal property of the defendants, or proceedings in equity instituted and prosecuted to subject their real estate.

7. **Construction of Contracts.**—If there were any doubts as to the construction which should be given to the agreement, that construction should be adopted which would be more to the advantage of the defendants, upon the general ground, that a party who takes an agreement prepared by another (as this was by plaintiffs' counsel), and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground, that when an instrument is susceptible of two constructions, the one working injustice, and the other consistent with the right of the case, that one should be favored which standeth with the right.

In July, 1871, there were two suits pending in the corporation court of Alexandria. One was an action of debt by the Bank of the Old Dominion against James H. McVeigh & Son and William N. McVeigh, and the 532 other by *the Bank of the Old Dominion against James H. McVeigh, James Chamberlain and William N. McVeigh; though process was not served on Chamberlain. On the 22d of July, 1871, the first suit

***Construction of Contracts.**—In *Knick v. Knick*, 75 Va. 12, the court said: "Although when the meaning of an instrument is clear, an erroneous construction of it by the parties to it will not control its effect, yet, where there is doubt as to the proper meaning of it, the construction which the parties have put upon it is said to be entitled to great consideration." Citing *Bank of Old Dominion v. McVeigh*, 32 Gratt. 530; *Railroad Company v. Trimble*, 10 Wall. 367. See also *Knopf v. Richmond*, etc., R. Co. 85 Va. 769.

was tried, and there was a verdict and judgment in favor of the plaintiff against all the defendants for \$12,323.55, with interest thereon from the 1st day of January, 1866, till paid, and costs. In the second case, it being known to the parties that the ground of defence and the evidence was the same as in the first case, the following entry, which was prepared by the plaintiff's counsel, was made in it:

The Bank of the Old Dominion *v.* McVeigh & Chamberlain & al.

Judgment by consent in favor of the plaintiff for \$10,760, the debt in the declaration mentioned, with interest from the 1st day of January, 1866, and costs.

Execution on the judgment to be stayed for ninety days, and in the event of an appeal being obtained and perfected in the case of the Bank of the Old Dominion *v.* James H. McVeigh & Son & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case: provided the appeal bond in that case be sufficient to secure the amount of both judgments.

H. O. Claughton, p. q.

Brent & Wattles, p. d.

James H. McVeigh and William N. McVeigh obtained a writ of supersedeas to the judgment in the first case; but they only gave a bond in the penalty of \$200. The court of appeals reversed the judgment of the court below, and sent the cause back for a new trial; and on the new trial, whilst there was a judgment for the full amount of the former judgment against James H. McVeigh & Son, there was a judgment in

533 *favor of William N. McVeigh, to the extent that he was an accommodation endorser on the notes sued on, though there was a judgment against him for \$306.03, with interest, on other notes discounted for his benefit; and this judgment was affirmed on appeal by the court of appeals.

After the last decision of the court of appeals, James H. and William N. McVeigh moved the corporation court of Alexandria to vacate the judgment entered on the 23d of July, 1871, in the case of the Bank of the Old Dominion against McVeigh & Chamberlain & al.; and their motion was docketed, with leave to the plaintiff to demur to or answer the motion.

At the January term, 1879, of the court, the plaintiff moved the court to strike out the motion of the defendants to vacate the judgment. But the court overruled the motion; and the plaintiff excepted. The plaintiff then demurred to the said motion; but the court overruled the demurrer; and the plaintiff again excepted. The evidence was then introduced, and the court rendered a judgment that the said judgment of the 23d July, 1871, entered by consent, be set aside so far as concerns the defendant William N. McVeigh, and that as to the other parties thereto the said judgment stand as it stood at the date of the entry. And the plaintiff again excepted, and applied for a writ of error; which was awarded.

Cloughton, for the appellant.

S. F. Beach and John Howard, for the appellee.

BURKS, J., delivered the opinion of the court.

Want of jurisdiction in the court below of the proceeding by motion in which the judgment complained of here was rendered is assigned by the Bank of the Old Dominion as one of the errors in said judgment.

534 *The entry on the records of said court, 22d July, 1871, on which the motion was based, is in these words:

"The Bank of the Old Dominion v. McVeigh & Chamberlain & al.

"Judgment, by consent, in favor of the plaintiff for ten thousand seven hundred and sixty dollars, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs.

"Execution on the judgment to be stayed for ninety days, and in the event of an appeal being obtained and perfected in the case of the Bank of the Old Dominion v. James H. McVeigh & Son & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case; provided the appeal bond in that case be sufficient to secure the amount of both judgments.

"H. O. Cloughton, p. q.

"Brent & Wattles, p. d."

Now, if this entry be a judgment at all (and it is insisted by the learned counsel for the bank that it is), it is a judgment by consent or confession, not absolute, but on the terms and conditions set out in the agreement annexed. In such a case, under the agreement, which is a continuing one, it is competent for the court which rendered it to deal with it in a summary way and see that its terms are complied with. It is said in 1 Tidd's Practice, 560, that when a judgment is confessed upon terms, in the king's bench, it being in effect but a conditional judgment, the court will take notice of it and see the terms performed; but when the judgment is acknowledged absolutely, and a subsequent agreement made, this does not affect the judgment; and the court will take no notice of it, but put the party to his action on the agreement.

We do not doubt, therefore, that the **535** corporation court *of the city of Alexandria had jurisdiction of the proceeding by motion to modify the judgment under the agreement of the 22d July, 1871, of record, if indeed there was any such judgment.

This brings us to consider the question raised by the petition of James H. McVeigh (who must, on said petition, be treated as a plaintiff in error), whether there ever was any such judgment. He insists that there was no such judgment, and that the court erred in treating the entry of the 22d July, 1871, as a judgment at all; that it was only an executory agreement of the parties by their counsel for a judgment, which in fact was never rendered, and that instead of recognizing and sanctioning it as a judgment as against him, the court should have

treated it, in the proceedings which were had, as a mere agreement, and should have given judgment thereon accordingly as of the 8th day of January, 1879.

It would seem to be sufficiently clear that the entry referred to, taken in connection with the record of the case in which it was made, has the requisite certainty of a judgment as to parties, amounts, dates, &c. The caption, giving the style of the case, plainly describes the plaintiff, but not so the defendants. They are described generally as "McVeigh & Chamberlain & al." But as the bill of exceptions shows that the entry was made in said case of "The Bank of the Old Dominion v. McVeigh & Chamberlain," we may look to the declaration and process in the suit to see who the defendants were. Thus looking, we find the writ commencing the suit was against James H. McVeigh and James Chamberlain, trading under the firm name of "McVeigh & Chamberlain," and William N. McVeigh. The declaration is against the same parties, and the writ was served on all except Chamberlain, as to whom it was returned not found. The defendants, therefore, referred to in the caption to the entry were the defendants already named, except Chamberlain, he

536 never *having been before the court at any time, and the plaintiff, in fact, conceding that he was not embraced as a party in the entry of the supposed judgment. The amount recovered, if recovery it be, with interest, corresponds accurately with the amount and interest in the declaration demanded.

But the objection urged against considering this entry as a judgment is not so much for uncertainty as for the alleged absence of expression of judicial action. It is essential to a judgment that it be a judicial determination, an adjudication by the court. If this appear, the form is not so material. Consideratum est per curiam, &c., is the old technical formula and the one generally followed; but a literal observance of it, although advisable, is not indispensable; language of like import will suffice.

Now, what is meant by this entry: "Judgment, by consent, in favor of the plaintiff for ten thousand seven hundred and sixty dollars, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs"? It is an order entered by the court in a pending cause, by the consent of the parties, to be sure, but nevertheless an order of the court, it matters not by whom it was drawn, whether by clerk or counsel, and the language of the order is the language of the court. If it had been intended as a mere agreement of parties for a judgment, the language would have been different. It is not, that judgment is to be, or may be, or shall be rendered by the court, but it is the actual rendition of the judgment itself. And what difference is there in meaning and legal effect between the language employed, "judgment, by consent, for the plaintiff," &c.? and the usual formula, "it is considered by the court, by consent of parties, that the

plaintiff recover the sum," &c.? The meaning is the same. The term "judgment," as used, imports judicial action—determination—adjudication—and "judgment, by consent, for the plaintiff for the sum" (named),
537 is an *adjudication that the plaintiff recover that sum. And so it has been considered and treated by the parties and by the corporation court. In the agreement annexed, it is styled a "judgment," on which "execution is to be stayed, &c." The motion of the McVeighs in the court below was a motion, in express terms, "to set aside the judgment entered in the cause on the 22d day of July, 1871, same being a judgment in favor of said Bank of the Old Dominion," and the corporation court acted upon it as a judgment, referring to it as "the judgment rendered in this court at the July term, 1871."

Adjudged cases, some of which were cited by learned counsel in argument, in which the question whether particular entries amounted to judgments or not, was presented and decided, are numerous, and the decisions conflicting. We do not deem it necessary to review them, as we are of opinion, for the reasons already stated, that the entry in question here was intended to be a judgment, and has all the essential qualities of a judgment.

The main contention in this case springs out of the agreement already set out, which was annexed to the judgment. The record shows that the bond, called in the agreement an "appeal bond," was never given. It is obvious that by the bond styled an "appeal bond" was intended a supersedeas bond, which should operate to suspend the execution of both judgments, and secure their payment in case of affirmance here of the judgment in the case of "The Bank of the Old Dominion v. James H. McVeigh & Son & al." The bond which was given was a bond in the penalty of \$200 only, and, though not set out in the record, was evidently such a bond as is required on awarding a writ of error without a supersedeas, the condition of which is for the payment of damages, costs and fees. The bond, or such one as the agreement provides for, not having been given, what was the consequence? How were the rights of the parties affected
538 by non-compliance with *this provision? The answer to this question depends on the construction to be given to the said agreement.

On behalf of the bank, it is contended that the execution of this bond was an essential part of the agreement that the judgment should abide the result of the decision by this court, on writ of error, in the case of the Bank of the Old Dominion v. James H. McVeigh & Son & others, and was a condition precedent, the performance of which was necessary to entitle the McVeighs to the benefit of that agreement; and as there was no performance, the judgment became absolute.

On the other hand, it is insisted by the counsel for the McVeighs that the stipulation for the suspension of execution on the

judgment for ninety days, and also that the judgment should abide the result of the decision by this court in the other case, was, in each particular, absolute, and the giving of the bond was required as a condition precedent only to the suspension of execution on that judgment while the other case was pending here on writ of error.

As said in the opinion in *Talbott v. Richmond & Danville R. R. Co.* (3 Va. Law Journal, 486), to ascertain the intent of the parties is the fundamental rule in the construction of agreements; (*Canal Co. v. Hill*, 15 Wall. 94); and in such construction, courts look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of words and of the correct application of the language to the things described. *Nash v. Towne*, 5 Wall. U. S. R. 689, 699. See also *Maryland v. Railroad Co.*, 22 Wall. U. S. R. 105; *Moran v. Prather*, 23 Wall. U. S. R. 492, 501.

539 *Guided by these principles, we are of opinion that the construction placed on the agreement by the defendants in error is the proper one. It is the only reasonable one. Here were two suits pending at the same time, in the same court, between the same parties, presenting the same questions, and depending on the same evidence. After trial, verdict and judgment in one case, with which the defendants were dissatisfied, and for correction of alleged errors, intended to apply to the appellate court, what more natural and reasonable than that it should be agreed between the parties that the decision in one case by the appellate court should be conclusive of the other, and that, pending the litigation in that court, the plaintiff's rights in the latter case should not be impaired or prejudiced? Hence, that the plaintiff should have immediate judgment in the second case, as in the first, and execution of the judgment should be suspended and await the decision of this court in the other case, provided security was given against loss occasioned by such suspension. Such an arrangement would avoid the expense, delay and vexation attending the trial of one of the cases in the court below and a prosecution of a writ of error in the same case here. And such, we think, was the agreement actually made.

There was judgment for the plaintiff by consent, and there is no doubt that the agreement provides for an unconditional stay of execution for ninety days. "In the event of an appeal being obtained and perfected" in the other case, a further stay is provided for, but it is conditional, as expressed by the concluding words, "provided, the appeal bond in that case be sufficient to secure the amount of both judgments." We think, that construing this agreement in reference to the subject matter and in the light of the sur-

rounding circumstances, with a view to discover the intention of the parties, we are warranted in transposing parts of it, so as to read thus: "Execution on the judgment to

be stayed for ninety days, and in the
 540 *event of an appeal being obtained and perfected in the case of the Bank of the Old Dominion v. James H. McVeigh & Son et al., decided at this term, then this judgment to abide the result in said case, and await the decision of the court of appeals, provided the appeal bond in that case be sufficient to secure the amount of both judgments." By this transposition—an expedient in the construction of instruments, when not forbidden by the plain meaning, often resorted to in the furtherance of a reasonable and probable intent, and sometimes rendered necessary to avoid conclusions so repugnant to a sense of justice and sound reason as to be not fairly imputable to the parties—the judgment is "to await the decision of the court of appeals," that is, as we interpret the language, is not to be enforced while the other case is pending in the court of appeals, "provided the appeal bond in that case be sufficient." &c.—this proviso or condition, in its application, being confined to the suspension of proceedings to enforce the judgment, and having no relation to the agreement that the judgment is "to abide the result" of the decision in the other case.

The agreement thus read expresses, we think, the true meaning of the parties, and that is, that the decision by this court in the case of the Bank v. James H. McVeigh & Son and others, should control the judgment in the other case, and while the former case was pending here, execution and other proceedings to enforce said judgment should be suspended, provided an "appeal bond"—that is, a supersedeas bond—was given in the case here sufficient to secure both judgments. If no such bond should or could be given (and we do not see how, under the statute, such bond to secure both judgments could be given, Code of 1873, ch. 178, § 13), the hands of the plaintiff would not be tied, nor its rights in any way impaired or prejudiced. Execution at law could have been sued out at any time to subject the personal property
 541 of the defendants, or *proceedings in equity instituted and prosecuted to subject their lands.

The agreement we are construing was drawn by the plaintiff's counsel, and was doubtless hastily prepared and executed at the termination of the trial in the first case, and probably in the midst of the business of the court. However that may be, it is difficult to believe, that the intelligent counsel for the plaintiff would ever have demanded, or the equally intelligent counsel for the defendants have assented to such an agreement as this is, if now rightly construed by the learned counsel for the plaintiff in error here. If his construction is right, the defendants agreed to confess judgment for a debt of large magnitude, which they denied they owed, and to continue bound by it, unless they performed a condition, which it

was practically, if not legally, impossible for them to perform, and that too although it should be authoritatively determined in the manner agreed upon, that they did not owe one dollar of the debt. It is in the highest degree improbable, that the defendants or their counsel so understood the contract when it was entered into. The defendants were under no such stress as to be forced into an undertaking of such a character. They might have proceeded with the trial of the second case, and if verdict and judgment had been rendered against them, they might, by writ of error in that case, have tested the correctness of the decision in the appellate court, as they did in the first case, and with like result. And this course would no doubt have been pursued, if they had not supposed that the same end would have been attained by the agreement made.

Although where the meaning of an instrument is clear, an erroneous construction of it by the parties to it will not control its effect, yet where there is doubt as to the proper meaning of it, the construction which the parties themselves have put upon it is said to be entitled to great consideration. *Railroad Co. v. Trimble, 10 Wall. U. S. R. 367, 377.

Notwithstanding the writ of error was awarded by this court in the first case in 1871, and the plaintiff in error then failed to give such bond as the agreement required, and the case was not decided by this court until 1875, and on the second writ of error, not until 1876, the plaintiff did not, in the meantime, take, nor has ever taken, any steps to enforce the judgment in the second case, thereby seeming to construe the agreement to mean, as the defendants construed it, that the judgment in the second case was to abide the result of the decision by this court in the first case, whether the bond required by the agreement was given or not.

It is not to be supposed for a moment, under the circumstances of the litigation between these parties, that the plaintiff would have delayed all this time, or even at all, after the failure to give the bond, to prosecute his remedies on a judgment by which the defendants were considered as irrevocably bound. The delay can be reasonably accounted for only, as it seems to us, upon the supposition that it was the agreement and understanding, recognized by both parties, that the judgment confessed in the second case should be controlled by the final decision of this court in the first, and "abide the result thereof."

Again, as has been said in another case, if there were any doubt as to the construction which should be given to the agreement, that construction should be adopted which would be more to the advantage of the defendants, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions, the one working injustice and the other

consistent with the right of the case, 543 that one should be favored *which standeth with the right. Noonan v. Bradley, 9 Wall. U. S. R. 394, 407.

Of the two constructions put upon the agreement in this case by opposing counsel, the one we have adopted "standeth with the right"; and is consistent with sound reason, as we think, and we are of opinion, upon the whole matter, that there is no error in the judgment complained of here, and that it should be affirmed.

MONCURE, P., dissented.

Judgment affirmed.

544 *Markells v. Markells.

November Term, 1879, Richmond.

Construction of Will—Residuary Clause.

—M, by his will, made in December, 1864, after directing the payment of his debts, gives to his wife all the property of every kind which belonged to her at the time of their marriage, and in addition thereto he gives to her for her natural life the house in which he lives, with the yard and garden attached, and his servant girl A, and any increase she may have; and he gives her in absolute right one-half of his personal property. He gives to his nieces E and S, certain articles and Confederate bonds, and also A, at the death of his wife. The residuary clause of the will is as follows:

5th. All the rest and residue of my estate is to be divided into two equal shares, and I give one-half to my sons J and A, and the other half to my nieces above named; but if from any cause either alienage or confiscation, either of my said sons cannot take or hold the share hereby given to him, then in that event I give the share of such one to my two nieces above named—HELD: The house and lot given to the wife for her life passes under the residuary clause of the will to the sons and nieces in equal shares; and this though there is some evidences of conversation between M and his wife of an intention that his sons should have the house and lot.

This case was heard in Staunton, and was decided at Richmond. It was a bill filed by James Henry Markell and Arthur Markell against Sally Morgan Markell and Elmira Markell. The question is whether the house and lot devised by John Markell, the father of the plaintiffs, to his widow for her life, passed under the residuary clause of John Markell's will to the plaintiffs and de-

545 fendants, or *passed to the plaintiffs on the death of the widow. The court below held that it passed to the plaintiffs and defendants equally. And the plaintiffs obtained an appeal to this court. The case is fully stated by Judge Moncure in his opinion.

Dandridge & Pendleton, for the appellants.
Wm. L. Clarke, for the appellees.

MONCURE, P., delivered the opinion of the court.

The controversy in this case is, as to the true construction of the will of John Markell, and is between his devisees—his two sons, James Henry Markell and Arthur Markell, and his two nieces, Elmira Markell and

Sally Morgan Markell. The said will is in the words and figures following, to wit:

"I, John Markell, of Winchester, Virginia, do make my last will and testament as follows:

"1st. I desire all my debts to be paid by my executor.

"2d. I give to my wife Mary all the property of every kind which belonged to her at the time of our marriage; and in addition thereto, I give to her, for and during her natural life, the house in which I now live, with the yard and garden attached thereto, and my servant girl Adeline, and any increase which she may have; and I give to my said wife, in absolute right, one-third of my personal estate, and she shall have the right to take any of the personal property, at the appraisement price, in part of her share.

"3d. I give to my niece Elmira Markell the portrait of my deceased daughter Bettie, and the ambrotype of my deceased wife; and I give my engravings to my niece Sally Morgan Markell, and family bible to my niece Elmira.

546 "4th. I give to my nieces my Confederate State bonds, to be delivered to them in kind, my servant Adeline and any increase that she may have, subject to my wife's life estate, and such of my beds and bed clothing as my wife shall not take at the appraisement price.

"5th. All the rest and residue of my estate to be divided into two equal shares, and I give one-half to my two sons, James Henry Markell and Arthur Markell, and the other half to my nieces above named; but if, from any cause, either alienage or confiscation, either of my said sons cannot take or hold the share hereby given to him, then and in that event I give the share of such one to my two nieces above named.

"6th. I appoint my friend, Philip Williams, executor of this my last will.

"7th. I hereby revoke all former wills.

"Given under my hand and seal this 7th day of December, 1864.

"John Markell, [Seal]

"Signed, sealed and proclaimed by the testator as his last will in our presence, who, in the presence of the testator and at his request, and in the presence of each other, have subscribed our names as witnesses.

"P. Williams.

"John D. Marvin."

"At a court held for Frederick county on Monday, May 1st, 1865, this last will of John Markell, deceased, was produced to the court and proved by the oath of P. Williams and John D. Marvin, the subscribing witnesses, thereto and ordered to be recorded.

"J. C. Riely, Clerk."

This bill was filed in the circuit court for Frederick county in 1878, by the said 547 James Henry Markell and *Arthur Markell, against the said Elmira Markell and Sally Morgan Markell. The complainants, in their said bill, among other things, allege "that amongst the property devised was the house in which the testator,

at the date of the execution of this will, lived; which he left to his wife for life. She is dead, and your orators are his only heirs at law. They claim the said real estate, which is located in Winchester, and deny that any others than themselves are interested in it."

The complainants then set forth the residuary clause of the will, and say that "it is under this clause that the said S. M. and E. Markell claim one-half of the reversionary interest in said house and lot after the death of testator's wife. Your orators were advised by the late P. Williams, the counsel of the testator, and by other eminent legal gentlemen, that the will left the property to them as heirs at law, after the death of the testator's wife. The testator had, before reaching the residuary clause, designated his wish as to certain specific parcels of real and personal property. He had much other real and personal property to dispose of, other slaves, another house, &c. Then as to this residuum of property he makes a disposition evidently excluding from his contemplation the other property. He confines the residuary clause to this real and personal estate other than that already disposed of. Prior to the execution of the will, up to the time of the execution, at the very time of its execution, and thereafter until his death, the testator explained and declared that this property was to be the absolute property in fee simple of your orators after the death of the wife, and that his will so provided and meant. This testimony, which in due time your orators will produce, explains any latent ambiguity on the face of the will. The house in dispute was the testator's residence, and the will provided for her holding it and other property in lieu of dower."

They therefore pray that the said
548 Sally Morgan Markell *and Elmira Markell be made defendants to the bill, that the said house and lot and appurtenances be decreed to the complainants, and that they may have general relief.

The said Elmira Markell and Sally M. Markell filed their answer to the said bill, in which answer they said, among other things, that by the said will "the decedent intended to dispose, and did dispose, of all the property which he then possessed; but your respondents deny the statements of the bill as to the intention of the testator in regard to the house and lot referred to in the bill, though such allegations are immaterial to the consideration of this case, and they claim that they are, in moral right, as well as in legal effect, entitled to one-half of the said house and lot under the residuary clause of the said will." "Your respondents were the nieces of the said decedent, the daughters of a brother for whom the testator had the tenderest affection, and whose welfare he ever had before his mind; one who was without means and in embarrassed circumstances, while the testator was a thrifty and successful man. Your respondents were each to him as a daughter, and as it became evident that their own father, through delicate health, seemed soon about to leave them heloless, the decedent became the more interested in

their behalf, and so remembered them, not only affectionately, but also substantially, in the disposition of his estate. Your respondents deny all the allegations of the bill upon which the complainants base their claim to an exclusive ownership of the said house and lot, and pray that they may be held to strict proof of the same."

The following was agreed to and signed by the parties, by their counsel, and filed as evidence in the case:

"Statement of Facts.

"John Markell made his will December 7, 1864; he died February 9, 1865. When he made his will, and when he died, he owned the following real estate:

549 *"1st. The house and lot left to Mrs. Markell (afterwards Mrs. Mary Kohlhousen) for life, referred to in the will of John Markell, deceased.

"2d. The house and lot in Winchester in which John Markell lived.

"3d. A vacant lot in Winchester, on the corner of Warwick and Kent streets, worth in good money about \$800.

"4th. A house and lot on East lane in Winchester, worth about \$900 in good money. Also the following personalty: numerous bonds and considerable personal property not specifically mentioned in John Markell's will, as appears in the appraisal, commissioner's reports, and statements filed in the papers of J. H. and A. S. Markell v. J. Markell's adm'r & al., amounting to some thousands of dollars in value. Nov. 23d, 1879.

"James H. Markell,
 "Michael Hassett."

"Endorsement.

"Nov. 26, 1878. We consent that the within may be read as the depositions of the persons who sign it.

"Wm. L. Clark;

"Counsel for defendants.

"Dandridge & Pendleton,

"Attorneys for complainants."

"It is also agreed that the original will of John Markell is in the handwriting of P. Williams, deceased, who was a lawyer at the Winchester bar for forty years.

"Dandridge & Pendleton,

"Attorneys.

"Wm. L. Clark,

"Counsel for defendants."

Three depositions were taken and
550 filed as evidence in *the case in behalf of the complainants, who testified, among other things, in substance, as follows:

1st. Adeline Scooe testified, that in 1864, she lived with John Markell's wife—his third and last wife—she knew him—was his servant—had belonged to him, and was raised by him. "Before his will was made, he said he intended the house he lived in for her, his wife, to do as she pleased with it. She would not accept it that way, because she said that at her death she would rather it would go to the boys—I mean his two sons. This talk was two or three days before the will was written. He said in reply, that if she wished it that way let it be so."

The defendants excepted to the foregoing deposition, so far as it introduces any evidence of the intentions of the said decedent as to what disposition he desired to have made of his property; also of any statement of Mrs. Markell, the same being incompetent. Not waiving the exception, they proceeded to cross-examine the witness, and among other questions asked her: "2d question. Were you present when the conversation occurred which you repeat, that Mr. Markell had with his wife?" To which question she gave the following "Answer. I was there. It was in his house. I was in his bed room. No one was present but myself and him and his wife. He was talking about making the will. I recollect the conversation distinctly. I don't know how long it was before he died. It was not a great while. I did not see him sign the will. I was't in his room when the will was signed. I never saw the will." "3d question. How do you manage to recollect the conversation thus referred to—when did Mr. Markell die?" To which she gave the following "Answer. Mr Markell died in February, 1865, during the war. I have been remembering the conversation."

2d. Miss S. E. Clipstine, in answer to a question propounded to her by complainants: "Please state anything *you may know of the disposition that Mr. John Markell intended should be made after his wife's death of the house in which he resided and which by his will was left to his wife for her life," (to which evidence the defendants excepted), said as follows: "He wished to leave it to her subject to her own will, but she said, No, Mr. Markell, you have sons, and it ought to go to them at my death; and he said, Well, Mary, if you wish it so it shall be so; that is what she told us, my sister and myself, frequently. We were living on her property, and she came frequently to see us, and every time she came she mentioned the subject. She hadn't any other thought or wish."

3d. Fanny A. Clipstine (to whose evidence the defendants also excepted) testified to the same effect as did her said sister.

On the 11th day of March, 1879, the cause came on to be heard, &c.; when the court was of opinion and decreed "that the true construction of the will of John Markell, deceased, is that the complainants, his sons, and the defendants, his nieces, are jointly and equally, share and share alike, entitled to the reversion of the house and lot referred to in the bill, and that said reversion hath now fallen in by the death of Mrs. Markell (afterwards Mrs. Kohlhouson), the life tenant; and it further appearing that the said property is not susceptible of partition in kind, a sale of the same was accordingly decreed, as mentioned in the said decree.

From which said decree, adjudging that under the said will the complainants, the said two sons of the testator, and the defendants, his said two nieces, are jointly and equally, share and share alike, entitled to the reversion of the said house and lot, which reversion hath now fallen in by the death of the life tenant aforesaid, the said complain-

ants applied to a judge of this court for an appeal; which was accordingly allowed.

Did the testator intend by his will to give to his two *nieces a moiety of the reversion or remainder of the house and lot given to his wife for and during her natural life, or did he intend thereby to give to his two sons the whole of said reversion or remainder, or to leave it undisposed of by his will, so that it would devolve on his said two sons as his only heirs at law? This is the question which we now have to solve.

In the construction of a will, the intention of the testator, as therein signified, must prevail and be carried into effect, if it be legal and the testator be sane.

There is no doubt about the sanity of the testator in this case. He was certainly sane when he made and published his will. Nor is there any doubt that but such a testator can disinherit his own issue, and leave his whole estate to strangers. Much less is there any that he may leave a moiety of his estate to his two nieces, to whom he was greatly attached, and who were in great need of his bounty, especially when, by his will, he gives the other moiety to his two and only heirs at law, after amply providing for his wife.

The will in this case was written, not by an illiterate testator, but by Philip Williams, the executor therein named, a distinguished lawyer of more than forty years practice. It is plainly indicated in the will that the testator intended thereby to dispose of his whole estate in possession or in action.

"I, John Markell, of Winchester, Virginia, do make my last will and testament as follows," is the first clause of the will, and just such a clause as might be expected in a will in which the testator intends to dispose of his whole estate, leaving no part of it to devolve, by mere operation of law, on his heirs or next of kin.

"1st. I desire all my debts to be paid by my executor," is the second clause, and just such a one as might be expected in such a will; thus plainly indicating that the testator intended, first, that his estate, or so

much of it as *might be necessary for the purpose, should be applied to the payment of his debts, and all his remaining estate, after the payment of his debts, should be disposed of as is directed by his will.

"2d. I give to my wife Mary all the property of every kind which belonged to her at the time of our marriage, and in addition thereto, I give to her, for and during her natural life, the house in which I now live, with the yard and garden attached thereto, and my servant girl Adaline, and any increase which she may have; and I give to my said wife, in absolute right, one-third of my personal estate, and she shall have the right to take any of the personal property, at the appraisement price, in part of her share." This is the provision made by the testator for his wife, and it seems to be perfectly plain. Indeed, no question has been raised about it. The provision is by an absolute gift, except as to the house, yard and garden, and servant girl Adaline and any increase she might have, therein mentioned.

which are given to her for and during her natural life.

The next is a gift of some small mementoes to the testator's two nieces.

"3d. I give to my niece, Elmira Markell, the portrait of my deceased daughter Bettie, and the ambrotype of my deceased wife, and I give my engravings to my niece Sally Morgan Markell, and my family Bible to my niece Elmira." There can certainly be no doubt as to the meaning of the testator in this clause. Nor can there be any as to his meaning in the next, viz:

"4th. I give to my nieces my Confederate States bonds, to be delivered to them in kind, my servant Adaline and any increase that she may have, subject to my wife's life estate, and such of my beds and bed clothing as my wife shall not take at the appraisement price."

Then follows the residuary clause of the will, which seems to be perfectly plain, but is the clause, and the only *clause, of the will about the meaning of which there is any controversy.

"5th. All the rest and residue of my estate is to be divided into two equal shares, and I give one-half to my two sons, James Henry Markell and Author Markell, and the other half to my nieces above named; but if, from any cause, either alienage or confiscation, either of my said sons cannot take or hold the share hereby given to him, then, and in that event, I give the share of such one to my two nieces above named."

Could more comprehensive words have been used to embrace the whole residuary estate, real and personal, in possession, remainder or reversion, which had not previously in the will been disposed of? "All the rest and residue of my estate is to be divided in two equal shares." It is contended by the appellants, by counsel, that these most comprehensive words were not intended by the testator to embrace the reversion or remainder of the house and lot given by him to his wife for life, though it is not contended that they were not intended to embrace the reversion or remainder of the servant girl Adaline and any increase she might have. Why not embrace the one as well as the other? Suppose that he certainly did intend to embrace the said reversion or remainder of both—how could he have used more suitable and comprehensive language to express such intention? The will was written by an enlightened lawyer of forty years' practice. Must he not have known that the comprehensive words which he used expressly included the said reversion or remainder? and if the testator did not in fact intend to include it, would not the draughtsman of the will have therein used additional language to explain the testator's meaning and to avoid otherwise inevitable misconstruction?

"But if from any cause, either alienage or confiscation, either of my said sons cannot take or hold the share hereby given to him, then and in that case I give the share of *such one to my two nieces above named." It is not plain that the testator intended to embrace in this provision

his son's portion of the reversion or remainder of the house and lot given to his wife for her life as aforesaid? Could he have intended that if from any cause, either alienage or confiscation, either of his said sons could not take or hold the share given to him by the will, then and in that event the two nieces should have all of said share, except of the said reversion or remainder, but that his share of that should be confiscated or be subject to be disposed of otherwise than the rest of his said share? If he had so intended, would not the draughtsman of the will, and especially such a draughtsman, have used plain language to avoid otherwise inevitable doubt and misconstruction?

By the 4th clause of the will, as we have seen, the testator gave to his nieces his servant Adaline and any increase she might have, subject to his wife's life estate therein; which shows that when he made his will he had in his mind the reversion or remainder of the estate, real and personal, given to his wife for her life; and the presumption is that he intended to dispose, by his will, of the whole of the said reversion or remainder. He expressly disposes of a portion of it by the 4th clause of the will, and just as plainly disposes of the residue of it by the comprehensive words used in the 5th or residuary clause of the will.

The only remaining clauses of the will, the 6th and 7th, confirm the view hereinbefore presented, that the testator intended by his will to dispose of his whole estate, in possession, remainder or reversion—the 6th being, "I appoint my friend Philip Williams executor of this my will"; and the 7th being, "I hereby revoke all former wills." And then follow the concluding words of the will:

"Given under my hand and seal this 7th day of December, 1864.

"John Markell. [Seal.]"

556 *At the foot of which is a very full and formal attestation clause:

"Signed, sealed and proclaimed by the testator as his last will, and in our presence, who, in the presence of the testator, and at his request, and in the presence of each other, have subscribed our names as witnesses.

"P. Williams.

"John W. Marvin."

The only evidence in the case being that of the three witnesses introduced by the complainants, is wholly insufficient to affect the construction of the will, the meaning of which seems to be therein plainly expressed, as hereinbefore shown. A will cannot be contradicted by parol testimony, however positive it may be, or however recently given after the execution of the will. In this case the testimony was given more than thirteen years after the execution of the will, with which neither of the said three witnesses had any connection, nor on which occasion was either of them present. One of them, Adaline Siscoe, was a slave of the testator, and testifies to what she says she heard the testator and his wife say to each other two or three days before the will was written. The other two, S. E. Clipstine and Fanny Clipstine, who were living on the

property of the testator's wife, and she came frequently to see them, and every time she came she mentioned the subject—their testimony is of what they profess to have heard the testator, and especially his wife, say in regard to the disposition intended by the testator to be made of the house and lot in question, after the death of his wife. Surely such testimony can have no weight or effect in such a case.

We think there is no conflict with any of the views hereinbefore presented in either of the three cases of *Kennon v. McRoberts & wife*, 1 Wash. 96-114; *Philips & wife*

557 **v. Melson*, 3 Munf. 76-78; and *Minor's ex'x v. Dabney*, 3 Rand. 191-213, cited, and so much relied on, in the argument of the counsel for the appellants—nor in any of the other cases therein cited. The transaction on which the first two of the said three cases occurred transpired before the enactment of October, 1785, that "every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a life estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." 12 Hen. Stat. at Large, p. 157. The present statute on the subject is in the Code of 1873, p. 889, ch. 112, § 8, and is in these words: "Where any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple or other the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance or grant." In such case at common law, no greater estate than one for the life of the grantor or testator was thereby transferred. See 1 Tuck. Com., book 2, ch. 5, pp. 42-44. The said views are fully sustained by those of this court in *Smith's ex'or v. Smith & al.*, 17 Gratt. 268-288, cited and relied on in the argument of the counsel for the appellees in this case.

The court is therefore of opinion that there is no error in the decree appealed from in this case, and that the same ought to be affirmed.

Decree affirmed.

558 **Anderson v. Johnson & als.*

November Term, 1879, Richmond.

1. *Equity Jurisdiction—Absent Defendant*

—*Affidavit*.—In a suit in equity against an absent defendant to attach his property for the satisfaction of a debt, if it appears from the bill that the court has jurisdiction of the case, it is not necessary that the affidavit should state that the defendant has property in the county where the suit is brought, but it is sufficient if it states that he has property and effects in any county of the state.

2. *Same—Same—Same—Remedy*.—If in such case the affidavit is defective, the remedy is by motion to quash the attachment.

3. *Attachment Bond—Decree of Sale—Statute*.—If it appears that a copy of the attachment was served on the defendant sixty days before a decree for the sale of the land attached, the decree for the sale may be made without requiring the bond provided for in the statute. Code of 1873, ch. 148, § 24, p. 1015.

4. *Same—Certificate of Foreign Justice—Appeal and Error*.—The certificate of M., describing himself as a justice of the peace of the county of B, in the state of Ohio, that P, a deputy sheriff of said county and state, had made oath before him, the said M. of a delivery to the defendant of a copy of the summons and attachment, not objected to in the court below, cannot be objected to in the appellate court.

5. *Foreign Attachment Suit—Rehearing—Statute*.—Under the statute, Code 1873, ch. 148, § 27, a defendant in a foreign attachment suit may appear at any time pending the suit, and have the cause reheard, tendering security for the costs. And the proviso to the statute, which excepts from the operation of the act a case in which the defendant was served with a copy or the attachment or with process in the suit, issued more than sixty days before the date of the decree, only refers to such a service in the proceedings in the suit, and not to a service out of the suit and out of the state; and a service out of "the suit and out of the state can have no greater effect than, if so great as, an order of publication duly posted and published.

6. *Attachment—Intervention—Right to Jury Trial*.—Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury empaneled for the purpose, as provided by the statute, Code of 1873, ch. 148, § 25; and it is error for the court to pass upon the claim without the intervention of a jury.

7. *Foreign Attachment Suit—Costs—Security*.—Where, on the motion of the defendant in an attachment case, the plaintiff, who is a non-resident of the state, is ordered to give security for the costs of the suit within sixty days, and fails to do so, his bill should be dismissed; and it is error to proceed to hear and decide the cause.

8. *Same—Same—Same—Dismissal of Suit*.—On reversing the decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the failure of the plaintiff to give security for costs, but will direct that he be allowed a reasonable time to comply with the order.

**Attachment*.—The construction contained in the third headnote of the proviso to the statute, which excepts from the operation of ch. 148, 24, Code 1873, a case in which the defendant was served with a copy of the attachment or process in the suit, issued more than sixty days before the date of the decree, is followed in *Smith & Wimsatt v. Chilton, etc.*, 77 Va. 538, citing the principal case.

†*Failure to Object Below*.—In *Sims v. Tyrer*, 96 Va. 7, it is said: "If the affidavit is not made, or, if made, is defective, this is ground for a motion to abate the attachment. This the appellant did not do, but appeared and defended the case on the merits. Having failed to make the objection in the court below, he cannot make it for the first time in the appellate court. *Anderson v. Johnson*, 32 Gratt. 558; and *Fisher & Brother v. March*, 26 Gratt. 765."

This case was argued at Staunton, but was decided at Richmond.

This is an appeal from three decrees of the circuit court of Clarke county, made at the terms of said court in February, 1877, and May, 1877 and 1878, and made in a cause in which the appellee, John B. Johnson, was plaintiff, and the appellant, Thomas H. Anderson, was defendant.

The cause was an attachment suit in chancery brought in the said court to recover a debt claimed to be due by a promissory note of the defendant, dated July 1, 1866, for the sum of eight hundred dollars, payable two years after date to the order of the plaintiff, for value received, with six per cent. interest from date. The defendant resided at the time of the institution of the suit in the county of Belmont, in the state of Ohio; but was supposed to own a tract of land containing about sixty acres, lying wholly or partly in the said county of Clarke, in the state of Virginia. As the foundation of the suit, the plaintiff, by his attorney, on the day

560 *the 24th day of May, 1875—filed in the clerk's office of the said court a paper purporting to be an affidavit made by said plaintiff on the 7th day of September, 1874, before a justice of the peace of said county of Belmont, "that Thomas H. Anderson was indebted to him in the sum of \$800, on note dated July 1st, 1866, with interest at six per cent. from date, credited June 16th, 1868, by \$387.95; that affiant believed he was justly entitled to recover in the suit the said sum of \$800, with interest as aforesaid, subject to the credit aforesaid; that said debt was then justly due and unpaid, and that the defendant, Thomas H. Anderson, then was a non-resident of the state of Virginia, but had property and effects within the same.

Annexed to the said affidavit was a certificate, purporting to be that of J. R. Mitchell, clerk of the court of common pleas, a court of record of said county of Belmont, in the state of Ohio, dated on the said 7th day of September, 1874, that Joseph P. Arnst, whose genuine signature appeared to the said affidavit, was at the time of signing the same an acting justice of the peace in and for said county, duly commissioned and qualified to administer oaths, &c., and that his official acts were entitled to full faith and credit. Affixed to said certificate was a seal purporting to be that of the said court.

On filing the said affidavit and certificate—to wit: on the 24th day of May, 1875—the plaintiff sued out of the clerk's office of the said circuit court of Clarke county, a summons against the defendant, to appear and answer a bill in chancery exhibited against him in the said court by the plaintiff.

There was an "endorsement" on the said summons, to "attach the real estate of the within named defendant, Thomas Anderson, lying in Clarke county, Virginia"—describing it—"containing about sixty acres, and subject the same to the payment of the claim of the complainant, amounting" as aforesaid, "and the costs of this suit."

561 *The said summons, so endorsed, was

returned by the sheriff to whom it was directed.

"Executed June 7, 1875, at 11 o'clock A. M., by attaching the above mentioned real estate, belonging to the above named Thomas Anderson, described as above. Said Anderson is a non-resident.

"JOHN T. CROW, Sheriff."

In 1875—June rules—the case was continued for bill and July rules; it was again continued for bill; and an order of publication was awarded against the defendant, a non-resident of the state.

On the 30th day of July, 1875, the plaintiff sued out another summons, which, with the attachment endorsed thereon, was similar to the one first issued as aforesaid, except the date and return day thereof. This second summons and attachment was placed in the hands of W. C. Cochran, sheriff of Belmont county, Ohio, who gave his receipt therefor, dated August 12, 1875, and on the same day authorized John H. Piper to serve the same, who accordingly delivered a copy thereof to the said Thomas Anderson in Belmont county, Ohio, on the 13th day of August, 1875, as appears by certificate annexed to the said return, purporting to be that of Benjamin Mackell, a justice of the peace of said county, that said Piper had made affidavit before him, the said justice, of such delivery of the said copy.

At August rules, 1875, the cause was continued for bill, and for completion of publication against the non-resident defendant.

At September rules, 1875, the bill and exhibit were filed; and the cause was continued for completion of the publication aforesaid; and at October rules, 1875, it was set for hearing.

On the 20th day of October, 1875, 562 the cause coming on *to be heard on the bill and exhibits filed therewith and said order of publication, was argued by counsel, whereupon the court decreed that the plaintiff recover of the defendant the sum of \$800, with interest thereon from July 1st, 1866, subject to a credit for \$387.95, of date June 16, 1868; and it appearing that the defendant had been served with a copy of the attachment in the cause more than sixty days before the rendition of said decree, it was further decreed that the sheriff of Clark county, expose to sale at public auction, in front of the court-house, after thirty days advertisement of the time and place thereof, in some convenient newspaper, the land in the bill mentioned, and sell the same on the terms of one-fourth cash, the balance in one, two and three years, the deferred payments to be secured by good personal security and the title to be retained until the money is paid. The bonds to be returned by the sheriff to the court.

On the 2d day of March, 1876, the defendant asked leave to file a plea in the cause, to which the plaintiff objected. The plea referred to was that of the act of limitations—to wit: that the promissory note sued on became due and payable more than five years before the institution of the suit.

On the 31st day of May, 1876, the defend-

ant appeared by his attorneys, and asked leave to file his petition, which was accordingly filed, and Samuel J. C. Moore and son (his attorneys) entered themselves as security for the costs of the said petitioner. And on motion of said defendant, Thos. H. Anderson, it was ordered that the complainant, who was suggested to be a non-resident of the state, give security for the costs within sixty days from the said date.

The said petition of said Thomas H. Anderson represented that he had a good defence to the claim of the plaintiff, and that he then appeared and asked leave to make said defence, and that the proceedings in the cause might be reheard.

563 *In 1877, at the February term of the court, John T. Crow, sheriff of the said county, returned to the said court a report of the sale made by him of the trace of land aforesaid under the decree made in the cause at the October term, 1875, as aforesaid, and recommended that the sale be not confirmed, as he did not consider the price at which it was made an adequate one.

On the 21st day of February, 1877, the cause came on to be again heard upon the papers formerly read and the report of the sale of the land made by the sheriff as aforesaid, and the motion of the plaintiff to set aside the order of May term, 1876, granting leave to the defendant Anderson to file his petition, alleging that he has a good defence to the plaintiff's claim, and was argued by counsel. Whereupon, it was decreed that the said order of May term, 1876, be set aside; and for reasons appearing to the court, it refused its leave to file said petition.

And the court, being of opinion upon the said report of Crow, sheriff, that the land sold on the 14th day of December, 1875, to the plaintiff, John B. Johnson, was sold for an inadequate price, being less than three-fourths of its assessed value, it was further decreed and ordered that said sale be not confirmed, and that said sheriff again expose said land to public sale on the terms prescribed in the order of sale of October term, 1875, and report his proceedings to the court.

The said decree of the 21st day of February, 1877, is the first of the three decrees appealed from in this case.

After the said decree was directed to be entered, a motion was submitted by J. W. Anderson, George W. Anderson, David E. Anderson and Eliza C. Jackson, for leave to file their petition, claiming the land attached in this cause; which motion was granted, and the petition accordingly filed. And Samuel J. C. Moore and son entered themselves as security for costs in said petition.

564 And it was ordered that so much of the decree as directed a sale *of the land be suspended until the further order of the court.

The petitioners represented in their petition that they were purchasers of the land in controversy of the defendant for valuable consideration; that they made their contract of purchase of the defendant on the 5th day of May, 1873, prior to the institution of this

suit; which contract never was admitted to record, as said petitioners were non-residents of the state, and did not know that under the provisions of the laws of said state such contracts could or should be admitted to record; that subsequent to said purchase they complied with its terms by paying the purchase money, and on the 22d day of January, 1876, a deed was executed, conveying said land to them; and that they were advised that their title to said land was good against said attaching creditor; and they prayed that the said land might be discharged from said attachment upon such terms, &c., and they might have general relief.

The contract of sale and deed referred to in said petition were exhibited therewith.

On the 26th day of May, 1877, the defendant, Thomas H. Anderson, personally appeared in court, and asked leave of the court to file his petition, together with a plea and answer in the case; to the filing of which the plaintiff objected. He represented in his petition that he had a good and legal defence to the claim of the plaintiff, to recover which this suit is brought; and he asked that the proceedings and decrees in the cause might be reheard, and that he might be permitted to make defence. He tendered as security for costs Samuel J. C. Moore and son, who were willing to become such security.

On the 14th day of June, 1877, the cause came on to be again heard upon the papers formerly read, and the motion of the defendant Anderson, made at that term, to file his said petition, and the plaintiffs' objection thereto. Whereupon, for reasons

565 appearing to the court, leave to *file said petition was refused, and the cause was continued for a hearing of the same upon the petition of J. W. Anderson and others, filed at the February term, 1877, and upon the other matters in said record.

The said decree of the 1st day of June, 1877, is the second of the three decrees appealed from in this case.

On the 29th day of May, 1878, the cause came on to be again heard upon the papers formerly read, the petition of J. W. Anderson, George W. Anderson and Eliza C. Jackson, and the exhibits filed therewith, claiming the property attached in this cause, a duly certified copy of the lis pendens recorded at the institution of this suit, and the motion of the defendant, Thomas H. Anderson, to file his petition at this term; which petition is set out in the said decree, in which the said petitioner states substantially that a decree was rendered against him in said cause at October term, 1875, of said court; that he has since returned to and appeared openly in this state; that he has a good defence to the claim of complainant in this cause, which is—1st, that he has paid said claim; 2d, that the statutes of limitations of this state and of the state of Ohio, where said contract was made, are, and were at the time of the institution of this suit, a complete bar to the action of complainant; that said petitioner, therefore, now appearing openly in this state, prays that he may have leave to file this his petition in said cause; that the

proceedings in said cause may be reheard, and that he may have leave to set up his said defences to the said action. He further says that a copy of the order before referred to in this cause has never been served upon him at the instance of the plaintiff.

And the objection of the plaintiff to the filing of this petition was argued by counsel: upon consideration whereof, it was decreed that said objection be sustained, and leave was refused to file said petition. And the court, being of opinion that the plain-

566 tiff, as against the petitioners, *J. W. Anderson, G. W. Anderson, and al., claiming the land attached in this cause, is entitled to subject said land to the payment of his said claim, decreed that unless the defendants pay to the plaintiff the said claim, which is set out in the said decree, within thirty days from the rising of the court, then the said Sheriff Crow was directed again to expose said land to sale at public auction, on the terms prescribed in the said order of the 20th of October, 1875, and to report his proceedings to the court. Said defendant tendered S. J. C. Moore and son as security for costs upon said petition, offered to be filed by him as aforesaid.

The said decree of the 29th day of May, 1878, is the third and last of said three decrees appealed from in this cause.

The defendant applied to a judge of this court for an appeal from and supersedeas to the said three decrees; which was accordingly allowed and awarded.

S. J. C. Moore, for the appellant.

McDowell & Moore, for the appellees.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

There are five assignments of error in the decrees appealed from in this case made in the petition for appeal, which will be examined and disposed of, so far as it may be deemed necessary or proper to do so, in the order in which they are made.

1. The first assignment of error is, the affidavit on which the attachment is based was defective.

The Code, ch. 148, § 1, page 1009, requires that the affidavit to be made for the purpose of obtaining an attachment on the institution of an action at law, shall,

567 among *other things, state, that "affiant believes that the defendant has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein." And § 11 of the same chapter, page 1011-12, requires that the affidavit be made for the purpose of obtaining an attachment on the institution of a suit in equity, may be according to the nature of the case, conforming as near as its nature will admit, to what is specified in previous sections; and such affidavit may be at the time or after the institution of the suit."

The reason for requiring that the affidavit in the former case shall state that affiant believes that the defendant has estate, &c., within the county, &c., in which the suit is,

or that he is sued with a defendant residing therein, is to show that the court of law in which the action is brought has jurisdiction of the case. If it has, as it certainly has, when the defendant against whom the attachment issued either has estate in the county in which he is sued, or is sued with a defendant residing therein; then the attachment, whether it be sued out in an action at law or suit in equity, may (except where it is sued out specially against specified property) be levied upon any estate, real or personal, of the defendant, or so much thereof as is sufficient, &c., whether the same be in the county, &c., where the suit is, or in any other, &c., § 7, p. 1010. If it appear from a bill in equity that the court in which the suit is brought has jurisdiction of the case, as it certainly does in this case, then the affidavit on which an attachment is issued in the case need not state that the property on which it is to be levied is situate in the county, &c., in which the suit is brought, but may state that it is situate in and county of the state. § 7, supra.

If the affidavit had been defective in this case, the remedy for the defect would have been by a motion to quash the attachment. There was no such motion in this case, though the defendant appeared and offered to defend himself in the suit upon the merits.

568 *The court is therefore of opinion, that there is no error in the decrees appealed from in respect to the matter of the first assignment of error.

2. The second assignment of error is, that the decree of the 20th day of October, 1875, for the sale of the property is erroneous, in that it failed to require an attachment bond, as directed by the Code of 1873, ch. 148, § 24, page 1015.

The said section provides, that if the defendant against whom the claim is has not appeared or been served with a copy of the attachment sixty days before such decree, the plaintiff shall not have the benefit of the preceding section (providing for a sale of the property attached), unless or until he shall have given bond "with sufficient security," &c., "with condition to perform such future order as may be made upon the appearance of the said defendant and his making defence. If the plaintiff fail to give such bond in a reasonable time, the court shall dispose of the estate attached, or the proceeds thereof, as to it shall seem just."

The certificate of Benjamin Mackall, if it be regarded as evidence, certainly shows that a copy of the attachment was served upon the defendant more than sixty days before the said decree. The attachment consisted of the said summons and the endorsement thereon. And as the defendant was served with a copy, not only of the said summons, but also of the endorsement thereon, he was served with a copy of the said attachment sixty days before said decree.

But must we not regard the said certificate as evidence, at least in the appellate court, as no exception was taken to it as

such in the court below, though the defendant appeared in person and by attorney in the court below and offered to defend himself therein on the merits in the said suit?

We are of opinion that we must; and we are therefore of opinion that there is no error in the decrees appealed from in respect to the matter of the second assignment of error.

569 *3. The third assignment of error is, that "the circuit court erred in refusing to permit the defendant to make defence, as he asked in his three several petitions."

By § 27 of ch. 148, of the Code, p. 1015, it is enacted, that "if a defendant against whom, on publication, judgment or decree is rendered under any such attachment, or his personal representative, shall return to or appear openly in this state, he may, within one year after a copy of such judgment or decree shall be served on him at the instance of the plaintiff, or within five years from the date of the decree or judgment, if he be not so served, petition to have the proceedings reheard. One giving security for costs, he shall be admitted to make defence against such judgment or decree as if he had appeared in the case before the same was rendered, except," &c. "But this section shall not apply to any case in which the petitioner or his decedent was served with a copy of the attachment, or with process in the suit wherein it issued more than sixty days before the date of the judgment or decree, or to any case in which he appeared and made defence."

On the 20th day of October, 1875, the decree aforesaid was rendered under the attachment aforesaid against the defendant therein on publication. And thereafter, before there was an effectual sale under the said decree—to wit: on the 26th day of May, 1877—the said defendant, Thos. H. Anderson, personally appeared in court—to wit: the court in which the decree was rendered as aforesaid—and asked leave of the said court to file his petition in writing, together with a plea and answer to the filing of which petition, plea and answer the plaintiff objected. In the said petition, the said defendant represented that he had a good and valid defence to the claim and of the plaintiff against him, to recover which the said suit was brought; asked that the proceedings and decrees in the cause might be reheard, and that he might be permitted to make defence; and tendered as security for costs Samuel J. C. Moore

570 and *son, who were willing to become such security. Afterwards, during the same term—to wit: on the 1st day of June, 1877—the cause came on to be again heard on the papers formerly read and the said motion of the defendant Anderson, made at the same term, to file the said petition, and the plaintiff's objection thereto: whereupon, for reasons appearing to the court, leave to file said petition was refused. And thereafter, during a subsequent term—to wit: on the 29th day of May, 1878—the cause came on again to be heard upon the papers formerly read, &c.; the said defendant Anderson again presented his petition to the said

court in the said cause, stating in substance, among other things, "that a decree was rendered against him in said cause at October term, 1875, of said court; that petitioner has since returned to and appeared openly in this state; that he has a good defence to the claim of the plaintiff in this cause; which is, 1st, that he has paid said claim; 2d, that the statutes of limitations of this state and of the state of Ohio, where said contract was made, are, and were at the time of the institution of this said suit, a complete bar to the action of the plaintiff. Your petitioner therefore now appearing openly in this state, prays that he may have leave to file this his petition in said cause; that the proceedings in said cause may be reheard, and that he may have leave to set up his said defences to the said action." And the said defendant tendered S. J. C. Moore and son as security for cost upon his said petition. And the objection of the plaintiff to the filing of said petition was argued by counsel; upon consideration whereof it was decreed that the said objection be sustained and leave to file said petition was refused.

Now it is very clear, that the defendant had a right to appear personally in the said cause in the said court and make his defence therein, as proposed in his said petition, under the said 27th section of ch. 148, of the Code,

page 1015, unless he was deprived of
571 that right by the concluding *portion of that section, which declares: "But this section shall not apply to any case in which the petitioner, or his decedent, was served with a copy of the attachment, or with process in the suit wherein it issued more than sixty days before the date of the judgment or decree, or to any case in which he appeared and made defence." The court is of opinion, that the said portion of the said section has no such effect; that the service "with a copy of the attachment or with process in the suit," therein mentioned, refers to such a service in the proceedings in the suit, and not to a service out of the suit and out of the state; that a service out of the state and out of the suit can have no greater effect than, if so great as, "an order of publication duly posted and published (Code 1873, ch. 166, § 15, page 1087). If then he had a right to make defence after a decree entered upon an order of publication (as he surely had) how could that right be impaired by the alleged service in Ohio? This language is used in the petition for the appeal in this case and seems to be correct.

The court is therefore of opinion, that the circuit court erred in refusing to permit the defendant to make defence as he asked in his petitions as aforesaid.

4. The fourth assignment of error is, that "the circuit court erred in overruling the petition of J. W. Anderson and others, the purchasers of the land attached, who had acquired an interest therein and an equitable title thereto, before the attachment was sued out."

By § 25 of ch. 148, of the Code, page 1015, it is enacted, that "any person may file his petition at any time before the property attached as the estate of a defendant is

sold, or the proceeds of the sale paid to the plaintiff under the decree or judgment, disputing the validity of the plaintiff's attachment thereon, or stating a claim thereto, or an interest in or lien on the same, under any other attachment or otherwise, and its nature,

572 and upon giving *security for costs, the court, without any other pleading, shall empanel a jury to enquire into such claim, and if it be found that the petitioner has title to, or a lien on, or any interest in, such property or its proceeds, the court shall make such order as is necessary to protect his rights; the costs of which enquiry shall be paid by either party, at the discretion of the court."

J. W. Anderson, George W. Anderson, David E. Anderson and Eliza C. Jackson, filed their petition by leave of the court, in the said cause, before the proceeds of sale of the said land were disposed of under a decree of the court in the said cause—to wit: at February term of said court, 1877—in which petition they represented, in substance, that they were purchasers for valuable consideration of the tract of land attached in this cause; that they purchased it before the institution of this suit, and were advised their title to it was good against the claim of the attaching creditor. They exhibited with their petition the contract of sale to them from the defendant, dated the 5th day of May, 1873, for said land, which never was admitted to record in Clarke county, Virginia; and as they were non-residents of the state, they did not know (as they stated in their petition) that under any provisions of the laws of said state such contracts could or should be admitted to record. They further represented, that subsequent to said purchase, they complied with its terms by paying the purchase money, and on the 22d day of January, 1876, a deed was executed conveying said land to them, which deed was also exhibited with said petition. They said they were advised that their title to said land is good against said attaching creditor, and they prayed for special and general relief against the same.

Samuel J. C. Moore and son entered themselves as security for costs in said petition; and the contract of sale and deed for the land, referred to in the partition, were exhibited therewith; and it was ordered that so much of the *decree rendered in the cause as directed a sale of the land be suspended until the further order of the court.

On the 29th day of May, 1878, the cause came on to be again heard upon the papers formerly read, the petition of J. W. Anderson, George W. Anderson and Eliza C. Jackson, and the exhibits filed therewith, claiming the property attached in this cause, &c. And the court, being of opinion that the complainant, as against the petitioners, J. W. Anderson, G. W. Anderson and al., claiming the land attached in this cause, is entitled to subject said land to the payment of their said debt, decreed that unless payment should be made within thirty days of the rising of the court of the debt and interest due by the defendant to the plaintiff as aforesaid, then the sheriff should make sale

of the said land, in the manner and on the terms aforesaid, and report the same to the court.

The court is of opinion that the circuit court erred in disposing of the case as it did in regard to the said petition without the intervention of a jury, but that instead of doing so, the said circuit court, as directed by section 25 of chapter 148 of the Code as aforesaid, should, upon the petitioners giving security for costs, and without any other pleading, have empanelled a jury to enquire into such claim; and if it had been found that the petitioners had title to such property the court should have made such order as was necessary to protect their rights.

5. The fifth assignment of error is, that "the circuit court erred in entering any decree for the complainant after his non-residence has been suggested and security for cost required." On the 31st day of May, 1876, on the motion of the defendant, it was ordered that the complainant, who was suggested to be a non-resident of this state, give security for the costs within sixty days from that date. The Code (p. 1161, § 2, ch. 181) provides that "after sixty days from such suggestion," the suit shall, by order of

the court, be dismissed, unless, before
574 the dismissal, the plaintiff *be proved to be a resident of the state, or security be given before said court or the clerk thereof for the payment of the costs and damages which may be awarded to the defendant, and for the fees due, or to become due, in such suit to the officers of the court."

Although more than sixty days elapsed after such suggestion, and the plaintiff was not proved to be a resident of this state, nor was security given before said court, or the clerk thereof, for the payment of the costs, &c., as aforesaid, yet the suit was not, by order of the said court, dismissed; but, on the contrary, the court proceeded further in the case until the decree of the 29th day of May, 1878, was entered for the sale of the said land for the payment of the claim of the plaintiff, unless payment thereof should be made within thirty days from the rising of the said court.

The court is of opinion that the circuit court erred in regard to the matter of the said 5th and last assignment of error.

The court is therefore of opinion that so much of the decrees appealed from in this case as are inconsistent with the foregoing opinion are erroneous, and ought to be reversed and annulled, and that the residue thereof is not erroneous, and ought to be affirmed; and that the cause ought to be remanded to the said circuit court for further proceedings to be had therein, in conformity with the said opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decrees appealed from are erroneous on the grounds taken in the 3d, 4th and 5th assignments of error in the petition for the appeal in this case: but are not erroneous on the grounds taken in the 1st and 2nd assignments

of error in said petition, or either of them, or any other ground.

575 *In regard to the 3d assignment of error, that "the circuit court erred in refusing to permit the defendant to make defence as he asked in his three several petitions;" this court is of opinion that, as stated in the said petition for the appeal, "when petitioner appeared openly in the state and petitioned to have the cause reheard, tendering security for the costs, he had a right to be admitted to make defence against the action as if he had appeared in the cause before the decree was rendered. (Code 1873, ch. 148, § 27, p. 1015.)"

In regard to the 4th assignment of error, that "the circuit court erred in overruling the petition of J. W. Anderson and others, the purchasers of the land attached, who had acquired an interest therein and an equitable title thereto, before the attachment was sued out." This court is of opinion that the said petition having been filed by leave of the said circuit court in this cause before the proceeds of the sale of the said land were disposed of under a decree of the court in the said cause, disputing the validity of the plaintiff's attachment thereon and stating a claim thereto, or an interest in or lien on the same, and its nature, and giving security for costs, in compliance with the requisitions of the 25th section of chapter 148 of the Code of 1873, page 1015, the said circuit court erred in not impanelling a jury, without any other pleading, to enquire into the said claim; and if found that the said petitioners had title to or a lien or any interest in said land or its proceeds, making such order as might have been necessary to protect the rights of said petitioners, according to the directions of the said 25th section; and instead of doing so, in deciding, without the intervention of a jury, that the plaintiff, as against the said petitioners, claiming the land attached in this cause, is entitled to subject the same to the payment of the claim for which it is so attached.

In regard to the 5th assignment of error, that "the circuit court erred in entering
576 any decree for complainant *after his non-residence has been suggested and security for costs required." On the 31st day of May, 1876, on the motion of the defendant, it was ordered that the complainant, who was suggested to be a non-resident of this state, give security for the costs within sixty days from that date. The Code, p. 1161, § 2, ch. 181, provides that "after sixty days from such suggestion, the suit shall, by order of the court, be dismissed, unless, before the dismissal, the plaintiff be proved to be a resident of the state, or security be given before said court, or the clerk thereof, for the payment of the costs and damages which may be awarded to the defendant, and for the fees due, or to become due, in such suit to the officers of the court." Although more than sixty days elapsed after such suggestion, and the plaintiff was not proved to be a resident of the state, nor was security given before said court, or the clerk thereof, for the payment of the costs, &c., as aforesaid, yet the suit was
577 not, by order of the said court, dismissed, but,

on the contrary, the court proceeded further in the case until the decree of the 29th day of May, 1878, was entered for the sale of the said land for the payment of the claim of the plaintiff, unless payment thereof should be made within thirty days from the rising of the said court.

Therefore it is decreed that the decrees appealed from be reversed and annulled so far as they are hereinbefore declared to be erroneous, and be affirmed so far as they are hereinbefore declared not to be erroneous; and that the cause be remanded to the said circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion and decree.

But the suit shall not be dismissed on account of the failure to give security before said court, or the clerk thereof, for the payment of the costs and damages which may be awarded to the defendant, and for the fees due, or to become due, in such suit to the officers of the court, as aforesaid, unless

577 such failure shall continue to exist after *the expiration of a reasonable time which shall be afforded by order of the said court for giving such security.

And it is further decreed and ordered that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

Which is ordered to be certified to the said court of Clarke county.

Decree reversed.

578 *Atlantic & Va. Fert. Co. v. Kishpaugh.

November Term, 1879, Richmond.

1. Fertilizers—Inspection—Statutes.—Section 48 of ch. 86 of the Code of 1873, and those sections following, in relation to the inspection, labelling, &c., of fertilizers, are not in conflict with the provisions of the act approved March 29th, 1877, entitled "an act to establish a department of agriculture, mining and manufacturing for the state" (acts 1876-7, p. 240), are not repealed by the last named act; and are in force in this state.

2. Same—Same—Labels—Statute.—The A & V F Co. were the manufacturers of a fertilizer which was labeled on the bags containing it—"Eureka. 200 lbs. Ammoniated bone superphosphate of lime"—and which was sold by its agents to different parties, some of whom gave their negotiable notes, with K as endorser, for the same. The notes were not paid, and in an action of debt by the Co. against K, his sole defence under the plea of *nil debet* was, that the labels on the bags was not in conformity with the statute (§ 48, ch. 86, Code 1873), and that consequently the sales made to the makers of the notes for whom he was endorser were illegal and void—**HELD:** The label aforesaid was a sufficient compliance with the terms of the statute, and that the company is entitled to recover on said notes given for the price of said fertilizers.

This was an action of debt in the circuit court of the city of Fredericksburg brought by the Atlantic and Virginia Fertilizing Company against A. Kishpaugh, to recover

the sum of \$607, with interest, as endorser of a number of notes executed by different parties, for the price of a fertilizing manure manufactured by the plaintiffs and sold *by their agents in this state. The facts were agreed by the parties, and the only question considered in this court was, whether the plaintiffs had complied with the law of Virginia, prescribing the terms on which such fertilizers might be sold, and imposing heavy penalties for a non-compliance with the law. The bags containing the fertilizers sold were each stamped as follows:

Eureka.
200 lbs.
Ammoniated Bone
Superphosphate of Lime.
Manufactured by
Atlantic & Virginia Fertilizing Co.
Orient, L. I.

The other facts are sufficiently stated by Judge Anderson in his opinion. On the facts agreed the circuit court rendered a judgment in favor of the defendant Kishpaugh; and the plaintiffs obtained a writ of error to this court.

John O. Steger, for the appellants.
John T. Goolrick, for the appellee.

ANDERSON, J., delivered the opinion of the court.

This case has been most elaborately argued, and at great length, especially by the learned counsel for the plaintiff in error. We deem it unnecessary to a right decision of the cause to follow the counsel through the learning they have evolved in the investigation of many of the questions they have raised.

The enquiry which is first suggested is, by what statute, or statutes, is the case governed? By the provisions of the statute, Code of 1873, ch. 86, p. 757, found in acts of 1870-71, ch. 227, or by the act approved March 29, 1877, entitled "an act to establish a department of agriculture, mining and manufacturing in the state"? (Acts of assembly for 1876-77, p. 240). Does the latter act repeal the former, or are both in force? This is determined by the last section of the latter act, which declares "that all acts or parts of acts in conflict with this act are hereby repealed." Any provision in the former statute, consequently, which is in conflict with this act is repealed; otherwise not. It is not perceivable how the latter act can be a substitute for the former, unless it repeals it.

Section 48 of the act of 1871, declares that all commercial manures and fertilizers "brought into or manufactured in the state of Virginia for sale, or sold, or kept for sale therein, shall have permanently affixed to every sack, bag (&c.), a stamped or printed label, which shall specify, legibly, the name or names of the manufacturer or manufacturers, his, her or their place of business, the net weight of such sack, bag (&c.), the component parts of such manure or fertilizer, the percentage, by weight, which it contains of the following constituents, viz: of phosphoric acid, soluble in pure cold water;

of phosphoric acid, insoluble in pure cold water; of available ammonia, potash and soda."

Section 49 imposes a penalty of \$100 for the first offence, and \$200 for the second and each subsequent offence, on any person who shall sell or keep for sale any commercial manures or artificially manufactured or manipulated fertilizers not labeled in accordance with the requirements of this act, or shall affix any label not expressing truly the component parts of said manures of fertilizers, or expressing a larger percentage of the constituents, or either of them, mentioned in the 48th section, than is contained therein.

Is there anything in these sections in conflict with the act of 1877? The design of this act, as its heading shows, was "to establish a department of agriculture, mining and manufacturing in the state."

581 *Section 1 authorizes and requires the governor to establish such department.

Section 2 provides that said department shall be under the control and management of one officer, who shall be known as the commissioner of agriculture; how he shall be appointed, where his office shall be, and how provided for him, and allowing him one clerk.

Section 3 fixes his salary and the salary of his clerk.

Section 4 prescribes his duties—

First. Relative to the geological formation of the various counties of the state, and the general adaptation of the soil of said counties for the various products. And for the purpose of analyzing the soils and minerals of this state, and guanos and fertilizers, as he may deem of importance, provides for his being furnished with a sufficient chemical apparatus to use in connection with his office; and further provides for his giving information upon the above subjects, and others of interest, to those who till the soil of this state.

Second. The commissioner to have charge of the analysis of fertilizers sold to be used for agricultural purposes in this state; requiring a fair sample of every brand thereof to be first submitted to said commissioner; makes it his duty thoroughly to test the same, and if he finds the same of no practical use, after he shall have summoned the parties interested before him, and given them every opportunity to be heard in defence, the sale of the same for use in this state as a fertilizer is prohibited; and a fine of not less than \$100 nor more than \$1,000 is imposed on any person who shall violate the provisions of this act by selling any fertilizer to be used in this state, without first submitting a fair sample of the same to said commissioner. And agricultural lime and certain other articles named are excepted from the operation of this act. And the analysis made by the commissioner is to be made without charge.

Various other duties, of an interesting and highly important character, are assigned to the commissioner in the subsequent clauses of this section; but neither they nor the subsequent sections of the act have any bearing upon the subject of the

act of 1871, or the question now under consideration.

The act of 1871 requires that the manufacturer or manipulator of the fertilizer shall label the bag or package containing it, before he sells the same in this state, and imposes a penalty on him for omitting it, or for false representations in the label as to the quantity or quality of the fertilizer contained in the bag or package. The act of 1877 requires him, before he sells, to furnish the superintendent of agriculture, under the penalty of a fine from \$100 to \$1,000, with a fair sample of the fertilizer which he has for sale in this state, who is required to analyze it carefully, and to determine whether it is of any practical value or not. And if he determines that it is of no practical value, after the parties interested have been summoned before him, and have had full and sufficient opportunity to contest it, the sale of it is prohibited as a fertilizer for use in this state.

These two clauses are not in conflict. The fertilizer may not conform in quantity and quality with the labels thereon, and yet may be of some practical value; so that the sale will not be prohibited under the act of 1877, which does not in such case afford protection to the purchaser. But he has remedy under the 50th section of the act of 1871 aforesaid, which is not taken away by the act of 1877; not being in conflict with it. There is nothing in the former act which prohibits the sale of the article if it has been labeled as required by the act, even if it should be of no practical value; and the purchaser's remedy is under section 50 of that act. The two acts are not in conflict; but the act of 1877 imposes additional duties on the manufacturer or seller, and provides additional securities for the purchaser; and the two acts should be considered together *in pari materia*.

583 *The court is of opinion that § 48, and those following on this subject, of ch. 86 of the Code of 1873, taken from the act of March, 1871, were not repealed by the act aforesaid of 1877, and were in force, and required the plaintiff in error to affix to each bag containing the fertilizer it sold to the makers of the negotiable notes in controversy a label, in conformity with the requirements of section 48.

The plaintiff's action is debt, and the plea is *nil debet*. The facts are agreed. And under the plea of *nil debet*, it was agreed that the defendant should have the benefit of all the facts agreed, as fully and effectually as he could under any special pleas which he could file in the cause, &c.

It seems that the defendant did not rely upon any defects in the fertilizer which the plaintiff sold to the makers of the notes, or upon the ground that the makers, or either of them, were injured or defrauded by the contents of the bags not conforming in quality or quantity to the labels thereon, or that there was any failure of consideration; but solely upon the ground that the labels were not in conformity with the requirements of the statute, and that the sales to

them were consequently illegal and void, and the plaintiff was not entitled to the aid of the court in the enforcement of an illegal contract.

The first enquiry, then, is, were the bags containing the fertilizer labeled in conformity with the requirements of the statute?

The defendant contends that the label affixed to the bags does not specify the component parts of the fertilizer they contain, as required by the statute; and upon that ground alone contends that the sale of it in Virginia was prohibited and illegal. According to the statement of agreed facts, the plaintiffs became the purchasers of the formula for making the fertilizer in question, and the right to use the brand of "Eureka" thereon, in July, 1873, and then commenced its manufacture—and used

584 the same materials *and the same formula, and adopted the same process, that had been used and adopted by those who preceded them in its manufacture from the year 1865 down to that time, and under the supervision of the same person who originated the said fertilizer, and who has continued to supervise the manufacture of the same for the plaintiffs. And they stamped on each bag the following label: "Eureka. 200 lbs. Ammoniated Bone Superphosphate of Lime. Manufactured by Atlantic & Virginia Fertilizing Co. Orient, L. I." And these words, they contend, express the component parts of the fertilizer, as required by the Virginia statute. They are not words in common or popular use, but are technical words used by chemists, and have a certain and exact meaning; and the question is, do they express what are the component parts of the said fertilizer? This is a question which chemists alone can satisfactorily answer.

We have the statements of Dr. Pollard, commissioner of agriculture for the state of Virginia, and Dr. William H. Taylor, state chemist, as experts, which, by the agreement of the parties, are to be taken as facts proved in the cause. Dr. Pollard states, as an expert, that the words "ammoniated bone superphosphate of lime," on the said label, do sufficiently express the component parts of said fertilizer, and gives his reasons for that opinion. He further states, as an expert, and as commissioner of agriculture, that in his opinion said label does comply with the requirements of ch. 86, § 48 of the Code of 1873; and from the nature and character of what is required, could not well be done in any other way or manner; and is the mode usually adopted by all manufacturers of such fertilizers, since the passage of the act requiring them to have stamped labels on the bags. Dr. Taylor, the regularly appointed state chemist, entirely concurs with Dr. Pollard in all his statements and opinions, and as an expert fully endorses them. What

better evidence could we have of the **585** meaning of the *words of art put upon these labels, and that they express the component parts of the fertilizer—at least what the manufacturers claimed for it? Indeed, there is not a particle of evidence in the

record in conflict with it. And we cannot resist the conclusion that the terms "ammoniated bone superphosphate of lime," legibly stamped or labeled on the bags containing the fertilizer, are a specification of its component parts. It is true that it is expressed in words which are not in common or popular use, but in technical terms, which would not convey to the mind of an uneducated farmer, who was not a chemist, what were the component parts. But the statute does not require that it shall be specified in words which are in common or popular use. It only requires that the stamped or printed label shall specify legibly the component parts. It does not say that it shall be specified in terms which may be understood by an unlettered man what are the component parts. It only requires that it shall be legibly specified on the label what are the component parts that is in such manure, that it may be read. And the statute being highly penal, must be construed strictly. The idea may be expressed in technical terms with more certainty and exactness, than when expressed in words in common and popular use. And if the purchaser does not understand the words of art, he may be readily informed by enquiring of the commissioner of agriculture, or of any good chemist, what they import. If it were expressed in the plainest terms, and in the most legible characters, it would not be understood by the man who could not read. But the statute does not require that it shall be expressed in words in common or popular use, and not in words of art.

It is expressed, the commissioner of agriculture says, in the mode usually adopted by all manufacturers, and in the mode which received his approval as commissioner of agriculture, and which he, in that capacity, having charge of the analysis of fertilizers sold to be used in this state for

586 *agricultural purposes, decided to be in conformity with the requirements of the statute; and now to hold that the purchasers of the plaintiffs' fertilizer, who have had the use of it, were released from the price which they agreed to pay for it, not for any defect in it, but on the ground that the label, contrary to the decision of the commissioner of agriculture, and contrary to the opinion of competent experts, did not exactly meet the requirements of the statute, would be an injustice to the plaintiffs of which they would have cause to complain.

The only impeachment of the label is the alleged nonspecification of the component parts of the fertilizer. No fault, as we understand, is ascribed to it in other respects; and we think there is not the slightest ground for it; but that in all other respects it fully meets the requirements of the statute. And we are of opinion upon the agreed facts, and the best, and in fact, the only evidence in the record, that, in the point where it is assailed it is groundlessly assailed, and that in that respect also it conforms to the requirements of the statute. It is therefore unnecessary to consider the question, which has been so elaborately and ably argued

by the learned counsel, whether the contracts in question, if prohibited, were illegal, and if illegal, could be enforced. We are of opinion for the reasons given, and upon the grounds stated, that the judgment of the court below is erroneous and must be reversed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the bags which contained the fertilizer sold by the plaintiffs to the makers of the negotiable notes, which was the consideration thereof, were labeled substantially in conformity with the requirements of the statute, and that the contracts of sale which were the foundation of said notes consequently were not illegal and *void; and that the judgment of the court below was erroneous. It is therefore considered, that the said judgment be reversed and annulled, and that the plaintiffs in error recover their costs expended in the prosecution of their writ of error here. And this court, proceeding to render such judgment as ought to have been rendered by the court below, it is considered that the plaintiffs recover of the defendant the sum of \$367, with interest at the rate of 6 per centum per annum, &c., on \$487, part thereof, from the 4th day of October, 1878; and on \$35, another part thereof, from October 13, 1878; and on \$10, another part thereof, from October 21, 1878; on \$50, another part thereof, from October 27, 1878; and on \$25, the residue thereof, from October 29, 1878, till payment, and their costs expended in the prosecution of their suit in the court below. Judgment reversed.

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*Binns v. Waddill.

November Term, 1879, Richmond.

1. Harmless Error.—In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property is the property of the plaintiff—Held: If the first count is defective, yet the second being good, and the jury finding that the property was the property of the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment.

2. Same.—On the trial of the cause the court gives to the jury two instructions; the first of which is

*Harmless Error.—Where the court can clearly see affirmatively that the error has worked no harm to the party appealing it will be disregarded. 4 Min. Ins. 2 (Ed.) 974; Preston v. Harvey, 2 H. & M. 55; Osborne v. Francis, 38 W. Va. 323; Mason v. Bridge Co., 20 W. Va. 239; Nichols v. Kershner, 20 W. Va. 263; Danks v. Rodcheaver, 26 W. Va. 298; Danville Bank v. Waddill, 27 W. Va. 239; Hall v. Lyons, 29 W. Va. 420; State v. Douglass, 28 W. Va. 298; Clay v. Robinson, 7 W. Va. 350; Beatty v. Railway Co., 6 W. Va. 388; Pitman v. Breckenridge, 3 Gratt. 127; Wiley v. Givens, 6 Gratt. 277; Colvin v. Menefee, 11 Gratt. 87; Rea v. Trotter, 26 Gratt. 585.

correct. And the jury in their verdict say, "We find under the first instruction of the court that the &c., meaning the property sued for, are the individual property of the plaintiff"—HELD: Even if the second instruction was erroneous, the jury having expressly said that they find their verdict under the first instruction, the error of the second instruction is not ground for the reversal of the judgment.

3. Partnership Property.†—It seems one partner cannot sell or pledge the partnership property in payment of his individual debt, without the consent of his co-partner, and the title is not divested by such sale or pledge in favor of a separate creditor, even though the latter may not know it was partnership property.

This was an action of detinue in the circuit court of Charles City county, brought by Edmund T. Waddill against Otway P. Binns, to recover three mules, a wagon and harness.

The declaration contains two counts.

589 In *the first count the plaintiff avers that on a day named, he delivered to the defendant Binns three mules, describing them by name and color, each of the value of \$200; a wagon and gear, describing the wagon, of the value of \$100, to be redelivered by the said Binns when he should be thereunto afterwards requested; and that Binns, though often required, has not delivered, &c.

The second count avers that the plaintiff, being lawfully possessed of the said mules, wagon and gear—describing them as in the first count—as of his own property, and being so possessed thereof, he afterwards—to wit, &c.—lost the said mules, &c., out of his possession, and the same, afterwards—to wit, &c. at, &c.—came into possession of the said Binns by finding. And then alleges the refusal of said Binns to deliver them to the plaintiff.

The defendant appeared and demurred to the declaration; but the court overruled the demurrer. And he then pleaded "non detinet," and not guilty.

The cause was then adjourned until the next day, when, upon the motion of the defendant, he had leave to withdraw his plea of not guilty. He then asked leave to withdraw his demurrer to the declaration, and to demur generally to the declaration and to each count thereof; which leave the court refused to grant. And the defendant excepted.

After the evidence had been introduced, the defendant asked for three instructions, which the court refused to give, but of his own motion gave two. To all which the defendant excepted. This exception contains a statement of what the evidence tended to prove, and from it it appears that the controversy was, whether the property was the property of the plaintiff Waddill, or was the property of A. K. Adams & Co., of which said Waddill was the other partner. And it appears that A. K. Adams, who had since died, had sold as his own, this property, to

Walker & Saunders, of Richmond, and had applied it to pay a debt of his own; and

Walker & Saunders had sold it to the
590 *defendant Binns. The instructions asked and those given are sufficiently set out in the opinion of Judge Staples.

The verdict of the jury was as follows:

"We, the jury, find under the first instruction of the court, that the mules and wagon and gear are the individual property of the plaintiff; and we find for the plaintiff the mules and wagon and gear in the declaration mentioned, of the value following." And they set out the value of each mule, and of the wagon and gear, amounting together to \$475; and they find \$228 damage for the detention of the property. And the court rendered a judgment in accordance with the verdict. And thereupon, the defendant Binns applied to a judge of this court for a writ of error and supersedeas: which was awarded.

Cannon & Courtney, for the appellant.

Lacy, Meredith and J. A. Jones, for the appellee.

STAPLES, J., delivered the opinion of the court.

This is an action of detinue. The declaration contains two counts. The first sets forth the delivery of the property by the plaintiff to the defendant, to be redelivered on request, and a failure to do so. The second avers that the plaintiff, being lawfully possessed of the property, casually lost it, out of his possession, and the same afterwards came to the defendant by finding, and that the defendant had refused to deliver the same, although often requested. It is by no means clear, but it may be conceded, that the first count is defective in failing to allege right of property in the plaintiff; and that the circuit court erred in refusing defendant's leave to demur to that count. Still, it does not necessarily follow that the judgment is therefore to be reversed.

591 *If the defendant was not and could not have been prejudiced by the ruling of the court below, the appellate court will not disturb the judgment, merely because the ruling may have been erroneous.

Had the jury found a general verdict, this court could not say whether it was based on the first or second counts. But the verdict is special. It expressly finds that the goods claimed are the individual property of the plaintiff. This is directly responsive to the second count, which asserts title in the plaintiff.

It was apparent that the jury intended to conform their verdict to that count.

The defendant might have asked the court to instruct the jury to disregard the first count; had he done so, and had the court granted such instruction, the verdict must have been the same. Under these circumstances, the action of the court upon the demurrer was wholly immaterial.

The next question for consideration is, whether the court committed any error with respect to the instructions which entitles the defendant to a reversal.

†**Partnership Property.**—See also *Liberty Savings Bank v. Campbell et al.*, 75 Va. 534, citing the principal case, and 3 Min. Inst. (2nd Ed.) 725 *et seq.*

The defendant asked for three instructions. The first of these asserts that if the jury believe that the property claimed was not the individual property of the plaintiff, but belonged to the firm or partnership of A. K. Adams & Co., of which plaintiff was a member, and that A. K. Adams, the other partner bona fide sold the property to Walker & Saunders, under whom defendant claimed, the plaintiff was not entitled to recover. The second instruction is substantially the same. The third instruction is not material to the present discussion, and need not be repeated here. The court refused to give either of these instructions, and in lieu thereof instructed the jury—first, that if they believed from the evidence that the plaintiff purchased the property as his individual property, paying for it and using it as his own, and that he has never parted with the title thereto, and the defendant

592 obtained the possession *without the plaintiff's knowledge or consent, and has refused to surrender the same, they ought to find for the plaintiff.

The court further instructed the jury in effect, that even if they believed the property belonged to A. K. Adams & Co., a sale by one of the partners, without the knowledge or consent of the other, for the purpose of paying the individual debts of the partner so selling, would not be effectual to pass the title.

It is not necessary now to determine whether the court erred in refusing to give the instructions of the defendant, or in giving the second instruction actually given. What has been already said with respect to the action of the court touching the demurrer, applies to the instruction.

An appellate court will not reverse the judgment for an erroneous instruction, if it can clearly see that the losing party could not have been prejudiced by it. In *Kincheloe v. Tracewells*, 11 Gratt. 587, 609, this court said, "If the questions involved in the instructions, are decided erroneously the judgment should not on that account be reversed, if the court can see from the bill of exceptions that they did not and could not affect the merits of the case before the jury. *Danville Bank v. Waddill*, 27 Gratt. 448. See also 8 U. S. Digest, N. S., Title Appeal, p. 29.

In the case before us, the court, in its first instruction, told the jury that if they believed from the evidence that the plaintiff had purchased, paid for and used the property as his own individual property, and had never parted with the title, and that the defendant had obtained the possession without the plaintiff's knowledge or consent, and refused to surrender the same, they must find for the plaintiff. The jury, in rendering their verdict, say, we, the jury, find, under the first instruction of the court, that the mules and wagons and gear are the individual property of the plaintiff.

593 *From this it is plain the jury were satisfied that the property did not belong to A. K. Adams & Co., but to the plaintiff individually; and therefore it was a matter of no sort of consequence what the court said

with reference to the power of one partner to dispose of the partnership property. With or without the instructions on that branch of the case, it is certain the finding of the jury must have been the same, and the defendant could not, by possibility, have been prejudiced by the action of the court with respect to the instructions.

The case, in some of its features, is like that of *Fleming v. Toler*, 7 Gratt. 310. There the defendant had filed a special plea, upon which issue was joined. He afterwards tendered other pleas, which were rejected. This court said the pleas so tendered were good in form and substance, and presented a substantial defence; but as the facts set forth therein were the same substantially as set forth in the plea filed, and as those facts had been negatived by the finding of the jury, the defendant could not have been prejudiced by the rejection of the two pleas.

The view here taken was not at all in conflict with the decision of this court in *Wiley et als. v. Givens & als.*, 6 Gratt. 277. There the lower court had instructed the jury that they were at liberty to regard the recitals in certain deeds as evidence. This instruction, it was contended, even if erroneous, worked no injury, inasmuch as the jury would have been warranted in finding the same verdict upon the whole evidence.

But this court said it could not determine what influence the recitals may have had on the minds of the jury, and therefore it would look no further than to the propriety of the instruction, based upon such recital. That case came within the influence of the principal that a misdirection of the trying court is always ground of reversal, unless it can be plainly seen from the record that the error did not, and could not, affect the verdict.

594 *Rea's adm'x v. Trotter & Bro.*, 26 Gratt. 585, was decided on the same ground; *Town of Danville v. Waddill*. On the other hand, the converse of the proposition is equally true, that if the appellate court is satisfied that the jury, in rendering their verdict, could not have been influenced by the misdirection, it will not, merely because of such misdirection, reverse the judgment. See also 9 vol. U. S. Digest, N. S. p. 538, § 635, 682.

In placing our decision on this ground, we are not to be understood as holding that the lower court erred in its instruction with respect to the limitations upon the power of one partner to dispose of partnership property, under the circumstances set forth in the instruction. The rule seems to be settled that the authority of each partner to dispose of partnership property extends only to the business and transactions of the partnership. And any disposition of the property beyond such purposes, without the consent of the co-partner, is an excess of authority. And further, one partner cannot pledge or sell the partnership's property, in payment of his individual debts, without the consent of his co-partner; and the title is not divested by such pledge or sale in favor of a separate creditor, even though the latter may not know it was partnership property. See

Rodgers & Sons v. Batchelor & als., 12 Peters R. 221; Story on Partnership, § 133, and note.

However, we do not deem it necessary to express any decided opinion on this subject. Upon the grounds already stated, we think the judgment should be affirmed.

Judgment affirmed.

595 *Nash v. Fugate & als.

[34 Am. Rep. 780.]

January Term, 1880, Richmond.

Absent, MONCURE, P.*

1. Bonds—Conditions—Sureties.—A bond is signed by the principal obligor and a number of sureties, and there are several scrolls below the names of the sureties who sign it. In other respects the bond is complete and perfect on its face; but the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional sureties to execute it, before he delivers it to the obligor; but he violates the condition, and delivers it to the obligee, without obtaining additional sureties—**Held:** The bond is binding on the sureties, unless the obligee had notice of the condition on which they executed it; and the fact that there were other scrolls to the instrument, to which no name was signed, was not sufficient to put the obligee upon enquiry as to the authority of the obligor to deliver the bond to him.

2. Same—Same—Same—Parol Evidence.—A bond, signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory.

This case was argued at Wytheville, but decided at Richmond. It was once before in this court, and is reported in 24 Gratt. 202. That report states the nature of the case, and gives a copy of the covenant sued on and the names of the parties to it.

When the cause went back to the circuit court of Russell county, the death of the defendant Vermillion was suggested;

596 *and the surviving sureties, in addition to the first, fourth and fifth general pleas of non est factum, which had been pleaded before the case came up to this court, filed two special pleas of non est factum, which are numbered sixth and seventh. The sixth is as follows:

The defendants—naming them—say the plaintiff his action against them ought not to be maintained, because they say before they signed said writing obligatory their co-defendant, A. W. Smith, had drawn the body of it, and in the presence of the plaintiff made a great many scrolls to it for obligors

*The case was argued at Wytheville, in his absence.

†**Parol Evidence.**—The principal case is cited and its holding as to the admissibility of parol proof is sustained in Solenberger, v. Gilbert's adm'r et al., 86 Va. 789; Wendlinger v. Smith et al., 75 Va. 317. See also 2 Min. Inst. (4th Ed.) 736.

to sign, and in this imperfect and incomplete condition, with his own name signed as principal obligor, brought it to these defendants respectively, at different times, and places. and then and there represented to them respectively, that if they would respectively sign to become bound as his sureties to the plaintiff, with as many more solvent sureties as would fill up the scrolls affixed thereto, that he, the said A. W. Smith, would not use it, or deliver it to the plaintiff until and unless he procured solvent sureties with these defendants to sign their names opposite each scroll to the said paper affixed, and become bound with them thereby.

And these defendants further say, that on this express contract and condition they respectively, and at different times and places, as the paper was presented to them, respectively signed it, and in its unfinished condition handed it to said Smith, to have perfected, by having it signed by other solvent persons as aforesaid. And the defendants further say, that afterwards—to wit: the — day of—, 18, the said A. W. Smith in the imperfect and incomplete condition the said paper was in when the last of these defendants signed it, and with a great many scrolls on the paper below their names that no names of obligors were signed to, and in violation of the conditions aforesaid or which these defendants were bound, fraudu-

597 lently delivered it to the plaintiff, and in its imperfect and incomplete *condition—to wit: with the said Smith's and these defendant's names signed to it only and a great many scrolls written to it aforesaid for other obligors to sign below these defendant's names, to which no names of obligors were signed, the plaintiff wrongfully and fraudulently accepted and received. wherefore these defendants further say, the plaintiff at and before the delivery of said supposed writing obligatory to him, had notice that these defendants had signed it to become bound thereby only when other solvent persons with themselves should sign their names to the vacant scrolls below their names, and become bound with them thereby, who had not done so; wherefore they say the said supposed writing obligatory is not their act and deed.

The 7th plea is as follows:

The defendants, &c., &c., come, &c., say the plaintiff, his action against them should not maintain, because they say A. W. Smith procured them to sign and deliver the said writing sued on to him to get other obligors to sign it on the following contract and agreement, made and entered into by and between said Smith and these defendants—to wit: that these defendants would and did sign said writing as sureties of said Smith on the express condition that it was not to be obligatory on these defendants, or either of them, and was not to be delivered by said Smith to the plaintiff as the bond of these defendants, or either one of them, unless and until said Smith procured a great many more solvent persons—to wit: a number sufficient with these defendants to make twenty—to sign it and become bound with

them as co-sureties for said Smith in said supposed writing obligatory; and these defendants say that on this condition only were they to become bound to the plaintiff, and none other; and on this condition they signed it, and put it in said Smith's hands to get the number of other persons he agreed should sign it; and the defendants say they never did acknowledge or deliver said

598 paper *to the plaintiff, and never agreed it should be done by the said Smith, except on the conditions aforesaid; yet they say the said Smith, wrongfully and without authority from the defendants, delivered to the plaintiff said supposed writing obligatory, without ever having or procuring any others to sign it with them as co-sureties of said Smith; and said plaintiff wrongfully received and accepted of said Smith said writing, well knowing of the condition aforesaid on which these defendants signed it and delivered it to their co-defendant, Smith; wherefore, they say the said supposed writing obligatory is not their deed, and of this they put themselves on the country.

The plaintiff objected to these pleas when they were offered; but the court overruled the objection.

In the progress of the trial, all the defendants' sureties and others were examined as witnesses, though objected to by the plaintiff, to prove the condition on which the sureties signed the paper, and that the plaintiff had knowledge of this condition, and also that there were other scrolls to it when they signed it; and the plaintiff introduced his own and other evidence to disprove his knowledge, and also the condition of the paper when delivered to him. And when the evidence was introduced before the jury, the court, on the motion of the defendants, gave to them the two following instructions:

The first, called in the record the sixth:

1st. The court instructs the jury that if they believe from the evidence that the defendants, Joseph C. Fugate, James C. Fugate, Robert Johnson, S. P. Munsey, George Banner, J. W. Smith, George C. Gose and Charles G. Gose, signed the covenant sued on, on the condition that it was not to bind them unless others, in addition to them, should sign it also, and was not to be delivered to the plaintiff as their bond until the others, who were to sign it with them, had done so, and placed it in the possession of A.

599 W. Smith, *who had also signed it, to be by him delivered to the plaintiff, only on the said condition being complied with, and that the others that were to sign it did not sign it, and that A. W. Smith delivered it to the plaintiff, and that the plaintiff knew, at the time he received it, that the aforesaid defendants signed it on the condition that it was not to be their bond, and was not to be delivered to him, unless the others signed it also, and that the others that were to sign it had not signed it, then the law is for the defendants, and the jury must find for them.

The second, called in the record the seventh:

2d. The court further instructs the jury that if they believe from the evidence that,

at the time the said defendants signed the covenant sued on, it had a number of scrolls on it for others to sign their names to as co-obligors with the defendants, and they signed it on the agreement with said A. W. Smith that he was to get other solvent persons than the defendants to sign their names to the scrolls that had no names signed opposite thereto, to become bound with the defendants in said covenant, and that unless he got other solvent persons to sign the covenant as co-obligors with the defendants they were not to be bound by it, and the said Smith was not to deliver it to the plaintiff; and if they further believe from the evidence that Smith did not get the other solvent persons to sign it as co-obligors, and delivered it to the plaintiff with a number of scrolls on it, so placed as to indicate that others were to sign it as co-obligors, that had no names of others signed thereto, then the law is for the defendants, and the jury must find for them.

To the giving of which instructions the plaintiff, by his counsel, objected; but the court overruled his objection, and gave the instructions; to which action of the court the plaintiff excepted.

600 *The jury found a verdict for the defendants; and the plaintiff moved for a new trial; but the court overruled the motion, and entered up a judgment in accordance with the verdict. And thereupon the plaintiff applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Campbell & Johnson, for the appellant.
Burns, for the appellees.

STAPLES, J., delivered the opinion of the court.

This case was before the court at the July term, 1873, held in Wytheville, and is reported in 24 Gratt. 202.

After the case was remanded to the circuit court, for a new trial to be had in conformity with the views of this court, the defendants tendered five pleas in writing, two of which were objected to by the plaintiff; but the objection was overruled by the court, and the pleas filed. The parties then proceeded to trial on the issues joined on the five pleas so filed.

When the evidence was concluded, the defendants asked for two instructions, to which the plaintiff objected; but the objection was overruled, and the instructions given; and the plaintiff again excepted.

In order to properly understand the bearing of these instructions, it is necessary briefly to advert to the point settled by the former decision of this court. No question was then raised as to the completeness of the instrument. It was assumed both in the pleadings and in the instructions given by the circuit court, that the bond in controversy at the time of its delivery to the obligee by the principal obligor, was in form a complete and perfect instrument, and that the obligee had no notice of the alleged

601 *condition upon which the sureties had signed the same.

This court held, that where the surety intrusts the bond to the principal obligor, and there is nothing on the face of the paper to indicate that others are also to sign as sureties, the obligee cannot be affected by any agreement or understanding between the principal obligor and the surety, that others were also to sign before delivery, unless it was made to appear that the obligee at the time that he received the bond had notice of the condition upon which the surety had so signed.

This decision was based mainly upon the ground that as the surety gave confidence to the representations of the principal obligor, he must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility in the matter unless the latter is guilty of fraud or gross negligence in accepting the security.

The instructions, already alluded to, given by the circuit court on the last trial, were intended to present to the consideration of the jury questions relating to the signing and delivery of the bond in controversy not passed upon by this court in the former decision.

One of these instructions, known in the record as the sixth, declares that if the bond in controversy was signed by the defendants as sureties, and delivered to the principal obligor, on condition that other persons were also to sign as sureties, and that if the principal obligor delivered the bond to the plaintiff without such other persons having so signed, and the plaintiff, at the time he received the bond, had notice of the condition, the plaintiff is not entitled to recover.

This instruction, it will be perceived, assumes that the bond is a complete and perfect instrument upon its face, but that it is invalid in the hands of the obligee, if he had notice of the condition on which it was signed by the defendants.

602 *The other instruction, known as the seventh, affirms that if the defendants signed the bond on condition that other persons besides the defendants were also to sign as sureties, and such persons did not in fact so sign, and if, at the time of the delivery of the bond to the plaintiff, there were scrolls on the bond, so placed as to indicate that others were to sign as co-obligors, but to which no names were attached, the condition not being complied with on which the defendant signed the bond, the instrument, as to them, is invalid, and the plaintiff cannot recover.

It will be observed that this instruction says nothing of the alleged notice to the plaintiff of a conditional delivery. The proposition asserted is, that the mere fact that there are seals on the paper, to which no names are attached, plainly indicate that the instrument, on its face, is incomplete and of itself sufficient to raise a presumption that others were to sign it beside the defendants; and this warrants the admission of testimony that such was the agreement of the parties, although the obligee may in fact have been ignorant of the condition.

These two instructions were based on the

sixth and seventh pleas. The pleas and instructions may, therefore, be considered together. In so considering them, it will be more convenient, first, to examine the proposition contained in the last instruction; and that is, a bond perfect in form, apparently duly executed by all whose names appear thereon, but which has on it scrolls to which no names are attached, is, on its face, an incomplete and imperfect instrument.

This precise question has never been decided by this court; at least there is no reported case. In *Hicks v. Goode*, 12 Leigh, 479, 492, Judge Cabell, in delivering the opinion of the court, did not place the decision on the ground that the instrument contained a scroll to which no name was attached. He does not even advert to the fact as material.

It was to the language of the instrument, *and to the fact that the name of one of the parties who did not sign was inserted in the body of the bond, he looked exclusively. From this he came to the conclusion that the instrument was incomplete, and plainly indicated on its face that some other person was to sign it before it could take effect as a valid obligation.

The decision in *Ward et als. v. Churn*, 18 Gratt. 801, proceeded substantially on the same ground. The incompleteness of the instrument there was inferred from its language, from the whole tenor of the writing, and not from the fact that there was a scroll without a name attached.

In the case before us, the names of none of the contracting parties are inserted in the body of the bond. It is signed by the principal obligor and nine others, claiming to be sureties. It is the joint and several obligation of all executing it. As to them, it is a complete and perfect instrument. There is nothing in its form or language to indicate that other persons were to sign it before it could take effect as to parties who have signed. Does the fact that there are scrolls to which there are no names render the instrument incomplete, or even tend to show an agreement that other parties were to sign, in order to give effect to the bond? It may be a circumstance to be considered, in connection with other evidence, showing that the obligee had actual knowledge of the agreement, but of itself is not sufficient to put him upon enquiry, or even to create a suspicion of the existence of such an agreement. The scrolls may indicate that, at the time the instrument was prepared, the obligee required that number of securities, or that the principal obligor expected or intended to procure them. Sometimes the bond is prepared by the obligee himself, and sometimes by the principal obligor.

Upon a contemplated loan of money or sale of property, quite often, as otherwise, the number of seals is purely accidental—

attached to the writing simply with
604 the view of *procuring a sufficient number of obligors to make the security satisfactory to the obligee. That object is effected, not unfrequently, with fewer signatures than there are scrolls, and the

obligee, being content with the security, accepts the bond without a suspicion that the principal obligor, in delivering it, is violating any agreement or transcending his authority.

In the case of personal representatives, and other fiduciaries, as also commissioners for the sale of lands and the investments of funds under decrees of court, this sort of transactions are of frequent occurrence. Indeed, throughout Virginia the practice is most common among all business men of accepting such securities without a suspicion of any informality in them. It is impossible to foresee the inconvenience and mischief that will ensue if the courts should establish the doctrine that the mere existence of one or more seals upon a bond without names opens the door to proof of parol agreements or alleged agreements between the several obligors—principal and sureties—which will invalidate the bond, as to such sureties, in the hands of an innocent holder. And it is worthy of observation, that the researches of counsel have not produced a single case sustaining their doctrine. See *Williams v. Springs*, 7 Ired. N. C. 384, and cases there cited.

For the reasons already stated, I think the bond in controversy is apparently a complete and perfect obligation, with nothing on its face to indicate that other persons were to sign it to make it effectual as to those who did sign it. It follows that the circuit court erred in giving the 7th instruction asked for by the defendant.

The proposition laid down in the 6th instruction is now to be considered; and that is a bond apparently perfect and complete may be avoided by parol proof, that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it in order to make the instrument effectual as to those who did sign it.

605 *The counsel for the plaintiff maintains that such proof is inadmissible under the well-established rule of law that parol testimony cannot be received to invalidate or affect a written contract. In this connection, the counsel rely mainly upon the case of *Miller v. Fletcher*, 27 Gratt. 403, in which it was held that where a deed, perfect on its face, is delivered by the obligor directly to the obligee, it is not competent to prove by parol evidence that the delivery was upon a condition which has not been complied with; and it matters not that the obligee is fully apprised of the condition at the time. And learned counsel insist that there is no substantial distinction between a delivery directly to the obligee by all the parties signing the paper and a delivery by part of them to the principal obligor and by the latter to the obligee. In either case, the delivery is absolute and the condition void.

A moment's reflection will, however, show there is a wide distinction between the two cases. A deed cannot be delivered as an escrow to the party on whose behalf it is made; no matter what may be the form of the words used, the delivery is absolute, and

the deed takes effect immediately. An escrow, on the other hand, *ex vi termini*, is a deed delivered to some third person, a stranger, to be by him delivered to the grantee, upon the performance of some condition. When the books speak of the delivery to a stranger as an essential to an escrow, it is in contradistinction to a delivery to the party in whose behalf the deed is made. Thus in *Sheppard's Touchstone*, vol. 1, p. 58-59, it is said, the deed must be delivered to one that is a stranger to it and not to the party himself to whom it is made.

One of the reasons of this rule is said to be, "The delivery to the party is sufficient without speaking of any words; and when the words are contrary to the act, which is the delivery, the words are of no effect."

This reason has, obviously, no sort of application to the case of a surety

606 *who makes a conditional delivery to the principal obligor. The principal in such case is not the agent of the obligee but of the surety, who intrusts the bond to the principal on the faith of the latter's representation. If the delivery to one who is an entire stranger to the instrument is consistent with its terms, it would seem that the delivery to a co-obligor is equally so. For although the latter is a party, he is not the party to whom the deed is made. A delivery to a co-obligor without words will give no more effect to the instrument than to a stranger without words. See *State Bank at Trenton v. Evans*, 3 Green New Jersey R. 155.

There are cases, however, that hold that a bond cannot be delivered to a co-obligor as an escrow. One of those is the noted case of *Millett v. Parker*, 2 Metc. Ky. R. 608; and the reason there given is, that while it remains in the hands of the obligor, it imposes no obligation whatever; whereas, an escrow is so far binding on the party who has delivered it that he cannot revoke it. This view is controverted by Judge Joynes in *Ward v. Churn*, 18 Gratt. 801, 814. It is not important now to enquire which of these views is correct, as the point does not affect the decision of the question here. In *Millett v. Parker*, the court, after an elaborate discussion of the principles governing the conditional delivery of deeds, says: "If the obligee had been apprised of the existence of the agreement, he would have acted in bad faith in accepting the covenant when it was offered to him by the principal obligor; but being ignorant that any such agreement had been made by the obligors, he had the right to presume that the instrument had been prepared for his acceptance, and that the obligor who had it in his possession was authorized to deliver it to him."

That case concedes, as will be observed, that a bond, complete on its face, delivered to a co-obligor on a condition that had not been complied with, may be avoided

607 in *the hands of an obligee, upon proof he had notice of the condition.

There are two classes of cases widely dissimilar in the doctrines they hold on this question. On one side it is held, that if the

sureties deliver a bond to the principal, perfect on its face, upon a condition not performed, and the latter in violation of the agreement, delivers the bond to the obligee, the sureties are not bound, although the obligee may not be apprised of the condition. On the other hand, there are numerous cases which hold that such an instrument cannot be avoided in the hands of the obligee where it appears he was not informed of the condition at the time that he received the bond. And so this court held in this case, when it was before us on a previous occasion.

That decision was not based upon any idea of the incompetency of parol testimony to establish the facts; but upon the ground that the surety having entrusted the bond to the principal obligor, the obligee had the right to infer that it was for the purpose of delivery; and the surety was estopped to set up a limitation upon the power of the principal unknown to the obligee. See also *Dain v. United States*, 16 Wall. U. S. R. 1.

There are no cases—certainly none I have seen—which hold that parol testimony is inadmissible to establish the notice as well as the conditional delivery to a co-obligor. There are, however, a multitude of decisions which expressly, or by strong implication, recognize such testimony as admissible. *State v. Peck*, 3 Maine R. 284; *Smith v. Moberly*, 10 B. Monr. R. 266; *Bank v. Goss*, 31 Verm. 315; *Black v. Lamb*, 1 Beasley R. N. J. 108; *Blume v. Bowman*, 2 Ired. R. 341; *Butler v. Smith & Thark*, 35 Miss. R. 457; *Deardorff v. Foresman*, 24 Ind. R. 481; *Quarles v. The Governor*, 10 Humph. R. 122; *Ricketts v. Pendelton*, 14 Maryl. R. 320; *Pawling v. United States*, 4 Cranch. 219; *Bibb v. Reid*, 3 Alab. R. 88; *Perry v. Patterson*, 5 Humph. R. 133.

608 *The decision in all these cases is founded in part upon the idea that the obligee is guilty of fraud in receiving the bond if he has notice that the delivery is in violation of the agreement of the parties. Fraud practiced by the parties seeking the remedy, upon him against whom it is sought, and in that which is the subject matter of the action or claim, is universally held fatal to his title. "The covin," said Lord Coke, "doth suffocate the right." *Underwood v. McVeigh*, 23 Gratt. 409, 424; 1 Greenl. Evi. § 284.

From the very necessity of the case, parol testimony must often be resorted to for the purpose of establishing the fraud. A judgment or decree may be set aside upon parol proof of fraud in obtaining it. The title of a purchaser under the most solemn deed may be defeated by showing he is a purchaser with notice. The most important transactions of mankind are founded upon faith in human testimony. If all enquiry into the truth is prohibited because men sometimes commit perjury, the most flagitious conduct would find security and protection when ever the offending party has been so fortunate or unscrupulous as to procure written evidence of his claim.

The rule which prohibits the admission of parol testimony to vary a deed or other writ-

ing is not infringed by the introduction of evidence relating to the delivery of the deed. Such evidence does not tend to contradict the deed or the recitals therein, but merely to show there has been no valid delivery. In *Towner v. Lucas*, 13 Gratt. 705, Judge Allen discusses with much learning and ability the rule of the common law respecting the admission of parol evidence where there is a written contract, and he distinguishes between the classes on that subject. In the course of his opinion, he said, "The fraud which will let in such proof must be fraud in the procurement of the instrument which goes to its validity, or some breach **609** of confidence in *using a paper delivered for one purpose and fraudulently perverting it to another.

In such cases, the oral evidence tends to prove independent facts, which, if established, avoids the effect of the written agreement by facts dehors the instrument, but do not tend to contradict or vary it. P. 715-716. And in *Woodward, Baldwin & Co. v. Foster*, 18 Gratt. 200, 207, Judge Joynes, in discussing the same subject, says, "So it has been held that between the immediate parties evidence may be given of a contemporaneous agreement consistent with the written contract; as, for example, that the bill was endorsed and handed over for a particular purpose, as for collection, without giving the trustee the usual rights of an endorsee—*Manley v. Boycot*, 75 Eng. C. L. R. 45—or that the bill was transferred as an escrow or upon an express condition which has not been complied with.

Such cases are subject to the ordinary rules applicable to the admission of parol testimony in reference to written contracts. Under these rules, it is always competent to show a want of consideration or fraud as between the immediate parties, in order to complete the contract. In support of this view, the learned judge cites a number of English decisions.

In a late case before the supreme court of the United States, Mr. Justice Field said: The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties: that cannot be qualified or varied from its natural import, but must speak for itself. The rule does not prohibit an enquiry into the object of the parties in executing and receiving the instrument. *Brick v. Brick*, 3 Otto R. 514. Indeed, it seems to be well-settled that whatever relates to the point of execution, whether tending to show the time of delivery, or that the delivery is in the nature of an escrow, or to disprove it altogether, may be established by parol.

610 *This species of evidence has been considered as not coming within the rule which prohibits parol proof to contradict a deed. 2 Phillips on Evi. 553, 557, 577, 634. If, for example, a bond should be signed, and left with the scrivener to be signed by other persons before it is delivered to the obligee, and is taken clandestinely and delivered to the obligee, who is aware of all the circumstances, all will concede that the writing would not preclude the parties

from showing the real facts of the transaction, and that the writing itself was being prostituted to purposes of fraud. And yet there is little difference between the case supposed and the case of an obligee who receives the bond from one of the obligors, knowing the latter has no authority to make the delivery. Such evidence does not contradict the deed, but establishes a want of authority in the agent and knowledge of that fact by the obligee.

Numerous other illustrations might be given, but it is unnecessary. I think, therefore, the circuit court did not err in giving the 6th instruction asked for by the defendants. But while parol evidence is properly admissible for the purpose of establishing that the bond was executed on a condition which has not been performed, and that the obligee had notice of the fact, such evidence, where there is nothing on the face of the paper to put the obligee on his enquiry, ought to be very clear and satisfactory.

The history of this case from its inception abundantly shows the necessity of caution in listening to such evidence. The defence set up in the sixth and seventh pleas seem never to have been thought of until the decision of this court overruling the main points upon which defendants formerly relied. And one of the defendants, offered as a witness and now relied on to prove the notice to the plaintiff, in his examination of 1871, made no mention of any fact from which it would be inferred the plaintiff had notice of the alleged condition attached to the execution of the bond.

611 *Whether the jury believed this witness, and rendered their verdict under the impression the plaintiff had such notice, it is impossible to say. They might have been satisfied the plaintiff was ignorant of the condition, and yet, under the sixth instruction, still have found a verdict for the defendants. The judgment of the circuit court must, therefore, be reversed, the verdict set aside, and a new trial awarded. Upon which new trial, the circuit court will decline to give the defendants seventh instruction if again asked for, but instruct the jury in conformity to the views herein presented.

Before concluding the opinion, it is proper to notice the sixth and seventh pleas offered by defendants and objected to by the plaintiffs.

The seventh plea is an affirmation or statement of the proposition contained in the sixth instruction, and, according to the views already expressed, presents a substantial defence to the action.

The sixth plea, however, is not free from difficulty. It is not very clear whether that plea was designed to aver actual notice to the obligee of the condition, or whether it was intended to declare a mere presumption of notice from the fact there were seals on the paper to which no names were attached. If the latter be the proper construction, the plea was clearly erroneous, for the reasons already stated; if the former, the plea conforms to the sixth instruction, and is therefore a valid defence.

Perhaps, under all the circumstances, it

would be safer to hold that the plea was intended to aver actual notice to the obligee, and thus give the defendants the benefit of any defence arising under it. It is, however, not very material either way, as the whole case is fairly presented by the instructions, and may hereafter be disposed of in the same way.

For reasons already stated, the judgment of the circuit court must be reversed, and the cause remanded for a new trial, in conformity with the views already expressed.

612 *The judgment was as follows:

This cause, which was pending in this court as its place of session in Wytheville, having been fully heard, but not determined, at said place of session, this day came here the parties, by their counsel; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in giving to the jury the seventh instruction set out in the first bill of exceptions of the plaintiff in error.

Therefore, for the error aforesaid, it is considered that the judgment of the said circuit court be reversed and annulled, and that the defendants in error do pay to the plaintiff in error his costs by him expended in the prosecution of his writ of error aforesaid here.

And this court, proceeding to render such judgment as the said circuit court ought to have rendered, it is considered that the verdict of the jury be set aside, and a new trial awarded the plaintiff in error; upon which new trial the said circuit court will decline to give said seventh instruction, if again asked for by the defendant in error.

And it is ordered that this order be entered in the order book here, and forthwith certified to the clerk of this court at Wytheville, who shall enter the same in his order book and certify it to the said circuit court of Russell county.

Judgment reversed.

613 *Portsmouth Ins. Co. v. Reynolds' Adm'x & al.

January Term, 1880, Richmond.

1. Ordinance of Secession—Ratification.—

By the act of the Virginia convention of 1861, the ordinance of secession, which was passed on the 17th of April, 1861, was submitted for ratification or rejection to the people of Virginia by a vote to be taken on the 4th Thursday in May following—**Held:** The act was merely inchoate until that vote was taken; and the state was not until after that vote was taken and declared in a state of war with the United States.

2. Same—Same.—The subsequent ratification of the act by the vote of the people could not have the effect, by relation to the day of its passage, to change the actual status of the two governments on that day, so as to make acts tortious which otherwise would not be so, and defeat the rights of private persons.

3. Same—Same—Insurance—Loss by Fire—Military Authority.—On the 21st April,

1861, the shiphouse and other buildings at the U. S. navy yard at Portsmouth were set fire to and burned by order of the officers of the United States forces, acting under the authority of that government, and the fire extended to buildings in the neighborhood, and consumed them. Upon two of these buildings there were policies of insurance against fire; with a proviso, that the insurance company shall not be liable to make good any loss by fire which may happen to take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power—Held: That the ordinance of secession not then being in force, the burning of the buildings caused by the firing of the U. S. buildings at the navy yard, does not bring the loss within the operation of the proviso as to any military or usurped authority.

4. Insurance—Proof of Loss—Waiver.—A distinct denial by the insurer of liability, and refusal to pay, on the ground that there is no liability, is a waiver of the condition of a policy requiring proof of loss; and such waiver *may be express or implied, and may be shown by acts as well as words.

5. Same—Enforcement of Claim—Equity Jurisdiction.—The policies being from year to year before the buildings were burned, and the insured having died intestate leaving a widow, who qualifies as his administratrix, and an infant son, and the administratrix continuing to pay the premiums, and it being a question whether the insurance money when recovered should be treated as real or personal assets, and disposed of as the one or the other, a court of equity has jurisdiction, at the suit of the administratrix and the heir, to enforce the claim against the insurance company.

6. Same—Interest during Civil War.—It was proper to allow interest during the war on the amount of the policies.

This was a suit in equity in the circuit court of Norfolk county, brought by Jemima Reynolds, widow and administratrix of Joseph P. Reynolds, deceased, and his only child and heir, Robert E. Reynolds, an infant, suing by his mother and next friend, against the Portsmouth Insurance Company, to recover the amount of two policies of insurance against fire on two houses in the city of Portsmouth. The policies had been taken out in his lifetime by Joseph P. Reynolds, and his administratrix continued to pay the premiums after his death, until the buildings were destroyed by fire on the 21st of April, 1861. There was a decree in favor of the plaintiffs; from which the insurance company obtained an appeal. The case is stated by Judge Burks in his opinion.

D. J. Godwin and Wm. W. Crump, for the appellant.

***Insurance—Proof of Loss—Waiver.**—The holding that a waiver of the condition of a policy requiring proof of loss may be express or implied, and may be shown by acts as well as words is sustained in 3 Min. Inst. (2nd Ed.) 1195; 13 Am. & Eng. Enc. Law 345. And that a denial of liability is a waiver, see *West Rockingham, &c., Co. v. Sheets*, 26 Gratt. 854; *Virginia Fire Ins. Co. v. Goode*, 95 Va. 762; *Sheppard v. Peawody Ins. Co.*, 21 W. Va. 368; *Deltz v. Providence, &c., Ins. Co.*, 33 W. Va. 526; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689.

Holliday & Gayle and John Howard, for the appellees.

BURKS, J., delivered the opinion of the court.

In each of the policies, for the enforcement of which the bill in this case was filed, the Portsmouth Insurance Company, in express terms, promised and agreed, for the
615 *consideration of the premium paid, to make good unto the assured, his executors, administrators and assigns, all loss or damage, not exceeding in amount the sum insured, as should happen by fire to the buildings specified, for the term of one year, with the stipulation that the insurance (the risk not being changed) might be continued for such further term as should be agreed on, provided the premium therefor be paid and endorsed on the policy, or receipt given for the same.

This general undertaking was limited and qualified by a subsequent clause, common to the two policies: "Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power."

The defence, upon the merits, to the claim of the amounts insured, on account of the admitted total loss of the buildings by fire, is based on this clause in the policies, the contention being that the loss happened or took place by means of some one or more of the perils expected therein.

The general undertaking extends to all loss by fire from whatever cause, unless occasioned by the fraud or design of the insured. As said by Judge Bronson in *City Fire Insurance Co. v. Corlies*, 21 Wend. R. 367, the company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, it matters not how the flame was kindled, whether it be the result of accident or design, whether the torch be applied by the honest magistrate or the wicked incendiary, whether the purpose was to save a city, as at New York, or a country, as at Moscow, the loss is equally within the terms of the contract. That the insurers intended

616 *the general engagement should extend to every possible loss by fire is evident from the fact that they afterwards proceed to specify particular losses by fire for which they will not be answerable. See also *Ins. Co. of Alexandria v. Lawrence*, 10 Peters R. pp. 507, 517, 518.

The loss by fire being admitted, the burden of proof is on the insurer, claiming exemption from liability, to show that it falls within the exceptions. 6 Rob. Prac. 73, citing *Pelly v. Roy. Exch. Asso. Co.*, 1 Burr R. 347.

The first enquiry is, what caused the fire that caused the loss? In other words, what was the proximate cause of the loss? For the maxim is, *In jure, non remota causa, sed*

proxima spectatur. "It were infinite," says Lord Bacon, "for the law to consider the causes of causes, and their impulsions, one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Brown's Leg. Max. 217.

The agreed facts will enable us, we think, to answer the enquiry without difficulty.

On the 17th day of April, 1861, the convention of Virginia, then in session at Richmond, passed what is known as the "ordinance of secession." On and during the 20th of that month the greatest excitement prevailed among the people at Portsmouth. The military companies in the city—five or six in number, forming a part of the Third Virginia regiment of infantry—were, during the day, called out by the governor of the state, and during the night of that day were stationed and picketed in small squads at various points around and near the navy yard. The entire community was excited, and on every hand arrangements of a warlike nature were being made for the sectional strife, which then, it was apparent, was imminent.

On the day and night of the 20th of April, obstructions were being placed in the Elizabeth river leading to the harbor, for the purpose thereby of preventing the ingress of vessels and the departure of the United States war vessels then in the harbor. About midday of the 20th of April, the gates of the Gosport navy yard were closed to all outsiders, and heavily guarded by United States marines. During the day the marines, sailors and attaches of the United States navy on the vessels moored at the wharves within the yard could be seen destroying small arms, and throwing them overboard into the river.

On the evening of that day, about dark, the United States steamer "Pawnee" came steaming into the port from the city of Washington, with a large number of United States marines, sailors and soldiers on board. She came in with banners flying and a band of music playing the national airs, her guns loaded and run out of their ports. She proceeded to the navy yard, and immediately disembarked the marines, sailors, soldiers and their officers on board, and thereupon soon began a general commotion in the navy yard, caused by the removing of valuable materials therefrom, and the destruction of cannon and other articles which could not be removed from the navy yard. This commotion, removal and destruction continued during the entire night and shortly before daylight of the 21st, when all the marines, sailors, soldiers, officers and every person within the yard, except one or two, who made their escape therefrom during the night, were taken aboard the "Pawnee" and the sail frigates "Constitution" and "Cumberland." The "Pawnee," with the latter two vessels in tow, then departed, and proceeded unmolested to Fortress Monroe, or further. Simultaneously with the departure of these vessels, the ship-house and other buildings in the navy yard, and also all the other ves-

sels left at the wharves of the yard and anchored in the stream, were fired by the United States forces, and all were consumed with great rapidity. Soon the fire was communicated from the ship-house to the main-entrance government buildings, and from *the latter to the insured buildings, which were wooden buildings covered with shingles. The distance from the ship-house to the main-entrance building was about 170 feet, the space between the two being open and unoccupied, and the distance between the main-entrance building and the insured buildings was about sixty feet. The fire was continuous, and all of these buildings were on fire at one and the same time, and were rapidly consumed. It is one of the facts agreed that the ship-house, the building in which the fire commenced, was "set on fire by forces of the United States, and by authority of the officers in charge of said forces, themselves acting under authority of the government of the United States."

From this statement of facts agreed, it would seem too plain to admit of dispute, that the cause, denominated in the law *causa proxima*—the direct, efficient, controlling, productive cause—of the loss of the insured buildings was the act of the government of the United States in setting fire, by its authorized agents, to the ship-house. The fire, originated by that act, it is agreed, was "continuous." The force set in motion by the hand that first applied the torch was uninterruptedly and unceasingly operative until all the buildings were destroyed, and the cause of the loss of all was the same, not less of the loss of the one last burnt than of the one first fired.

Although the application of a maxim referred to is often difficult and embarrassing, yet in determining in each particular case whether the alleged cause of a catastrophe is proximate or too remote in a legal view, it is said that one of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Ins. Co. v.*

Tweed, 7 Wall. U. S. R. 44, 52. To the same effect are *Milwaukee &c. Railway Co. v. Kellogg*, 94 U. S. R. (4 Otto), 469; *Ins. Co. v. Transportation Co.*, 12 Wall. U. S. R. 194, 199; *Ins. Co. v. Seaver*, 19 Wall. U. S. R. 531, 542.

Certainly, in this case, there was no new independent cause intervening between the alleged cause (the setting fire to the ship-house) and the accomplished fact (the destruction of the Reynolds' buildings) sufficient of itself to stand as the cause of the misfortune which occurred.

In this connection, it is convenient to notice a view of the case presented, but not much relied on, by the learned counsel for the appellant—to wit: that the navy yard was fired by the lawful orders of the United States government forces in consequence of

a threatened attack of the rebel forces of Virginia, and that this threatened attack of the usurping military force or power of Virginia was the predominating and operative cause of the fire. And in support of this view, we are referred to the decision of the supreme court of the United States in *Ins. Co. v. Boon*, 95 U. S. R. (5 Otto), 117.

The case briefly stated was this: The suit was brought to recover the amount insured against loss by fire on a stock of goods of the plaintiff in their store house at Glasgow, in the state of Missouri. The insurance was effected in 1864, while war was flagrant between the United States and the Confederate State, and the goods were destroyed by fire on the 15th day of October, 1864, under the following circumstances: Glasgow was a military post and a place of deposit for military stores of the United States, which were in the city hall. The city was occupied, guarded and defended by a military force of the United States under the command of Col. Harding.

At an early hour of the morning of the 15th of October, 1864, an armed Confederate force, under military organization, surrounded and attacked the city and threw shell and shot into it, penetrating some buildings, and one thereof penetrating the store of the plaintiffs, but without
620 *setting fire thereto or causing any fire therein, and some of the shell killed soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and a battle between the United States troops and the Confederate forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city.

During the battle, and when the United States troops had been driven from their exterior lines of defence, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the military stores from falling into the possession of the Confederate forces, ordered one of the officers under his command to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, the officer set fire to the city hall, and thereby the building with its contents was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street from the city hall to the building adjacent thereto, and from building to building through two other intermediate buildings, to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy. During this time, and until after the fire had consumed the goods, the battle continued, and no surrender had taken place, nor had the Confederate forces, nor any part thereof, obtained the possession of or entered the city.

Upon these facts and circumstances, the supreme court was of opinion and decided that, what it was pleased to style the "rebel invasion" or "the usurping military force or

power," was the predominating and operative cause of the fire that destroyed the goods insured, overruling the decision of the circuit court for the district of Connecticut, which held the action of the United States military authorities a sufficient cause intervening between the attack of the *Confederate forces and the destruction of the plaintiff's property, and therefore the responsible cause.

If this decision of the supreme court be sound law rightly applied to the facts upon the assumption that the attack on the city of Glasgow was a "rebel invasion," or proceeded from a "usurping military force or power"—a conclusion the correctness of which admits of great doubt—yet it furnishes no precedent to guide in the determination of the case before us. There was no attack upon the Gosport navy yard—no battle—nor, indeed, had the war in Virginia commenced at the time the buildings were destroyed. There was no such exigency—no such urgent military necessity for the burning as existed at Glasgow. The United States government may have been, and doubtless was, apprehensive of danger to the navy yard and the naval stores there, and this apprehension may have been the occasion or motive for destroying the buildings and stores; but the alleged threatened attack by the military forces of the state was not the cause, in a legal sense, of the destruction, or, if it was, it was the remote, not the proximate, cause. There was an independent intervening cause, sufficient of itself to account for the loss, and that cause was the act of the government of the United States in setting fire to the government buildings.

The decision of the supreme court of Pennsylvania in *Harris v. York Mut. Ins. Co.*, 30 Penn. State R. 341, seems not to accord with that of the supreme court of the United States in *Insurance Co. v. Boon*, supra, in the application of the rule of law as to proximate and remote causes. In that case, the policy excepted "loss by fire occasioned by mobs or riots." The Confederate forces had invaded Pennsylvania, and in order to impede their advance, the Federal troops, by authority of the military officer commanding that department, burned a bridge, the fire from which communicated with and destroyed the insured building. It was held that the fire

622 was occasioned approximately *by lawful orders of the military authorities of the United States, and remotely by an invading army, which was much more than either a mob or a riot in the ordinary acceptance of those terms.

Our conclusion, therefore, is, that the proximate cause of the loss of the Reynolds' buildings was the act of the government of the United States through its officers and soldiers setting fire by its authority to the buildings at the navy yard.

The next enquiry is, does this loss fall within the excepting clause of the policies? Was it a loss by fire which happened or took place "by means of invasion, insurrection, riot or civil commotion, or of any military or usurped power?" The terms, "insurrec-

tion, riot or civil commotion," may be laid out of view, as they can have no application to the government of the United States, whose act has been shown to be the responsible cause of the fire. Their meaning, when found in excepting clauses of policies of insurance, is defined or explained in some adjudged cases. *Langdale v. Mason* (a nisi prius case before Lord Mansfield), 1 Bennett's Fire Ins. Cas. 16; *Spruill v. North Car. Mut. Life Ins. Co.*, 1 Jones R. 126. See also *May on Ins.* 490, 491, Lord Mansfield in *Langdale v. Mason* states, that the words "civil commotion" were introduced in policies as early as 1727—words, said he, as general and untechnical as can possibly be used. His idea of a "civil commotion" is thus expressed: "I think a 'civil commotion' is this: an insurrection of the people for general purposes, though it may not amount to a rebellion where there is a usurped power." In *Spruill v. North Car. Mut. Life Ins. Co.*, the court, after defining a riot, describe a commotion, according to Worcester, as being a tumult, and a tumult as being a promiscuous commotion in a multitude—an irregular violence, a wild commotion.

The terms being very general do not perhaps admit of any exact definition. So it is, whatever ideas they are intended to convey, it would seem too clear for controversy, they are descriptive of no act, fact, or state of things, which, on the evidence in the record, could stand as the proximate cause of the fire in this case, nor was the learned counsel of the appellant understood as contending to the contrary in the elaborate argument addressed to this court.

Passing by these terms, without further remark, our enquiry is confined to the words "invasion * * * or military or usurped power." What was intended by them, as used? They were first introduced in policies more than a century and a half ago. The word "invasion" seems at first to have been followed immediately "by foreign enemies." These last words, at some subsequent period, appear to have been dropped. There is no ambiguity in the word "invasion," but in *Langdale v. Mason & others*, supra, decided in 1780, Lord Mansfield said the words "military or usurped power" were ambiguous, but they had already been the subject of a judicial determination. He had reference to the judgment of the common pleas in *Drinkwater v. The Corporation of the London Assurance*, rendered in 1767. See Bennett's Fire Ins. Cas. 12. In that case, the proviso in the policy was, "that the corporation shall not be liable in case the same (the building insured) shall be burnt by any invasion by foreign enemies, or any military or usurped power whatsoever."

Mr. Justice Bathurst was of opinion, that the words "usurped power" in the proviso, according to the true import thereof and the meaning of the parties, could only mean an invasion of the kingdom by foreign enemies to give laws and usurp the government thereof, or an internal armed force in rebellion assuming the power of government by

making laws, and punishing for not obeying those laws.

Clive, Justice, was of opinion, that the words "usurped power" in the proviso, must mean such an usurped power as amounts to high treason, which is settled by 25 Edw. 3.

624 *Wilmot, Chief Justice, said, "my idea of the words burnt by usurped power, from the context, is, that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it; when the laws are dormant and silent, and the firing of towns is unavoidable."

Lord Mansfield, in the subsequent case of *Langdale v. Mason & others*, supra, said, "they (the words 'military or usurped power') must mean rebellion conducted by authority, as in the year 1845, when the rebels came to Derby; and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case; it must be by rebellion got to such a head as to be under some authority. * * * Usurped power takes in rebellion acting under usurped authority."

In *City Fire Ins. Co. v. Corlies*, 21 Wend. R. 367, Judge Bronson defines the words "usurped power" in a policy as meaning "an usurpation of the powers of government."

These cases do not distinguish between "military power" and "usurped power," and Lord Mansfield plainly speaks of both as the same. His language is, "the words military or usurped power are ambiguous, but they have been the subject of a judicial determination. They must mean rebellion conducted by authority," &c.

It was strenuously argued before the supreme court of the United States in *Ins. Co. v. Boon*, supra, that these words, "military or usurped power," should be construed as meaning military and usurped power; that they do not refer to military power of the government lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. In notice

625 ing this argument, the court said, there is, it must be admitted, considerable authority, and no less reason, in support of this interpretation, but they did not deem it necessary to the decision of the case before them to affirm positively that such is the true meaning of the words in the connection in which they were used in the policy under review.

The reasoning of Judge Woodruff, who decided the case in the court below, is, in our judgment, conclusive to show that the term "military" is employed in the proviso in a meaning synonymous with the "usurped power" intended to be described, or as qualifying or explaining what was meant by "usurped power." After referring to the cases already cited, he adverts to the significant fact that every other word used in the proviso to designate the means by which a

fire may happen for which the company will not be liable, expresses clearly and unequivocally what is unlawful, employed in disregard or in subversion of the laws or the government, and this fact, among other considerations, furnishes a strong case for the application of the maxim, *noscitur a sociis*.

He observed, "We think it not too much to say, that most, if not all, intelligent readers of the proviso in question would at once declare that the word 'military' therein was employed in a sense kindred to the other terms, and that it described an organization military in its form, but unlawful and hostile to the government in its character and purpose."

The lucid and very able opinion of this learned judge will be found in the supplement to 40 Conn. Rep. 575 et seq.

It would seem that the Portsmouth insurance company has virtually acquiesced in this construction of the word "military," as since the war it has, and perhaps other insurance companies have also, added war to the excepted perils.

With the understanding of the terms 626 "military or *usurped power," used in the proviso, as expounded in these authorities, the further inquiry is, did "the fire happen or take place by means of invasion" by a foreign enemy? At the time the fire took place, was the government of the United States foreign to the state of Virginia, and was the firing of the building at the navy yard an act of "invasion" on the part of the United States, within the meaning of the policies? If so, it must be because, by virtue of the ordinance of secession passed by the convention on the 17th day of April, 1861, Virginia, on and after that day, became a separate, independent, and absolutely sovereign state, and as such entitled to the navy yard as a part of her territory, and the further occupation of the same against her will and the destruction of the buildings thereon by the United States were hostile acts of a foreign enemy. And so it has been argued before us.

The assumption, that the ordinance, on its passage by the convention, was designed to operate eo instanti as a complete and final separation of the state from the Union, is not supported by the facts of history.

When the general assembly, on the 14th day of January, 1861, passed the act providing for an election on the 4th of February, 1861, of delegates to the convention, it provides at the same time, after much debate, for the opening of a separate poll to take the sense of the qualified voters as to whether any action of said convention dissolving the connection of the state with the Federal Union, or changing the organic law of the state, should be submitted to the people for ratification or rejection; (Acts of 1861, ch. 3, § 1); and at said election, a very large majority of the people voted that such action, if taken, should be so submitted. The convention thus constituted was therefore one of limited powers, at least as to the subject of changes in existing Federal relations and in

the state's constitution. No ordinance of secession passed by that body could be effectual and binding on the people of the 627 *state unless and until it was submitted to and ratified by the people. The convention itself recognized this fact, and accordingly the ordinance of the 17th of April provided, that it should take effect and be an act of that day, when ratified by a majority of the votes of the people of the state, cast at a poll to be taken thereon on the fourth Thursday of May following. It was submitted and ratified on that day. Until so ratified, however, it was not a complete act. It was inchoate and not consummate until that day. In the meantime, the convention, recognizing the conditional character of the ordinance, on the 25th day of April, 1861, by a further ordinance of that date, ratified and confirmed articles entered into by its commissioners for a "temporary union of Virginia and the Confederate States;" and by a still further ordinance of the same date, adopted and ratified the constitution of the provisional government of the Confederate States ordained and established at Montgomery, Alabama, on the 8th day of February, 1861, but with a proviso, "that this ordinance shall cease to have any legal operation or effect, if the people of this commonwealth, upon the vote directed to be taken on the ordinance of secession passed by this convention on the seventeenth day of April, eighteen hundred and sixty-one, shall reject the same." See ordinances, Nos. 2, 3, appended to acts of 1861. It was not until the 19th of June, 1861, that the convention, formally ratified what was called the permanent constitution of the Confederate States, and proclaimed it binding upon the people of the commonwealth. Ord. No. 56.

In the light of these facts, it cannot be said that the government of the United States, on the 21st day of April, 1861, the fourth day after the passage of the conditional ordinance of secession by the convention, was foreign in its relation to the state of Virginia, and that the occupation of Gosport navy yard and the destruction of the government buildings therein were hostile 628 acts of a foreign *invader. Giving all the effect to the ordinance designed by its authors, the state had not then ceased to be a member of the Union. The United States were in possession of the navy yard and of the buildings they had erected, under a title acquired in the year 1800 (1 R. Code, ch. 10) by purchase from the state under an act of the general assembly; and the destruction of the buildings, to prevent their falling into other hands, could not be justly construed as an act of hostility to the state. The subsequent ratification of the ordinance by the people could not have the effect, by relation to the day of its passage, to change the actual status of the two governments on that day, so as to make acts tortious which otherwise would not be so, and defeat the just rights of private citizens.

There was no war existing at that time between the United States and the state of Virginia. What was said in Roberts' adm'r

v. Cocke & others, 28 Gratt. 207, 219, must be taken in reference to the subject matter—the period fixed by the legislature for abatement of interest. It was not necessary to decide in that case, nor was it intended to decide, when the war actually commenced. The supreme court of the United States has found it necessary, in several cases before it, to fix the periods of the commencement and termination of the war. For the former (the commencement of the war), as to the several states, the dates of the president's proclamations of intended blockade have been assumed as the proper dates. The proclamation as to Virginia was on the 27th day of April, 1861. The Protector, 12 Wall. U. S. R. 700; *Adger v. Alston*, 15 Wall. U. S. R. 555; *Brown v. Hiatts*, *Id.* 177.

It follows, from what has been said, that, in our opinion, the loss of the insured buildings by the fire which took place on the 21st of April, 1861, was covered by the general undertaking of the insurers, and was not within the operation of the excepting clauses of the policies.

Several assignments of error of
629 minor importance, which, *with due regard to regularity, should have been considered in the first part of the opinion, remain to be disposed of.

1. The ninth condition of the policies requires persons sustaining loss or damage by fire to forthwith give notice thereof to the company, and as soon after as possible to furnish what is usually denominated "preliminary proofs" of the loss. This condition was never complied with, and the appellant contends that the bill, for that reason, should have been dismissed. Compliance is a condition precedent to the right of recovery, unless it has been waived by the insurer. The appellees rely on such waiver. It is an old maxim of the law: *Quilibet potest renunciare juri pro se introducto*; anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favor. *Brown's Leg. Max.* 699.

The principle is of most frequent application in cases of policies of insurance, which usually abound in conditions and stipulations introduced by the insurer exclusively for his own benefit. Waiver may be express or implied. It may be shown by acts or conduct as well as by words.

A distinct denial by the insurer of liability and refusal to pay, on the ground that there is no liability, is a waiver of the condition requiring proof of loss. It is equivalent to a declaration of the insurer that he will not pay, though the proof be furnished; and to require the presentation of proof in such case, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not sustain. *May on Insurance*, 573, and authorities there cited; *Flanders on Fire Insurance*, 541, 542; *West Rockingham Mut. Fire Ins. Co. v. Sheets & Co.*, 26 Gratt. 854.

We think the waiver is established in this

case. It sufficiently appears by the answer to the bill. For the answer, while in terms it denies the waiver, admits facts
630 *which substantially show it. The language is, "This defendant admits that verbal application for the payment of the losses claimed by the plaintiff was made; but this defendant never, by any act or word, admitted the justice of the plaintiff's claim, but at all times denied it, and at all times refused payment on the ground that the company was not responsible for losses occasioned by the burning of the said houses, inasmuch as the said fire happened and took place by means of invasion, insurrection, riot, civil commotion, military and usurped power."

The object of requiring notice and proofs of loss is to enable the insurer to investigate the claim before he shall be compelled to pay it; but if, at the time the loss occurs, he has, as in the present case, personal knowledge of it, the cause, occasion, and extent of it, and the attending facts and circumstances, and from this knowledge has determined not to pay the amount insured or any part thereof, and on application denies all liability and refuses payment, it would indeed seem to be a futile thing, under such circumstances, for the insurer to give formal notice or furnish preliminary proofs.

2. The appellant also assigns as error the refusal of the court to dismiss the bill of the complainants on demurrer based upon the ground that they had a plain and adequate remedy at law.

The policies insured Joseph P. Reynolds, his executors, administrators and assigns, for the term of one year from date, with the stipulation, which has been referred to, that the insurance might be continued for such further term as should be agreed on, provided the premium therefor be paid and endorsed on the policy or receipt given for the same.

Under this stipulation, the insurance was continued from year to year during the life of Reynolds by the regular payment of annual premiums and taking receipts for the same. By the death of Reynolds in-
631 testate, and while the *policies were in force for the current term of one year, the property which was the subject of the insurance descended to Robert E. Reynolds, a minor, the surviving child and only heir at law of the intestate, subject to the dower therein of the intestate's wife, who also survives him.

After the death of Joseph P. Reynolds, the insurance was continued, under the stipulation aforesaid, from year to year by the payment of annual premiums by his widow, who was the administratrix of his estate, and the policies thus kept in force were binding engagements at the time of the loss.

Under these circumstances, it is doubtful whether any action at law could be maintained on the policies by the widow, in her character of administratrix, or alone in her individual right, there being a question whether the insurance money when recovered would be assets in her hands as administratrix, liable to the intestate's debts and

distributable as personal estate, or whether the money does not stand in the place of the buildings and become divisible between the heir and herself in the proportion of their respective interests in said buildings, in which event a court of equity only could adequately provide for the investment of her portion so as to secure the principal to the heir at her death.

At all events, if there was any remedy at law it was not plain, and the case was a proper one for equitable cognizance.

This case is distinguishable from *Geo. Home Ins. Co. v. Kinnier's adm'r*, 28 Gratt. 36. There the loss occurred after the death of the plaintiff's intestate, but during the term of the insurance contracted for by him in his lifetime, and there had therefore been no renewal of the policy after his death. But the question decided on the demurrer turned upon the construction of the words, "legal representatives," in the policy, the contention of the defendant being that they meant heirs, and that the undertaking
632 was *to insure the heirs. The decision was that the words were of the same import with the words executors, administrators, personal representatives.

3. The circuit court gave a decree (the same appealed from) in behalf of the complainant for the aggregate amount of the sums insured, with interest from the 21st of June, 1861, until paid, and for costs. The appellant assigns as error the allowance of interest during the war. The decision in *Roberts' adm'r v. Cocke & others*, and *Murphy v. Gaskins' adm'r*, 28 Gratt. 207, is a complete answer to this assignment.

Upon the whole case, we are of opinion that there is no error in the decree of the circuit court, and that it should be affirmed.

MONCURE, P., and CHRISTIAN, J., dissented.

Decree affirmed.

633 *Burgess v. Belvin & als.

January Term, 1880, Richmond.

Deeds—Recordation.—The clerk's office of the chancery court of the city of Richmond is the proper office for the recordation of deeds conveying land lying within one mile of the city of Richmond on the north side of James river, though outside of the city limits.

By deed bearing date the 27th of March, 1872, Rush Burgess and wife conveyed to John A. Belvin and Lewis H. Frayser a tract of forty acres of land lying in the county of Henrico, immediately outside of the limits of the city of Richmond, but within one mile of the said limits, in trust to secure the payment to John B. Davis a debt of \$2,750, evidenced by a negotiable note of the same date as the deed, and payable at one year, with interest at the rate of ten per centum per annum from the date of its maturity. This deed was admitted to record in the

clerk's office of the county court of Henrico on the 29th of March, 1872, and in the clerk's office of the chancery court of the city of Richmond on the 19th of December, 1876.

By deed bearing date on the 1st day of December, 1873, Rush Burgess and wife conveyed to Clark Burgess the same tract of land, in trust to secure the payment to Mary C. Burgess of the sum of \$4,000, evidenced by a negotiable note of the same date as the deed, and payable at five years after date, with interest from the date of the note, at eight per cent. per annum. This deed was admitted to record in the clerk's office of the county court of Henrico on the 22d of August, 1874, and in the clerk's office of the
634 *chancery court of the city of Richmond on the 16th of December, 1876. Neither of these deeds was signed by the trustees.

The trustees Belvin and Frayser, having advertised the sale of the land under the deed to them to secure the debt due to John B. Davis in November, 1877, Mary C. Burgess applied by bill to the judge of the chancery court of the city of Richmond for an injunction to prevent a sale, until the rights of herself and Davis, under their respective deeds, could be settled; she claiming that the record of the deeds in the clerk's office of the county court of Henrico was of no avail, and that her deed, having been first recorded in the clerk's office of the chancery court of the city of Richmond, it had priority over that of Davis.

Davis answered the bill. He insisted that his deed was properly recorded in the clerk's office of the county court of Henrico. And he averred further that before the execution and delivery of the deed from Rush Burgess and wife to Clark Burgess, and before said deed was recorded, the said Clark Burgess, trustee, and Mary C. Burgess, the beneficiary in said deed, had actual notice of the execution, delivery and recordation of the deed to Belvin and Frayser for his benefit.

Upon the question of notice, the evidence is conflicting. The court below was of opinion, and so held, that Mrs. Mary C. Burgess did have actual notice of the deed to Belvin and Frayser to secure Davis, before the recordation of the deed to secure her. Upon the question, where the deeds should be recorded, that court held that the clerk's office of the chancery court of the city of Richmond was the proper office.

The cause came on to be heard on the 16th of January, 1879, when the court held that the deed to Belvin and Frayser to secure Davis was a prior lien to that to secure the plaintiff. And by consent of the parties, the land was put into the hands of a receiver to be rented out; and a *commissioner was directed to enquire and report what liens there were upon the land, whether by deeds of trust, judgments or otherwise. And thereupon Mary C. Burgess applied to this court for an appeal; which was awarded.

Donnan & Hamilton and F. M. Conner, for the appellant.

Cannon & Courtney, for the appellees.

***Deeds—Recordation.**—See also *Blackford v. Hurst*, 26 Gratt. 203; *Campbell v. Nonpareil*, 75 Va. 292; *Boston v. Chesapeake, &c.*, R. Co., 76 Va. 183.

MONCURE, P., delivered the opinion of the court.

The controversy in this case is between conflicting claimants of liens by deed of trust on the same tract of land lying outside of the limits of the city of Richmond, but within one mile thereof, executed by Rush Burgess and Mary E., his wife; one of them being to John A. Belvin and Lewis H. Frayser, trustees, to secure to John B. Davis payment of the sum of \$2,750, for which the said Rush Burgess had made his negotiable note, dated 27th March, 1872, and payable one year after its date, and recorded in the clerk's office of Henrico county court on the 29th day of March, 1872, and in the office of the court of chancery for the city of Richmond on the 19th day of December, 1876; and the other of them being to Clark Burgess, in trust to secure to Mary C. Burgess, of the city of Petersburg, payment of the sum of \$4,000, for which the said Rush Burgess had made his negotiable note, dated December 1st, 1873, and payable five years after its date, with interest thereon at the rate of eight per centum per annum from its date until paid, and recorded in the clerk's office of Henrico county court on the 22d day of August, 1874, and in the office of the court of chancery for the city of Richmond on the 16th day of December, 1876. The conflicting claim of the parties is for priority of lien under the deeds of trust, under which they respectively claim, as aforesaid.

636 *If the clerk's office of Henrico county court was the proper place for the recordation of the said deeds, then the said deed to Belvin and Frayser, having been there recorded on the 29th day of March, 1872, is entitled to priority over the said deed to Clark Burgess, which was not there recorded until the 22d day of August, 1874.

Then, was that the proper place for the recordation of the said deeds?

It certainly would have been if the land conveyed had been situate, not only in the said county of Henrico, but more than one mile outside and beyond the limits of the city of Richmond.

But the said land was situate, not only in the county of Henrico, but within one mile of the said limits of the city of Richmond.

Then was the clerk's office of Henrico county court the proper place for the recordation of the said deeds?

The court is of opinion that it was not. From a period long anterior to that of the recordation of said deeds, the said clerk's office had ceased to be the proper place for the recordation of deeds conveying land lying within one mile of the limits of the city of Richmond, and provision had been made for the recordation of such deeds within the limits of the said city, just as if the land conveyed had been situate within the said limits. In other words, for the purpose of the recordation of deeds for land within one mile of the limits of the city north of the James river, the said limits were, in effect, extended so as to embrace that space within them.

As early as 1803, an act of the legislature was passed giving jurisdiction over that space to the hustings court of said city. Acts of 1803, ch. 31, § 14, p. 22. By an act passed February 21, 1842, entitled "an act to revise and amend the charter of the city of Richmond," it was, among other things, enacted that "the jurisdiction of said court shall extend one mile on the north side

637 of James river, *without and around the corporate limits of said city, and every part thereof, including so much of the said river to low water mark on the shore of the county of Chesterfield as shall be between two lines drawn due south from the eastern and western termination of the one mile aforesaid." Acts of assembly 1841-2, p. 138, § 65. By an act passed March 30, 1852, entitled "an act revising and reducing into one act the provisions of the charter of the city of Richmond," it was, among other things, enacted that "the said court" of hustings "shall continue to have jurisdiction," &c., "not only within said corporate limits, but also for the space of one mile on the north side of James river without and around said city and every part thereof, &c. Acts of assembly 1852, p. 259, § 3. By the Code of 1860, ch. 157, § 4, p. 661, it was enacted that "the said court of hustings shall continue to have civil and criminal jurisdiction," &c., "not only within the corporate limits of the said city, but also for the space of one mile on the north side of James river without and around said city and every part thereof," &c. This section of the Code is identical with the third section of the act passed March 15, 1860, entitled "an act to amend the charter of the city of Richmond and to reorganize the court of hustings of the said city"—acts of assembly 1859-60, ch. 169, § 3, p. 313—and was copied therefrom.

By an act passed March 19, 1867, amending the charter of the city of Richmond—acts of 1866-7, ch. 29, § 89, p. 801—it is enacted that the court of hustings of the city of Richmond, &c., shall have jurisdiction, &c., "within the corporate limits of said city and within the space of one mile on the northern side of James river without and around said city and every part thereof, including so much of said river to low water mark on the shore of the county of Chesterfield as shall be between two lines drawn due south from the eastern and western termination of the one mile aforesaid."

638 *By an act passed April 7th, 1870, entitled "an act providing for courts for the city of Richmond and defining the jurisdiction thereof"—ch. 43, pp. 42-44—it is, among other things, enacted as follows:

In section 1 that there shall be for the city of Richmond a circuit court, to be held, &c.; a hustings court, to be held, &c., "and a court of probate and record to be called the chancery court of the city of Richmond, to be held by a judge with like qualifications and elected in the same manner and for the same term as the judge of the hustings court."

In section 5 that "the chancery court of the city of Richmond shall exercise exclu-

sively all jurisdiction now vested in circuit or corporation courts, concerning the probate and recordation of wills, the appointment, qualification and removal of fiduciaries, and the settlement of their accounts, the docketing of judgments, the recordation in the manner prescribed by law of deeds and other papers required by law to be recorded, and shall have exclusive jurisdiction of all suits and proceedings in chancery cognizable by law in any circuit court of the commonwealth."

In section 6, that "so soon as the clerk of the chancery court of the city of Richmond shall have qualified, all chancery records," &c., "and all papers, books and records pertaining to the probate and recordation of wills, the appointment, qualification, and removal of fiduciaries, the recordation of deeds and other papers required by law to be recorded, and the judgment docket shall be removed to, and kept in, the office of the clerk of the chancery court of the city of Richmond," &c.

And in section 10, "that the said chancery court shall be always open as a court of probate and record, and the clerk thereof shall at all times exercise such powers, and perform such duties, as to docketing judgments and recording deeds and other papers, as have been heretofore exercised and performed by the clerk of the hustings court of the city of Richmond."

639 *Thus stood the statute law of the state when the deeds in controversy were executed, and until after their recordation in the office of the court of chancery for the city of Richmond, one of which—to wit: the deed for the benefit of the appellant, Mary C. Burgess—was there recorded on the 16th day of December, 1876, and the other—to wit: the deed for the benefit of the appellee, John B. Davis—was there recorded on the 19th day of December, 1876. Therefore the lien of the former has priority of right over that of the latter, if such priority depends upon the order of time in which the said deeds were duly recorded respectively, and they were so recorded in the office of the chancery court of the city of Richmond as aforesaid; unless at the time of the said recordation of the deed for the benefit of Mrs. Mary C. Burgess she had notice of the existence of the said deed for the benefit of the said John B. Davis; which was prior in date and time of execution to the said deed for the benefit of Mary C. Burgess.

Then were they duly recorded in the office of the court of chancery for the city of Richmond? In other words, was that the proper place for the recordation of said deeds? And, if so, Did Mary C. Burgess, at the time of the said recordation of the said deed for her benefit, have notice of the existence of the said prior deed for the benefit of John B. Davis?

First. Were they duly recorded as aforesaid? In other words, was the office of the court of chancery for the city of Richmond the proper place for the recordation of the said deeds?

The court is of opinion that it was; and

that it was so, in effect, decided by this court, in the cases of *Blackford, &c., v. Hurst, &c.*, 26 Gratt. 203; and *Jordan's case*, 25 Gratt. 943.

In *Jordan's case* it was held that the criminal jurisdiction of the hustings court of the city of Richmond extends one mile beyond the city limits, on the north side

640 *of the James river. The principle of that case applies to and governs this.

If the criminal jurisdiction of the court of hustings embraces the territory within one mile of the limits of the city on the north side of the James river, so also does the civil jurisdiction of the court, if not a fortiori.

In *Blackford, &c., v. Hurst, &c.* it was held that by the charter of the city of Lynchburg, jurisdiction being given to the court of hustings for said city, not only within the limits of the corporation, but also for the space of one mile without and around said city, a deed of trust conveying real estate lying outside the corporation limits, but within one mile without and around said city, is to be recorded in the clerk's office of the corporation court of the city—and being so recorded, it is valid, and has priority over subsequent judgments against the grantor in the deed docketed in the clerk's office of the county court. The principal of that case also applies to this.

At the time of the enactment of the law creating the present court of chancery of the city of Richmond—to wit: on the 7th day of April, 1870—there can be no doubt but that the court of hustings of the city of Richmond had jurisdiction outside of the limits of said city to the extent of one mile, and continued to have such jurisdiction from 1803 down to the date of the act in 1870; and it does not appear that such jurisdiction ceased thereafter to exist. There does not appear to be anything in the said act of 1870, nor in any subsequent act, which was intended to take away such jurisdiction. On the contrary, the said act of 1870, the substance of which, in this respect, has hereinbefore been set out, manifests an intention, on the part of the legislature, to leave the law unchanged in the said respect. It is unnecessary to repeat here the said provisions of the said act.

But as has been before stated, herein, the two cases before referred to in effect decided that there has been no such

641 *change in our statute law on the subject as was supposed by the counsel for the appellee, Davis, to exist.

Secondly. Did Mrs. Mary C. Burgess, at the time of the said recordation of the said deed for her benefit, have notice of the existence of the said prior deed for the benefit of John B. Davis?

The deed for her benefit, having been duly recorded—to wit: in the office of the court of chancery for the city of Richmond—on the 16th day of December, 1876, prior to the recordation of the deed for the benefit of John B. Davis in the same office, on the 19th day of the same month in the same year, the said office being the proper place for the recordation of both of said deeds; it follows that the former has priority over the latter

unless the party entitled to the benefit of the former had actual notice at least as early as the time of its recordation of the existence and effect of the latter. And such notice, to be sufficient to supply the place of due recordation, ought to be so distinct and free from doubt as fully to inform her on the subject.

Now, did she have such actual notice?

The court is of opinion that she did not, according to the proceedings and the proofs in the cause.

The testimony on one side—to wit: that of the appellees, of the witnesses, Rush Burgess and John B. Davis—tends to show that she had such actual notice. But the testimony on the other—to wit: that of the appellant, of the witnesses, Mary C. Burgess, and Clark Burgess, and Charles E. Gregory—tends to show the contrary, that she did not have such actual notice.

Certainly the former does not preponderate over the latter, and it ought to do so decidedly, in order to prevail over the effect of prior due recordation.

But besides, the other circumstances of the case tend strongly to sustain the latter, and to show that the deed of trust for the benefit of Mary C. Burgess was executed by *Rush Burgess without informing her of the prior lien on the same property for the benefit of John B. Davis.

No notice whatever was taken of the said prior lien in the said deed of trust for the benefit of said Mary C. Burgess, as would no doubt have been done if the latter lien had been intended by her to be taken subject to the former. The former lien was to secure a debt which had become due and payable before the latter was executed, which bore interest at the rate of ten per centum per annum, and for which debt and interest the land conveyed was at any time liable to be sold. It was to the manifest interest of Rush Burgess to borrow money of Mrs. Mary C. Burgess at eight per cent. interest to pay off the said debt already due by him at ten per cent. interest, for which debt and interest the land conveyed was at any time liable to be sold. He borrowed four thousand dollars of her for five years at eight per cent. interest, and the presumption is that one of his motives for doing so was to pay off the debt he then owed, on which he was paying ten per cent. as aforesaid. Being asked the question, Did you not expect to pay off that note (due to said Davis as aforesaid) with the money obtained from Mary C. Burgess, and thereby reduce the rate of interest on the money you had borrowed? he answered: "Probably so and probably not."

Such was probably his intention when he borrowed the money of Mary C. Burgess as aforesaid, and expecting to discharge the said prior lien out of the said money soon after he received it, he considered it unnecessary to name the said prior lien, either to the said Mary C. Burgess or in the deed of trust executed for her benefit as aforesaid.

This circumstance, therefore, strongly confirms her version of the fact in regard to

notice, which is a subject of controversy as aforesaid.

In regard to Clark Burgess, trustee in the deed of trust for the benefit of Mrs. Mary C. Burgess; he never executed the said deed, nor had any notice that he was named
643 *as trustee therein, until after the said deed was recorded in the office of the chancery court of Richmond. Notice to him prior to that time, therefore, of the existence of the prior deed, for the benefit of John B. Davis, would not affect Mary C. Burgess, as he was not then her agent, if in fact he received such prior notice, about the fact or time of his receiving which the evidence in the record is uncertain and doubtful, but it is immaterial.

There may be some doubt whether Alexander Donnan did not receive notice of the existence of the said prior lien for the benefit of John B. Davis before and about the time of the recordation of the deed for the benefit of Mrs. Mary C. Burgess in the office of the chancery court of the city of Richmond, and whether he was not then her agent in the transaction, so as to affect her with the same notice as principal.

But even if that be so, such notice cannot affect her, as she had, years before, loaned the money and received the deed of trust aforesaid, without any notice of any prior lien, and it only remained for her to have the deed for her benefit duly recorded; which she accordingly did, on the 16th day of December, 1876, three days before the deed of trust for the benefit of John B. Davis was so recorded.

The court is therefore of opinion that the court below erred in deciding that the weight of evidence is to the effect that Mrs. Burgess and Clark Burgess both had notice of the Belvin & Frayser deed of trust before the recordation of exhibit A, on the 16th December, 1876, in the chancery court, and so were not purchasers for value without notice, so far as regards the said Belvin & Frayser deed. And that the decree appealed from be reversed and annulled so far as it is hereinbefore declared to be erroneous, and be affirmed in all other respects; and the case is remanded to said court of chancery for further proceedings, to be had therein in conformity with the foregoing opinion.

Which is decreed accordingly.

644 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the deed of trust from Rush Burgess and wife to Clark Burgess, trustee, dated December 1st, 1873, is a prior lien on the land in the said deed described to the lien created by the deed from Rush Burgess and wife to John A. Belvin and Lewis H. Frayser, trustees, dated the 27th day of March, 1872; and doth accordingly so adjudge, order and decree.

And the court doth further adjudge, order and decree, that so much of the decree appealed from in this case as is in conflict with the foregoing opinion and decree is erroneous and be reversed and annulled, and that the residue thereof is not erroneous, and

be affirmed; and that the appellant, Mary C. Burgess, recover against the appellee, John B. Davis, her costs by her expended in the prosecution of her appeal aforesaid here. And it is further decreed and ordered, that this cause be remanded to the said chancery court for the city of Richmond, for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion and decree.

Which is ordered to be certified to the said chancery court of the city Richmond. Decree reversed.

645 *Wyeth v. Mahoney & als.

January Term, 1880, Richmond.

J, acting as agent of W, wrote to M, proposing to purchase for W a certain tract of land owned by M and his two brothers, at the price of \$12 an acre; and M replies by letter to J, accepting his proposition. These letters were enclosed to W, and not long after he wrote to J, saying I am pleased with your new purchase at twelve dollars; and have again to thank you for your kindness and attention to my interest. Upon bill for specific execution of the contract by M and his brothers against W—HELD:

1. **Principal and Agent—Validity of Contract—Equity.**—The contract is a valid contract, and will be enforced in equity.

2. **Same—Same.**—It was not necessary that J should be authorized in writing to make the contract.

3. **Same—Same.**—Though the contract was made with M, yet as he had been authorized by his brothers to sell the land, and they unite in the bill, the contract will be enforced.

This was a suit in equity in the circuit court of Fredericksburg, brought in January, 1875, by Simon Mahoney, John Mahoney and Patrick Mahoney against Henry C. Wyeth, to enforce the execution of a contract for the sale by the plaintiffs to the defendant of a tract of one hundred and seventy acres of land lying in the county of Spottsylvania. The cause came on to be heard on the 3d of January, 1876, when the court decreed the specific execution of the contract as alleged in the bill. And, thereupon, the defendant Wyeth applied to this court for an appeal; which *was awarded. The case as viewed by this court is stated by Judge Staples in his opinion.

Ould & Carrington, for the appellant.

Marye & Fitzhugh, for the appellees.

STAPLES, J., delivered the opinion of the court.

This is a suit for the specific execution of a contract. The bill alleges that one of the appellees about the 3d of September, 1873, contracted in writing with the appellant for the sale of a tract of land in Spottsylvania county, and that the appellant agreed in writing to purchase said tract at the price of twelve dollars per acre, one-third to be paid in cash, the remainder in one and two years.

The appellant, in his answer to the bill, denies that he made any such contract, or that he ever had any intention of purchasing

the land; and he denies that he ever made any proposition, orally or in writing, to the appellees, or either of them, looking to said purchase.

This is the sole issue presented by the pleadings, and the only question we have to determine is, whether the allegations of the bill are sustained by the proofs.

The main witness relied upon by the appellees is John H. Walze, the alleged agent of the appellant. This witness states that in September, 1873, he was authorized by the appellant to make the purchase upon the terms set out in the bill; that thereupon he wrote to one of the appellees, Simon Mahoney, informing him of the fact, and distinctly stating in his letter the terms of the proposed purchase; and shortly thereafter he received a reply from the same appellee accepting the proposition and agreeing to the sale upon the terms proposed.

The witness further says, that he immediately wrote to the appellant, informing 647 him of the purchase made on his *behalf, and the terms, and this letter, together with the one received from the appellee, he delivered to William Wyeth, appellant's brother, and requested him to send them to appellant; and that William Wyeth, in the presence of witness, mailed them accordingly to appellant's proper address.

Witness also states that not very long afterwards he received a letter from appellant, in which he says, "I am pleased with your new purchase at twelve dollars, and have again to thank you sincerely for your kindness and attention to my interests."

This letter bears date 30th of October, 1873, and is a part of the record.

If the statements made by the witness are true, it must be conceded that the contract is fully established; for it is now well settled that the memorandum required by the statute of frauds may consist wholly of the letters of the parties interested, whether they be written to the person with whom the contract is made, or to some third person. All that is necessary is that the writing, whatever it may be, shall contain the essential terms of the agreement, and shall show that the proposals on one side have been accepted by the other, without a resort to parol testimony. In order to form a contract by letter, Lord Eldon has said, "Nothing more is necessary than this, that when one man makes an offer to another to sell for so much and the other closes with his offer, there must be a fair understanding on the part of each as to what is to be the purchase money, and how it is to be paid, as also a reasonable description of the subject of the bargain." *Stratford v. Bosworth*, 2 Ves. & B. 341, 346; 2 Lomax Digest, p. 37, side; *Pomeroy on Contracts*, § 81, 84.

It is well settled that under the statute of frauds it is not necessary that the writing shall be signed by either of the parties. It is sufficient that it is signed by the agent of the party to be charged. Nor is it necessary that the *authority of the agent 648 shall be in writing. It may be con-

ferred by parol. The statute does not make it indispensable that the agent shall sign the name of his principal—the signing his own name is sufficient. 2 Lomax Dig. 45; Pomeroy, § 78, 79.

In the case before us, we have all those requirements of the statute complied with—authority given to the agent to buy, the terms agreed upon by the agent and the vendor—contained in the letters of the agent and of the vendor; and we have also the written acceptance of the contract by the appellant. We have all these—if the evidence of the agent Walze is to be relied upon.

The appellant, or his counsel, fully appreciating this fact, have adduced testimony assailing the character of the witness as a man of veracity. Without stopping now to enquire how far he has been successful in the effort, let us see whether the witness is sufficiently corroborated by other facts and circumstances as to warrant the court in believing his evidence.

At the time the deposition was taken, the appellant and his counsel were present cross-examining the witness.

When the witness spoke of the two letters, the one written by Simon Mahoney and the other by himself, which were mailed to appellant by his brother, appellant was then and there called upon to produce these letters. He made no response whatever. He neither denied nor affirmed that he had ever received them. If he did not receive them, why did he not say so? Could anything be more natural, or proper, or reasonable, than that he should at once say he had never received any such letters, and he knew nothing about them?

The conclusion is irresistible that appellant was but too conscious that the witness was telling the truth. He was not then prepared to deny having received the letters, he was not willing to produce them, and he took refuge in silence.

649 *It is to be borne in mind, further, that Walze states that he delivered the two letters to appellant's brother, William Wyeth, and the latter, in witness' presence, mailed them to appellant. If this statement was false, nothing was easier than for appellant to bring his brother forward, and show the fact. The statement was susceptible of ready contradiction if it was untrue, and the appellant failed to avail himself of the means of making that contradiction. It is hardly to be supposed this court would, under such circumstances, reject the testimony as unworthy of credit. And it is observable throughout that whilst the appellant had the right to testify and give his version of the transaction, he has not thought proper to do so. It is impossible to avoid a suspicion, at least, that the appellant was, perhaps, not willing to encounter the test of a public cross-examination with respect to these letters and the purchase made for his benefit.

After all the evidence was concluded, and not till then, he filed his answer. In it he makes no allusion whatever to the letters alleged to have been sent him through his brother. He contents himself with a general

denial that he had ever received any communication from either of the complainants for the sale of the land; which may be literally true, and yet he may nevertheless have received the appellant's letter directed to Walze. That letter was not a proposition of sale, but was an acceptance of a proposition of sale made by Walze, professing to act as appellant's agent.

As has been stated, there is in the record a letter written by appellant, dated October 3d, 1873, in which he says he is pleased with the new purchase at twelve dollars. The appellant, upon a trial in the superior court of the city of Baltimore, testified that this letter related to the purchase of the Libby farm, and not to the purchase of the Mahoney property. It was, however, then demonstrated that this statement was **650** not correct, as the price of *the Libby farm exceeded twelve dollars per acre.

In his answer, however, the appellant states he does not remember to what he referred as the new purchase made by Walze. He thinks it was to some articles of personal property purchased by Walze, to be used on his farm, known as Chancellorsville.

This statement is somewhat improbable, to say the least, as the appellant would scarcely have taken the trouble to write a letter merely for the purpose of expressing his pleasure at the purchase involving the small sum of twelve dollars. Walze, on the contrary, swears that the reference was to the purchase of the Mahoney farm at twelve dollars per acre. The whole difficulty would have been removed by producing Walze's letter, to which appellant's was a reply. What has become of that letter? The appellant does not say that it was lost or destroyed; he makes no excuse or explanation of his failure to produce it. If a party having important documents in his possession, which would show the truth of his statements, suppresses it or fails to produce it, what other inference can be drawn than that it would operate to his prejudice? 1 Greenl. Ev. § 37.

From all these circumstances, it is apparent that the testimony of Walze derives the strongest confirmation from the conduct of the appellant himself. It is also confirmed by the uncontradicted testimony of Simon Mahoney, one of the appellees. This witness states that the appellant visited the land between the 23d October and the 4th of November, 1873, and expressed his entire satisfaction at the purchase, and that he declared he expected to have the purchase money in a month or two, and that he would pay the interest promptly. Here, again, the appellant was called upon to contradict the statement of the witness; but he never did so. Conceding that this appellee is mistaken in supposing he signed a written contract for the sale of the land other than the let- **651** ter, he is not mistaken in the *assertion that the appellant, after seeing the land, expressed his entire satisfaction with the purchase made by his agent.

The learned counsel for the appellant insists, that even conceding the contract to be proved by the evidence, it is not such a con-

tract as a court of equity will enforce; because it is apparent, that whilst Walze was professing to act as the agent of the appellant in making the purchase, he was, at the same time, the agent of the appellees in making the sale of the land; all of which was well understood by the appellees.

There is not a doubt that Walze did occupy the position of agent for both parties in the transaction. And if this were all it would be impossible to enforce the contract. But it appears, that after the purchase was concluded and all its terms made known to the appellant, and after he was informed of the arrangement between appellees and Walze, the appellant said he was pleased with the purchase, the action of the agent was right, and he made some arrangement with respect to the payment of the interest. Simon Mahoney, to whom reference has been made, says he told appellant, that he, the appellee, was to give Walze all over ten dollars per acre he could get for the land.

The appellant insisted that it was too much to give him; and proposed to appellee, that the latter should receive payment directly from appellant, and thus save the commission to Walze, which could be divided between appellant and appellee.

If this testimony be reliable—and it has not been contradicted—it puts an end to every allegation of fraud founded upon the idea that Walze was acting as agent for the appellees.

It has been further insisted that while Simon, John and Patrick Mahoney were jointly interested in the land, the sale was made by Simon Mahoney alone, without authority from the other two, and inas-

652 much as the appellant was in *no condition to enforce the contract against them, they of course, cannot maintain a suit for specific performance against him. There can be no doubt, however, that Simon Mahoney was fully authorized by his co-tenants to make the sale. The fact is proved by Simon Mahoney himself, who says that they wrote to him, authorizing him to sell the land on the best terms that could be obtained. These letters are not produced, having been mislaid or lost as the witness states, but there is no reason to doubt that they were written, and that they conferred full authority to make the sale. That authority, as has been seen, might have been conferred by parol. The appellees may maintain a suit for specific execution, although neither of them have signed a written contract of sale. As a general rule, the mutuality of the obligation must be judged of by reference to the time the agreement was entered into. There are, however, certain well known exceptions to this rule. One of them is found in the case of a party, who not having signed may yet, upon filing a bill, enforce the agreement against one who has signed. The reason most generally given for this exception is, that the plaintiff by filing the bill waives the original want of mutuality, and renders the remedy mutual. Fry on Specific Performance, §§ 296-7.

Whatever may be said with respect to the

justice of this exception to the general rule, requiring mutuality of remedy, it is now too well established to be called in question at the present day. See Lomax Digest, side page 56; 5 Wait's Digest, 788; Pomeroy on Contracts, § 170.

Here the appellees, having filed their bill, have submitted to the jurisdiction of the court, and waive the want of mutuality, if there was any such, and thus removed any difficulty in the way of specific execution.

We are of opinion, however, that all the appellees were originally bound, and that the appellant could have maintained
653 *the suit against them, it is was originally entered into between the parties. For these reasons, we think there is no error in the decree of the circuit court, and that the same should be affirmed.

Decree affirmed.

654 *Paulsen v. Rogers, Second Auditor.

January Term, 1880, Richmond.

Absent, *Moncure*, P.*

Public Debt—State Bonds—Coupon Bonds—Statutes.—The act of March 30th, 1871, which authorized the holders of state bonds to invest them in tax receivable coupon bonds, was modified and repealed as to the tax receivable coupons by the act of March 7th, 1872, and was wholly repealed by the act of March 28th, 1879, entitled "an act to provide a plan of settlement of the public debt." And a holder of state bonds applying in November, 1879, cannot have them funded under the act of March, 1871, in tax receivable coupon bonds.

This was an application in November, 1879, to this court by Herman G. C. Paulsen for a mandamus to Asa Rogers, second auditor of the state, requiring him to fund certain bonds of the state, which had been issued in 1851, held by the petitioner, in tax receivable coupon bonds, as provided by the act of March 30th, 1871. The auditor answered the rule, insisting that by the act of March 7th, 1872, the act of March 30th, 1871, so far as it authorized the issue of tax receivable coupon bonds, had been repealed, and by the act of March 29th, 1879, the said act had been wholly repealed.

Frank W. Christian, for the petitioner.

The Attorney-General, for the second auditor.

655 *CHRISTIAN, J., delivered the opinion of the court.

The petition in this case is filed by Herman G. C. Paulsen, who is a holder of certain Virginia consol bonds, invoking the original and extraordinary jurisdiction of this court, by way mandamus, to compel the second auditor to fund said bonds, according to the provisions of the act of the general assembly, approved March 30th, 1871.

It is admitted in said petition, as well as averred in the answer of the said auditor, that the bonds held by said petitioner were not presented to the said auditor for the pur-

*Judge *Moncure* considered himself interested in the question involved in the case.

pose of being funded until the 17th day of November, 1879.

The court is of opinion, that on that day the second auditor had no authority to fund said bonds. The act of March 30th, 1871, was, in certain essential particulars, modified and repealed by the act of March 7th, 1872, and was wholly repealed by the act approved March 28th, 1879, entitled "an act to provide a plan of settlement of the public debt."

It was not until after the passage of both of these last named acts that the petitioner presented his bonds to the second auditor, and demanded that they should be funded under the act of March 30th, 1871.

The court is of opinion that the principles declared by this court in the case of *Wise, Bro., &c., v. Rogers*, second auditor, and *Maury & Co. v. Rogers*, second auditor, 24 Gratt. 169, must govern the case before us. And while it is true that, under the decisions of this court, all holders of the bonds of Virginia who came forward and funded the same, under the provisions of the act of March 30th, 1871, before its repeal by the acts above referred to, could not be affected by such repeal, and that as to them such acts were unconstitutional and void, because they impaired the obligation of the contract

656 which the state had entered *into with such of its creditors as availed themselves of the provisions of said act before its repeal, it is equally clear that the aforementioned acts, repealing the act of March 30th, 1871, are valid and binding upon those who did not avail themselves of the provisions of that act before its repeal. The legislature had the unquestioned right to amend, modify or repeal that act, provided such modification or repeal did not affect rights already vested under the same. And those creditors who, like the petitioner, did not present their bonds to be funded under the provisions of that act until after its repeal, cannot claim the benefit of its provisions, and call on the courts to compel the auditor to fund bonds under an act which had been repealed at the time they were presented for funding.

The court is, therefore of opinion that the petition of Herman G. C. Paulsen be denied, and that the rule heretofore awarded against the second auditor be discharged.

Mandamus refused.

657 *Connolly v. Connolly & als.

January Term, 1880, Richmond.

I. **Validity of Wills—Court of Equity—Review.**—The court in which a bill is filed under the statute to impeach or establish a will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, it may on a proper bill, review and correct errors in its proceedings after final decree in the cause.

II. On a bill filed under the statute to invalidate the probate of a will, which had been admitted to

probate as the will of C, there was a final decree in the cause establishing the paper as the will of C, and this was affirmed on appeal. A relation of C, interested in his estate, who was an infant at the time, and was not made a party, or represented in the case, may file a bill to review the decree. And the bill stating the fact that the plaintiff was an infant at the time of the decree, and was not a party or represented in the case; and also the discovery of evidence since the decree which, as stated, is of great importance and not cumulative—**Held:**

1. **Same—Bill of Review.**—Upon the application for leave to file the bill, the statements of the bill must be taken as true.

2. **Same—Same—After-Discovered Evidence.**—The grounds stated in the bill are sufficient to authorize the bill of review.

III. **Conclusiveness of Probate Proceedings.**—The present state of the law of probate in Virginia is, that a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons, and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury and decree thereon in the proceeding by bill under the statute, as to a sentence pronounced in any other authorized probate proceeding.

658 *This was an application by Rosa Ann Connolly to the circuit court of Fairfax county, to be permitted to file a bill to review the decree of said court, which had been affirmed upon appeal by the court of appeals, admitting to probate a paper propounded as the will of Edmund Connolly. That case is reported in 27 Gratt. 313, under the name of *Cody v. Conly & als.* The grounds upon which the application is made are set out in the opinion of the court delivered by Burks, J.

The circuit court refused to allow the bill to be filed, and the petitioner applied to a judge of this court for an appeal; which was granted.

H. O. Cloughton, for the appellant.

Thomas & Carter, for the appellees.

BURKS, J., delivered the opinion of the court.

***Same—Court of Equity.**—See *Dower v. Church*, 21 W. Va. 47; *Blanton v. Carroll*, 86 Va. 541; *Hartman v. Strickler*, 82 Va. 233; *Kirby v. Kirby*, 84 Va. 629; *Coalter's v. Bryan*, 1 Gratt. 18; *Lamberts v. Cooper*, 29 Gratt. 61.

†**Bill of Review—After-Discovered Evidence.**—As to the requisites of a bill of review based on after-discovered evidence, see also *Douglas v. Stephenson's Ex'or et al.*, 75 Va. 747; *Trevelyan's adm'r v. Lofft*, 83 Va. 146; *Corey v. Moore*, 86 Va. 731; *Carter v. Allan*, 21 Gratt. 245; *Kendrick v. Whitney*, 28 Gratt. 646; *Whitten v. Saunders*, 75 Va. 563; 4 Min. Inst. (2nd Ed.) 1392.

‡**Conclusiveness of Probate Proceedings.**—The principal case is cited, and the rule stated in its third headnote, is sustained in *Norvell et al., v. Lessueur et al.*, 33 Gratt. 229; 4 Min. Inst. (2nd Ed.) 94. See also *Dower v. Church*, 21 W. Va. 47; *Renick v. Ludington*, 20 W. Va. 536.

***Wills—Probate—Review—Court of Equity.**—See also 4 Min. Inst. (2nd Ed.) 93.

After the affirmance by this court of the decree of the circuit court of Fairfax county, in the case of *Cody v. Conly & others*, reported in 27 Gratt. 313, et seq., and within three years after said affirmance, the present appellant, Rosa A. Connolly, one of the heirs and next of kin of Edmund Connolly, deceased, presented her bill by the said circuit court, praying a review and reversal of the decree aforesaid, which established, on the verdict of a jury rendered on the trial of the issue directed, that a certain writing set out in the record, which had been admitted to probate in the county of Fairfax county, was the true last will and testament of the said Edmund Connolly, deceased, and praying further that an issue be ordered to be tried by a jury to ascertain whether any, and if any, how much of the said writing was the true will of the said Edmund Connolly, and that said writing be canceled and declared void, &c.

659 *The record of the original suit is referred to and made a part of the bill, and the prayer for review and reversal of the decree, and for an issue, is based on two grounds:

1st. That the complainant, as one of the heirs and distributees of the decedent, Edmund Connolly, had a direct interest in the subject-matter of controversy in said suit, and should have been a party thereto; that she was an infant at the commencement and during the pendency of the suit, was not a party, and was not represented therein either by guardian ad litem or otherwise.

The record does not show that any guardian ad litem was appointed to represent her, or that any answer was ever filed for her, or that any one ever appeared for or represented her in the cause, although she was named as a party defendant in the bill, and the process was returned "executed by posting copies on door of residence, no person being found there."

2d. That since the decree and affirmance thereof by this court she has discovered evidence that would prove that the said writing, admitted to probate as the last will and testament of Edmund Connolly, deceased, is not in his handwriting, and is a forgery, a pretence, and a fraud, of which Margaret Connolly (the widow of said decedent, and a party to the suit) had notice, and in which she participated; that she has discovered that the said paper is in the handwriting of one Thomas Kerans, and was written by him after the death of the said Edmund Connolly; that said Kerans being ill and expecting to die, did, on the 26th day of November, 1876, (which after the affirmance of the decree aforesaid by the court), send for the Rev. Father J. B. DeWolf, to receive his last confession, and did then confess that he wrote the said paper after the death of the said Edmund Connolly, and requested the said DeWolf to give to the parties interested information of the fact: and believing he was about to die, executed a paper in the following words:

660 *Lewensville, Nov. 26, 1876.

"I certify on oath I wrote, after the death of Edmund Connolly, the will that

was supposed to be written by Mr. Connolly himself.

"Thomas Kerans."

That she can prove the fact that the paper admitted to probate aforesaid is not in the handwriting of the said Edmund Connolly, but in the handwriting of said Kerans, and was written after the death of said Edmund Connolly, by evidence not known at the time of the hearing and decision of the aforesaid suit, and which could not have been discovered before said hearing by the use of the most extraordinary diligence; that Kerans did not die, as he expected, at the time of the confession, and is now living and can be required to testify.

The bill was sworn to by the complainant; and, on being tendered, the circuit court refused liberty to file it, and from this order of refusal the present appeal was allowed.

That there may be an appeal from such an order, is decided in *Lee's infants by next friend v. Braxton*, 5 Call. 459; *Williamson v. Ledbetter*, 2 Munf. 521.

If the circuit court of Fairfax had jurisdiction, as a court of equity, to review the decree and proceedings complained of, there can be no doubt, we think, that liberty should have been granted to file the bill tendered. The complainant was an infant, not really a party to the suit, though named in the bill, being unrepresented by guardian ad litem or otherwise, and yet, in such a proceeding, the decree unreversed was to her prejudice, and this alone would seem to be a sufficient foundation for the review asked; but, in addition, the after discovered evidence, in ordinary cases, would warrant the filing of the bill. All the requisites of a bill based on this ground are found in the bill of the appellant. 1.

661 The evidence was discovered *after the decree was rendered and affirmed. 2. It could not have been discovered before by the exercise of reasonable diligence. 3. It is material, and such as, if true, ought to produce, on another trial of the issue, a different result on the merits. 4. It is not merely cumulative.

A bill founded on after-discovered evidence, with the requisites just stated, may be filed to review a decree even after it has been affirmed by an appellate court. *J. B. Campbell's ex'ors v. A. C. Campbell's ex'or*, 22 Gratt. 649, and cases cited; *Singleton v. Singleton & others*, 8 B. Monroe, 340.

But it is contended by the learned counsel for the appellees, that on a bill filed under our statute to impeach the validity of a will, which has been admitted to probate in an ex parte proceeding, the court exercises the functions of a court of probate merely, and not of a court of equity, and that its jurisdiction is exhausted when the jury have rendered a verdict on the issue, and the court, approving the same, has pronounced its decree thereon; and hence, that a bill of review, which is a remedy appropriate only to courts of equity in the exercise of their ordinary powers, will not lie to correct errors in such a case.

There is no doubt that the statutory proceeding was designed as a secondary or final

probate, and that the verdict of a jury on the issue prescribed is an essential feature in such proceeding. It is the verdict which ascertains and determines "whether any, and if any, how much of what was offered for probate be the will of the decedent." But the court, though limited in its functions, is still a court of equity, and acts as such to the extent of its powers over the subject confided to it by the statute. The proceeding is commenced by bill, denominated in the act a "bill in equity." It must be framed as any other bill in equity would be framed, except that it must be confined in its aim and object to the specific relief contemplated by the statute—namely, the determination by

662 a jury, on an issue to be directed *and tried, of the validity or invalidity of the testamentary paper or papers which are drawn in question. Process to convene the parties issues, as in other cases in equity suits, and the pleadings are of the same nature. The court, by decree, settles and directs the issue. The trial may be had at the bar of the chancery court, or in some court of common law; but wherever had, the chancery court alone in which the suit is pending can grant a new trial. *Lamberts v. Cooper's ex'or & als.*, 29 Gratt. 61, 66, and cases cited.

Now, all the functions performed by the court seem to be, in their nature and the mode of exercising them, such as appertain to a court of equity. If errors are committed in the progress of the case, it cannot be doubted that the court may correct them before the cause is terminated, and should correct them in the mode and according to the practice of courts of equity. If, after verdict, it should appear that all the parties in interest are not before the court, would not the court set aside the verdict and require an amendment of the pleadings, as in other equity suits, so as to bring the omitted parties into the cause? Or if, after verdict, and before decree thereon, it were ascertained that new evidence had been discovered, which in a court of equity, in ordinary cases, would warrant a bill of review after final decree, would the court hesitate to set aside the verdict and order a new trial?

It results from what has been said, that in our opinion the court in which a bill is filed under the statute to impeach or establish a will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, yet it may, on a proper bill, review and correct errors in its proceedings after final decree in the cause.

The precise question now decided has never before presented to this court for determination, as far as we know. No decision of this court on the very point has been cited in argument.

663 *In *Coalter's ex'or & others v. Bryan & others*, 1 Gratt. 18, on a bill filed to contest the validity of certain papers which had been admitted to probate as the will of John Randolph, of Roanoke, the prayer was for an issue to be made up and tried to test the validity of these testamentary papers, and that they be declared invalid; and fur-

ther, that certain parties, who, as alleged, had possessed themselves of the estate of the decedent, might be decreed to account for and surrender it; and for general relief.

This court held, that so much of the bill as sought relief beyond the vacation of the contested instruments should be dismissed.

The decision was based on the ground, that the sole function of the suit under the statute was to test the validity of the will or wills which had been admitted to probate, and when the alleged testamentary papers were declared invalid and null, it was not competent for the court to proceed in that cause to make any further decree.

This was the extent of the decision, and we do not question its soundness. But in the opinion of the court, delivered by Judge Baldwin, it is said, that the jurisdiction of the court in such a case "is merely that of a court of probate, and to be exercised not by the court, but by a jury under its supervision." The remark in its broad terms was not necessary to the decision of the question presented. It must be taken in reference to the subject matter; and although the functions of the court are limited to matters of a probate nature, it by no means follows that those functions are not to be performed by the court acting as a court of equity, and clothed with all the powers of a court of equity, to give and secure the specific relief authorized by the statute. See also what is said by the same judge in *Malone's adm'r and others v. Hobbs and others*, 1 Rob. R. 346, 410.

It is very true, that the court is not **664** empowered to give *general relief, as in ordinary cases within the jurisdiction of equity tribunals, but it may and should exert its powers to secure the specific relief designed by the statute, and make the remedy provided effectual for the promotion of justice and the prevention of wrong.

The decisions in *Wills v. Spraggins*, 3 Gratt. 529, and *Schultz v. Schultz*, 10 Gratt. 358, cited in argument, are not pertinent to the question immediately under consideration. These cases merely decide the general proposition, that when a paper is propounded for probate to the proper court by the nominated executor, or by a devisee or legatee, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from probate, such sentence of exclusion is conclusively binding upon all claiming under the paper, though they were infants at the time and not parties to the proceeding.

It is also well settled, that the sentence of a court having jurisdiction of the subject matter, admitting a will to probate, is conclusive as long as such sentence remains in force. A judgment of this nature is classed among those which, in legal nomenclature, are called judgments in rem. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all courts. *Ballow v. Hudson & others*, 13 Gratt. 672, 682, and cases cited.

Provision was made, however, by the legislature as early as 1785, for contesting by

bill in chancery the validity of a paper which had been admitted to probate as a will in an ex parte proceeding, but no such provision was made for establishing a will which had been rejected in such proceeding. See the statute, 1 Rev. Code (1819), ch. 104, § 13. It was under this act that the decisions *supra* in 3 Gratt. and 10 Gratt. were made, which left a person interested, under a will which had been offered for probate and rejected by a sentence fairly obtained and pronounced on the merits, conclusively bound by such

665 sentence, although not *a party to the proceeding in which it was rendered. This defect in the law, for such it certainly was, was remedied by amendment at the revision of 1849, whereby a person interested, not a party to the primary probate proceeding, was authorized, within the time prescribed, to file a bill to establish a will which had been rejected, as well as to impeach one which had been admitted to probate. The section was adopted in the precise form in which it was reported by the revisors, and has not been since changed. Code of 1849, chap. 122, § 34; Code of 1873, chap. 118, § 34.

In their report, the revisors say, "The present statute (1 R. Code, chap. 104, § 13) was the subject of judicial decision in *Wills v. Spraggins*, 3 Gratt. 529. It is defective, when a will is improperly rejected, in leaving a person interested, who was no party to the proceeding, without any means of redress. It is no more than justice, that he should have the like remedy where a will is improperly rejected, as where it is improperly established. The section as above proposed puts him on the same footing in the two cases." Report of Revisors, 632 (note).

Thus it appears, that the present state of the law of probate in Virginia is, that a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate, or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons, and all other courts; and the principle applies as well to a sentence represented by the verdict of a jury and decree thereon in the proceeding by bill under the statute as to a sentence pronounced in any other authorized probate proceeding.

Apply the rule to the present case, and what result have we?

The appellant is bound by a sentence rendered in a proceeding had while she was 666 an infant, and, although interested *in the result, she was not a party to such proceeding, and was without a representative.

Since the sentence, she has discovered the fact, which could not have been sooner discovered by the use of the most extraordinary diligence, that the paper established in that proceeding as the will of her uncle was forged after his death by a man whose name is given in the bill, and who makes a written confession of his crime under circumstances of great solemnity. The statements of her bill, on a motion for leave to file it, must be taken as true. Her prayer is, that the former proceedings may be opened, and that she

may be allowed the opportunity, hitherto not afforded her, of being heard, and that she may be permitted to make good her allegations and have the spurious paper annulled.

Is it possible that the law provides no remedy, can give no relief in such a case? Is the appellant, under the circumstances shown by her bill, to continue bound, and to be forever barred of her rights, without being heard, or having an opportunity of being heard? We think not. As said by Judge Christian in *Underwood v. McVeigh*, 23 Gratt. 409, 418, "it lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in his defence, both in repelling the allegations of fact and upon the matter of law;" and in the language of an eminent judge of a sister state, "we take it to be an indisputable principle, essentially inherent in every enlightened system of jurisprudence, that every person who is bound by a proceeding to which he is no party and had no opportunity of becoming a party or of making a defence, and in which he is unrepresented, must, if he had such interest in the subject as required or authorized him to be made a party, be entitled to some mode of reversing the sentence." Marshall (Chief Justice), in *Singleton v. Singleton & others*, 8 B. Mon. R. 340, 345.

667 *That mode, as has already been pointed out, is the one adopted by the appellant in this case, and *Singleton v. Singleton* and others, *supra*, decided by the court of appeals of Kentucky in 1843, seems to be a direct authority in support of it. The Kentucky statute concerning wills, enacted in 1797, was taken substantially from our act of 1785, and sections 10 and 11 correspond with sections 12 and 13 of chapter 104 of the Revised Code of 1819.

A bill was filed under the 11th section of the Kentucky act contesting the validity of a writing which had been admitted to probate as a will, and there was a decree on the verdict of a jury against the validity, which, on appeal, was affirmed by the court of appeals. Afterwards two infant grandsons of the supposed testator, claiming to be devisees, filed their bill, showing their interest under the alleged will, and charging that they had not been made parties to the bill and proceedings in which the decree annulling the will was rendered; that, being infants of tender years, they had no notice or knowledge of said proceeding, had no opportunity of defending and protecting their rights, and were seriously injured by the decree. They averred that the writing which had been vacated was the true last will and testament of their grandfather, and prayed that the decree might be reviewed and reversed and opened, and that they might be allowed to contest the matters set up in the original bill; that the issue, whether the said writing was the true will of their grandfather, might be tried by a jury, so that they might have an opportunity of maintaining its validity and protecting their rights under it, &c.

The cause being heard on demurrer to the

bill, and a plea relying on the former decree and its affirmance by the appellate court as a bar to relief, there was a decree dismissing the bill, which, on appeal, was reversed by the court of appeals.

It was held by that court that the 668 decree against the *validity of the operated in rem, and was binding on all persons, whether parties to the suit or not, until reversed by legal proceedings for that object; that all parties interested should have been brought before the court, and that the appropriate and only remedy for the omitted parties was by a bill of review, or supplemental bill, in the nature of a bill of review, to reverse the decree complained of, set aside the verdict of the jury, and have a new trial of the issue.

The reasons on which the decision was based are very clearly and forcibly expressed in the opinion of the court, delivered by the Chief Justice (Marshall), to which we beg to refer.

The case in judgment, it will be perceived, presents a much stronger claim to relief than the Kentucky case in the circumstances of after-discovered evidence—a feature that did not exist in the latter case.

Upon the whole matter, we are of opinion that the circuit court erred in refusing leave to the appellant to file her bill; and the order of refusal will, therefore, be reversed and the cause remanded, with direction to receive the bill, and for further proceedings therein, in order to final decree.

MONCURE, P., dissented.

The decree was as follows:

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the order aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in refusing to grant to the appellant leave to file the bill of review tendered to the said court; therefore, it is decreed and ordered, that the said order be reversed and annulled, and that the 669 appellant *recover against the appellee, Walker R. Millan, administrator of Edmund Connolly, deceased, her costs by her expended in the prosecution of her appeal aforesaid here, to be levied of the goods and chattels of the said decedent, Edmund Connolly, in the hands of the said Walker R. Millan to be administered, and this cause is remanded to the said circuit court with directions to receive the said bill of review tendered by the appellant and permit the same to be filed and regularly proceeded with in order to final decree.

Which is ordered to be certified to the said circuit court of Fairfax county.

Decree reversed.

670 *Carrington v. Ficklin's Ex'or.

January Term, 1880, Richmond.

1. **Bailees—Negligence—Liability.**—A gratuitous bailee is only liable for gross negligence.

*Liability of Gratuitous Bailee.—See also

2. **Negligence—Question of Fact.**—The question of negligence on the part of an agent, as a general rule, is a question of fact, and not of law.

3. **Same—Question of Law.**—It is only in that class of cases where a party has failed in the performance of a clear legal duty, that when the facts are undisputed, the question of negligence is necessarily one of law.

4. **Same—Question for Jury.**—When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inference to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ.

This was an action of assumpsit in the circuit court of the city of Richmond, brought in June, 1863, by B. F. Ficklin's executor against Eugene Carrington, to recover the amount of a bill of exchange for four hundred and twenty pounds sterling, which B. F. Ficklin had drawn upon De La Rue, of the city of London, for the accommodation of Carrington, which had been accepted and paid by De La Rue. The bill bore date March 15th, 1864, and was payable sixty days after sight.

At the time Carrington received this draft, he gave to Ficklin a receipt for it (describing it) as "being an advance by him to me of that amount, to be reimbursed to him out of the sale of the following registered

671 bonds of the C. S. *15 million loan, viz: (setting out the numbers of ten bonds,) left with W. F. De La Rue by the said Ficklin for sale of my benefit."

The defendant pleaded non assumpsit, and it was agreed that any defence might be made under this plea which could be given under a special plea. And he filed an account of offsets of ten bonds of the Confederate States for \$1,000 each, \$3,000.

Upon the trial of the cause, the jury found a verdict in favor of the plaintiff for \$2,268, with interest thereon from June 13th, 1874, and the court rendered a judgment in accordance with the verdict. From this judgment Carrington obtained a writ of error; and the judgment was reversed by this court, and the cause was sent back for a new trial.

On the 28th of March, 1879, the case was again tried, when there was a verdict and judgment for \$2,016, with interest from August 1, 1864. And Carrington thereupon again applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Tancil v. Seaton, 28 Gratt. 601, 26 Am. Rep. 380; 1 Min. Inst. (4th Ed.) 221.

†**Negligence—Question for Jury.**—The principal case is cited and its holding on this subject is approved in Richmond, etc., R. Co. v. Medley, 75 Va. 505; R. & D. R. Co. v. Risdon's adm'r, 87 Va. 335; Western Union Tel. Co. v. Paper Co., 87 Va. 423; Kimball v. Friend, 95 Va. 140. See also 1 Min. Inst. (4th Ed.) 220, *et seq.*

In the progress of the cause, the defendant took two exceptions to rulings of the court. One was to the refusal of the court to give instructions asked by him, and the giving of other instructions; and the other was to the refusal of the court to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the evidence. The instructions refused and given are as follows:

II.

"If the jury believe from the evidence that B. F. Ficklin received from the defendant the bonds in the declaration mentioned, under an agreement that he would act as agent of the defendant in their sale; that the said B. F. Ficklin failed to make enquiry as to the salableness of said bonds at the time they were deposited with De La Rue, and to give seasonable information thereof to the
672 defendant. *then the said Ficklin became responsible to the defendant for the actual loss occasioned by such failure, and the jury should allow the amount of such loss as an offset against the plaintiff's demand."

III.

"If the jury believe from the evidence that B. F. Ficklin, from the time of his statement to L. R. Smoot that he would not make any demand upon, or claim of, the defendant for anything on account of Confederate bonds delivered to him to the time of his death, purposed and intended not to assert his legal rights against the defendant touching the loan made to him, for the payment of which the bonds were pledged as security, then the plaintiff is not entitled to recover."

And thereupon the court gave to the jury the first three instructions asked by the plaintiff, and the first instruction asked by the defendant; refused to give the fourth and fifth instruction asked by the plaintiff, and the second and third instruction asked by the defendant; but in lieu of the second instruction asked by the defendant, the court gave the following:

Instruction "A."

"If the jury believe from the evidence that B. F. Ficklin received from the defendant the bonds in the declaration mentioned under an agreement that he would act as agent of the defendant in their sale; that the said B. F. Ficklin failed to make enquiry as to the salableness of said bonds at the time they were deposited with De La Rue, and to give seasonable information thereof to the defendant, and if the jury shall believe that such failure on the part of B. F. Ficklin constituted such negligence as an ordinary prudent man would not have been guilty of in the conduct of his own affairs, then
673 the said Ficklin became *responsible to the defendant for the actual loss occasioned by such failure, and the jury should allow the amount of such loss as an offset against the plaintiff's demand."

And the court then, against the objection of the defendant, gave the jury the following instruction:

Instruction "B."

"If the jury believe from the evidence that B. F. Ficklin, from the time of his statement to L. R. Smoot that he would not make any demand upon or claim of the defendant for anything on account of the Confederate bonds delivered to him to the time of his death, purposed and intended not to assert his legal rights against the defendant touching the loan made to him, for the payment of which the bonds were pledged as security, the jury cannot infer from such fact that the claim against the defendant was released; but the jury may consider the fact in connection with all the other evidence in the record, either as evidence of a purpose from motives of kindness and friendship or sympathy with the defendant in his loss, to waive his legal rights, which would constitute no defence in this action, or as evidence in the light of surrounding circumstances of an implied admission that he had lost his right by culpable negligence or misinformation to the defendant, by reason of which negligence or misinformation the defendant suffered loss of the bonds, which would constitute valid defence in this action to the extent of the actual loss occasioned thereby."

As to the question of the new trial, the view taken of it by this court will be seen in the opinion of the court.

Ould & Carrington, for the appellant.
674 *Kean & Davis, for the appellee.

BURKS, J., delivered the opinion of the court.

This is the second time this case has been before this court on a writ of error allowed the defendant. On a new trial had, as ordered, after the cause had been remanded, the defendant excepted to rulings of the court, which are the basis of two assignments of error. The first is the refusal of the court to give to the jury instruction No. 2 in the form as prayed and the giving of that instruction with an addition made by the court. The second is the refusal of the court, on the motion of the defendant, to set aside the verdict of the jury and grant him a new trial, on the ground that the verdict was contrary to the evidence.

1. In the instruction asked the court determines as matter of law the question of negligence on certain facts hypothetically stated, while the instruction given leaves the question as one of fact to be decided by the jury. That is the only essential difference in the two instructions; and we are of opinion that the circuit court did not err in its ruling on this point. Indeed, the question now made was virtually settled by this court when the case was here before in disposing of the defendant's third bill of exceptions taken to the refusal of the court to give the instruction set out in that bill.

That instruction was in these words: "If the jury believe from the evidence that the intestate of the plaintiff, B. F. Ficklin, received from the defendant the ten bonds in the declaration mentioned, under an agreement that he would act as agent of the de-

fendant in their sale; that the said B. F. Ficklin failed to sell said bonds, and that such failure was caused by the gross negligence of the said Ficklin in attention to his agency, that then the said Ficklin was responsible to the defendant for the actual
675 loss *occasioned by his failure to sell said bonds, and the jury should allow the amount of such actual loss as an offset in this case."

This court was of opinion, and so declared, that this instruction was faulty in assuming that there was evidence of an agreement of Ficklin to act as agent of the defendant in the sale of the bonds, whereas the agency extended no further than to the taking of the bonds to England for sale, and when they were deposited with De La Rue for sale and the defendant was informed of that fact, Ficklin's agency ceased. And the judge, who delivered the opinion concurred in by the court, expressed himself thus: "It was a fair subject of enquiry for the jury, as to how far Ficklin, under the circumstances, may have been guilty of negligence in failing to make enquiry as to the salableness of the bonds at the time they were deposited with De La Rue, and to give seasonable information thereof to the defendant; and if the instruction had been limited to negligence in this respect, I think it might properly have been given."

Now, this language seems to us too plain to admit of misapprehension. The instruction was based on the assumption of evidence not furnished by the record, that Ficklin was agent to sell the bonds. That was the defect. It should have been limited to the agency to take the bonds abroad and deposit them for sale, and advise the defendant of such deposit, and the enquiry as to negligence should have been confined to that agency; and that is what was said substantially in the opinion. The instruction expressly referred the question of negligence to the jury. We did not say, that was error. On the contrary, it was in effect affirmed, that the jury was the proper tribunal to decide that question, only that the enquiry as to negligence should be confined to the subject matter of the agency limited as before stated. The rulings of the circuit court, therefore, set out in
 the first bill of exceptions, and now
676 *the subject of complaint here, were not erroneous, but in conformity to the principles already recognized in the cause by this court.

Notwithstanding some contrariety of decision, it cannot be doubted that the question of negligence, as a general rule, is a question of fact and not of law. There are exceptions, but the case must be a very clear one, says Mr. Chief Justice Cooley, in a well considered opinion, which would justify the court in taking upon itself the responsibility of determining the question as one of law; for when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to

have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. *Detroit & Milwaukee R. R. Co. v. Von Steinburg*, 17 Mich. R. 99, 120.

It is a mistake to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury.

The inferences to be drawn from
677 *the evidence must either be certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ. *Idem*, p. 123. To the same effect is *R. R. Co. v. Stout*, 17 Wall. U. S. R. 657.

In *West Chester & Philadelphia R. R. Co. v. McElwee*, 67 Penn. St. R. 311, 315 (decided in 1871), it is said, that negligence is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases, the standard of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with. See also *Barron & others v. Eldridge & others*, 100 Mass. R. 455, 459; *Sher. & Redf. on Negligence*, § 11.

The present is a case of a gratuitous bailee, who can be held liable for gross negligence only. In such a case, whether the proper degree of care has been observed is one of fact, not of law. *Cooley on Torts*, 632, and cases cited.

In *Doorman v. Jenkins*, 2 Ad. & El. 256, (29 E. C. L. R. 80), the liability of the defendant depended on the question whether he had been guilty of gross negligence, and it was decided that it was properly left to the jury to determine. The only question before us is, said Williams, J., whether the judge should have said that the case was not made out on the part of the plaintiff, or should have left it to the jury. If the judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where "gross negligence" begins? Can it be any other than a question of fact? The case was properly left to

the jury. What was said by the
678 *other judges was to the like effect.

How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, it is necessarily a question of fact, depending upon a great variety of circumstances, which the law cannot exactly define. *Stover v. Gowan*, 18 Maine R. 174, 177. The question of gross negligence was left to the jury by Mr. Justice Story in *Tracy & others v. Wood*, 3 Mason's R. 132.

2. Did the circuit court err in overruling the defendant's motion for a new trial based solely on the ground that the verdict was contrary to the evidence?

The defence to the plaintiff's action was two-fold. First, equitable estoppel. Second, negligence: on both of which grounds it was contended, that the loss of the bonds was attributable to the conduct of the plaintiff's intestate, and that the defendant was entitled to set off their value against the plaintiff's demand.

The first branch of the defence is presented by the instruction given to the jury, on the defendant's motion, without objection from the plaintiff, that if the jury should believe from the evidence "that information was communicated by B. F. Ficklin personally or through L. R. Smoot to the defendant before the termination of the war, or before the Confederate States bonds became valueless, that said bonds delivered to said Ficklin had been sold, and that by reason thereof the defendant was induced not to prosecute his rights in relation to said bonds, and thus the bonds were lost to him, the defendant is entitled to set off the value of the bonds as of the date of said representation, or a reasonable time thereafter, against the plaintiff's demand."

It was proved by the testimony of Smoot and Lathrop, that the information referred to in the instruction was given. It seems, that at or about the time when Ficklin left

the defendant's bonds with De La Rue,
679 Smoot, who *was also then in England, deposited some Confederate coupon bonds of his own with the same De La Rue, with directions to sell them and place the proceeds to Ficklin's credit. After Ficklin's return to Virginia in 1864, having been informed by De La Rue of credits to his account growing out of the sale of Confederate bonds, and having forgotten the deposit of the coupon bonds made by Smoot, and supposing, therefore, that the credits, referred to by De La Rue arose from the sale of the defendant's registered bonds, which had been deposited as aforesaid, he told the defendant that his bonds had been sold. But notwithstanding this statement to the defendant, founded, as shown, on a mistake of fact, there would seem to be nothing in the record warranting the conclusion that the statement induced the defendant to do or omit to do anything in reference to the bonds, which operated to his prejudice. If it were otherwise, it was incumbent on him to show it. On the contrary, it may be inferred, that the information as to the supposed sale had

no influence on his conduct; for, on the 15th of March, 1864, when the loan was made, both he and Ficklin must have thought that the bonds had probably been sold, though Ficklin had not been advised whether anything had been done with them or not, and it was after this that Ficklin stated to the defendant that the sale had been made. But even if the defendant had been informed that no sale had been made, and he had desired to have his bonds returned to him in Virginia where they could be available, it is not probable that he could have effected that object while the blockade existed and was being enforced.

The alleged negligence of the plaintiff's intestate, which is the second ground of defence, remains to be considered.

The care and diligence required of Ficklin in the business entrusted to him were such as the law imposes on a bailee without compensation, and he was therefore liable, if at

all, only for gross negligence. He un-
680 dertook, at the *request of the defendant and for his accommodation merely,

to take the bonds to England for sale. He did not undertake to make the sale. He deposited them, according to usage, with a responsible banker or broker in London, and informed the defendant of that fact; and there his agency terminated. When the bonds were presented to Ficklin they were in the form of coupon bonds. He objected to taking bonds of that description, assigning as a reason that should he be captured while running the blockade, he would have to destroy them. He, therefore, suggested that they should be exchanged for or converted into registered bonds, as in case of loss or destruction there would, necessarily, be great difficulty and delay in obtaining duplicates of coupon bonds, while there would be little or none in getting a renewal of registered bonds. They were therefore converted into registered bonds, payable to Ficklin.

The complaint is, that registered bonds were not salable in England, while coupon bonds were; and although this fact may not have been known to Ficklin when he suggested the conversion, he ought to have enquired into the matter when he reached England; and upon ascertaining that the bonds could not be sold, he should have brought them back with him and re-delivered them to the defendant, or if he left them with the broker, he should have informed the defendant of that fact, and also that they were not salable.

If it be conceded that such enquiry was a duty which the law, under the circumstances, imposed upon a gratuitous bailee, we think the fair inference is that the enquiry was made, though it is not expressly proved. Ficklin was in England several months, and before the bonds were placed in the hands of De La Rue with the view of rendering them negotiable, they were assigned by Ficklin, by written endorsement, to payee in blank, and the assignments were executed in the presence of a commercial agent of the
681 Confederate *States at London. There can be no reasonable doubt that Fick-

lin had information that the bonds so endorsed could and would be sold. Otherwise, he would not have delivered them, nor would De La Rue have taken them for sale. That Ficklin probably had this information and regarded it as reliable, is shown by the fact that after his return to this country, he, on the 15th of March, 1864, made the loan to the defendant, to be reimbursed out of the sales of the bonds, and when afterwards he was advised by De La Rue of credits to his account, he supposed they arose from those sales.

But his subsequent declarations and conduct are relied upon by the learned counsel for the plaintiff in error, as in the nature of admissions of his neglect and of his liability for the consequent loss.

After Ficklin's return from England in 1865, in a conversation with Smoot, which had reference to the bonds and the information he had given to the defendant as to the supposed sale, he remarked that he would not make any demand or claim of the defendant for anything on account of the bonds, nor would he ever let him know that the bonds were not sold. It was said of this statement, in the opinion delivered when the case was here before, that "it is susceptible of several interpretations. It might be construed as a declaration of a purpose on his (Ficklin's) part, from motives of kindness and friendship or sympathy with the defendant in his loss, to waive or at least not to assert his legal rights against the defendant touching the loan made to him, or it might, in the light of the attending circumstances, be construed as an implied admission that by culpable conduct he had lost his rights, and that he was conscious of that fact." Either of these inferences might be drawn, and there being room for doubt as to which was the more reasonable, it was for the jury to decide, upon a view of all the facts and circumstances of the case.

682 *Another circumstance relied on by the counsel for the plaintiff in error is the offer of Ficklin in 1869, when he was in need of money, to accept from the defendant \$1,000 in satisfaction of all demands.

In the troublous times of 1865, Ficklin had lent \$500 in gold coin to the defendant's wife. The defendant was indebted for the amount of that loan with interest. When the proposition was made by Ficklin to accept \$1,000 in full discharge of all demands, the principal, interest, and premium on that loan were several hundred dollars less than the sum proposed to be taken. The most that can be made of this offer is, that it was a proposition to adjust and settle accounts, which was declined by the defendant for the want of ready means. It could not be reasonably construed as an admission that nothing more was really owing, and we decided, when the case was here before, that it was not evidence of a release or discharge.

A further circumstance relied on is, that Ficklin kept the bonds until he died in 1871, and never offered to surrender them, thus treating them, as alleged, as his own. One answer to this argument is, that the bonds

were perfectly valueless, and therefore there was no necessity of returning them. The further answer is, that while he kept the bonds, he also preserved the bill of exchange and receipt for the loan, which were the evidences of his claim. Looking at the whole case, it is clear that it is not one in which this court can reverse the judgment complained of on the sole ground that the verdict of the jury was contrary to the evidence. To warrant such reversal, it must appear by the record that the verdict was a manifest deviation from the evidence—that the evidence was plainly insufficient to warrant it. This rule, established by this court at an early day, has been reaffirmed over and over again, and is so well settled that it cannot be necessary to cite adjudged cases in support of **683** it. It is peculiarly applicable *where, as in this case, there have been two verdicts the same way in two successive trials, and each has been approved by the presiding judge.

The judgment of the circuit court, therefore, must be affirmed.

Judgment affirmed.

684 *Ellis v. Harris' Ex'or

January Term, 1880, Richmond.

1. Injury to Land by Overflow—Evidence.

—In an action by E against H's executor to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream on which H had built a dam in 1848, in the county of Louisa, evidence of the effect of a dam in raising the bottom of the stream and overflowing the lands lying on the streams above the dams in the county of Albemarle is inadmissible.

2. Same—Same—Experts.—A person who all his life had been familiar with the effect of a dam upon the channel of a stream, and who had twice superintended the putting up ...e dam, and was also familiar with the effect upon the channel of the stream when the dam was washed away by a flood, but who was not a millwright or mechanic of any sort, but only a farmer and owner of the mill, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county thirty miles distant.

3. Competency of Witnesses—Death of Other Party.—H, who built the dam, being dead, the plaintiff E is not a competent witness to prove anything occurring in the lifetime of H.

4. Same—Same—Executors.—The executor of H, though a part owner of the land on which the mill was built, is a competent witness in the case.

5. Damages—Second Suit.—E having sued H in his lifetime for damages to his lands from the erection of the dam, and a judgment in that case having been rendered in 1859 in favor of H, in this second suit E can only recover for damages occasioned by the continuance of the dam subsequently.

6. Same—After-Acquired Land—Presumptions.—E may recover full damages for all the land owned by him at the time of the erection of the dam. But for land since acquired by him,

*Competency of Witnesses—Death of Other Party.—See also 4 Min. Inst. (2nd Ed.) 767 et seq.; 8 Am. & Eng. Enc. of Law (2nd Ed.) 717, 723.

he can only recover such damage as was not actually foreseen and estimated for by the jury when the dam was built; and the jury must presume that the jury of inquest and the county court did foresee and estimate for all damages which it was then practicable to foresee and estimate for.

685 *This was an action on the case in the circuit court of Louisa county, brought in November, 1872, by Robert S. Ellis against Henry Harris' ex'or, to recover damages for injury done to plaintiff's land by a dam erected by Henry Harris in his lifetime across the North Anna river. There were several questions raised during the trial as to the competency of evidence and witnesses, all of which are fully set out in the opinion of the court delivered by Judge Moncure. After the evidence had been introduced, both the plaintiff and defendant asked for instructions, all of which the court refused to give, and gave the following:

1. The jury are instructed that they are limited by the pleadings in this case to the enquiry whether any damages were sustained, and if so, how much, by the plaintiff's lands, during the period between March the 1st, 1860, and August 18th, 1872, by reason of the continuance of the dam erected by Henry Harris in 1848, and that in making such enquiry, they must be governed exclusively by the evidence in the cause.

2. The plaintiff is entitled to recover the full amount of all such damages to the lands held by him at the time of the erection of the dam.

3. The plaintiff is not entitled to recover for any such damages to the land held by Mary Harris at the time of the inquest by the jury made on application of Henry Harris, unless such damage was not actually foreseen and estimated for by the jury, and in determining whether such damage was actually foreseen and estimated for, this jury must presume that the jury of inquest and the county court of Orange did foresee and estimate for all damages which it was then practicable to foresee and estimate for.

4. But if the jury shall be of opinion that any such damage referred to in the last instruction was not actually foreseen and estimated for, the jury must determine the damages sustained by the said land

686 from the date of the *erection of the dam to August 18th, 1872, and credit the defendant therein with the amount awarded by the court to Mary Harris, and they can only allow to the plaintiff for his damages to that land so much of the surplus, if any, as may be necessary to indemnify him for such damages as accrued between March 1st, 1860, and August 15th, 1872.

There was a verdict and judgment for the defendant; and the plaintiff obtained a writ of error.

The Attorney-General, for the appellant. J. V. Winston and Guy & Gilliam, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of

the circuit court of Louisa county, rendered on the 18th day of December, 1875, in an action of trespass on the case, brought by the plaintiff in error, Robert S. Ellis, against the defendant in error, Herbert Harris, executor of Henry Harris, deceased, on the 13th day of November, 1872.

The declaration contains four counts, in which it is variously charged that the said testator, Henry Harris, did unlawfully erect and make a certain dam or obstruction across a branch of the North Anna river, on which branch, above and adjoining the land of said testator, the plaintiff owned a tract of land, a part of which was overflowed and covered with water, in consequence of the said obstruction, so as to be useless and unprofitable to the said plaintiff, and by the same means a large quantity of the low grounds of the plaintiff attached to his said tract of land were so much slobbered and saturated with water as to be wholly useless and unfit for cultivation; and that the said testator continued thereafter, during his lifetime and until his death, which happened on the

687 28th day of August, 1872, to keep *up the said dam or obstruction, which has ever since been and still is kept up, causing the same damage as aforesaid to the plaintiff.

Many proceedings were had in the case, which need not be here mentioned. Others occurred, which are substantially as follows: On the 24th of March, 1875, the defendant plead not guilty, and not guilty in five years, to the plaintiff's action; to which pleas the plaintiff replied generally, and issues were thus joined. On the 8th of December, 1875, a jury was sworn to try the said issues, and also another issue, which was joined on the plea of former judgment. The said jury was engaged in the trial of the said issues from day to day until the 18th of December, 1875, when they rendered a verdict for the defendant; on which the court gave judgment accordingly.

That is the judgment to which the writ of error in this case was awarded, and the assignments of error in it are founded on the decisions of the circuit court on questions which arose during the progress of the trial, which, and the decisions of the said court thereon, are presented by the bills of exceptions which were taken during the trial, and made part of the record.

We will consider and dispose of these questions in the order in which they are presented by the said bills.

1. In the first of said bills it is stated that on the trial of the case, the plaintiff, to sustain the issue joined on his part, introduced testimony tending to show that portions of his land adjacent to the North Anna river, and lying above the mill dam erected across said river by defendant's testator, were greatly injured by wetting and slobbering, owing to the want of drainage occasioned by gradual elevation of the bed of North Anna river, in and above the pond occasioned by the dam aforesaid. And then the plaintiff introduced William H. Southall as one of several witnesses summoned from the county of Albemarle, by whom he pro-

posed to prove that in several instances in *said county the bed of the stream on which a mill dam was situated had gradually become filled up and elevated for a great distance above the head of the pond occasioned by the dam, so as to render the lands above the pond and adjacent to the stream incapable of drainage and unfit for cultivation; and that after the removal of the dam the bed of the stream had gradually been washed out and deepened, until it was restored to its normal condition, and the adjacent lands rendered capable of being drained; and that in fact they were easily drained and thoroughly reclaimed and restored to their former value. To the introduction of which testimony the defendant objected; and the court sustained the objection, and excluded the proposed testimony; to which ruling the plaintiff excepted.

The said testimony, we think, was clearly inadmissible, and was properly excluded. It was admitted by the counsel for the plaintiff in error, as was certainly the fact, that the witness Southall was not an expert, and the matters to which he testified were wholly irrelevant to the issues. They might be true, and yet did not at all affect the questions in issue in this case. They concerned only certain mill dams and streams in Albemarle, and not the mill dam and stream in Louisa and Orange involved in this case. 1 Greenleaf's Ev., § 51, cited by the counsel for the appellee, seems to be conclusive upon this subject; where it is said that "it is an established rule, which we state as the first rule, governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue." See note 1 thereto, § 52: "The reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it."

2. In the second of said bills it is stated that on the trial of the cause, after the plaintiff had introduced testimony
689 *tending to show that the lands of the plaintiff adjacent to the North Anna river, and lying immediately above the mill pond made by the dam across said river, erected by the defendant's testator, had, since the erection of the said dam, and within the time specified in the declaration, become wet and slobbered, and useless for cultivation, and incapable of drainage, owing to the gradual rise of the bed of said river, occasioned by the mill dam and pond aforesaid. The plaintiff then introduced a witness, Jesse L. Maury, of the county of Albemarle, who proved that he was sixty-four years of age; that from the time of his earliest recollection his father had been a mill-owner, and that he, from his boyhood to the present time, had had something to do with the management of said mill, to the ownership of which he succeeded on his father's death, which occurred some years ago, and he now owns said mill. The witness further proved that the dam which supplied said mill with water had been twice taken

down and new dams erected; that he, as agent and manager for his father, had superintended the work incident thereto; that he had such familiarity with mills and mill dams as had resulted from his attention to the mill aforesaid in his father's lifetime, as already stated, and to the same mill as his own property since his father's death, and from his having superintended for his father the erection of the two dams aforesaid, and that for many years he had observed the effects on the bed of the stream, and on the lands adjacent thereto and above the head of the pond, occasioned by the dam aforesaid; and that in addition to this experience, he was familiar with a mill dam and pond, owned by another party, situated on the same stream, a mile or two below his mill, and for years had observed the effect of the said pond upon the lands on the stream above; and he also observed the effect upon the same lands of the removal of said dam caused by a freshet in 1870. The witness admitted that he was not by profession
690 a millwright, or mechanic *of any other sort, but a farmer and mill-owner, and that in superintending the erection of the dams referred to by him he had merely carried out the plans of his father. Upon proof of these facts, plaintiff offered to prove by said witness what had been the effect of all the dams referred to by him upon the lands above them, all of which lands and dams are in Albemarle county, about 30 miles from the dam of the defendant; and further to examine said witness, as an expert, touching the general influence and effects of dams upon the lands in and adjacent to the streams across which they are constructed; to the introduction of which testimony the defendant objected, and the court sustained the objection and refused to allow the witness to be examined as aforesaid; to which ruling of the court the plaintiff excepted.

We think the testimony of this witness also was clearly inadmissible, and that it was certainly not admissible upon the ground of its being the testimony of an expert. As to the law upon this subject, reference was properly made, in the argument, to 3 Doug. 157; 26 E. C. L. R. 63, *Folkes v. Chadd*; also *Livingston's case*, 14 Gratt. 592. See also 1 *Greenleaf on Evidence*, §§ 440, 440a, and notes; and notes on the subject of experts. To be satisfied that our conclusions on this branch of the subject are correct, it can only be necessary to read the authorities here referred to.

3. In the third of said bills it is stated, that upon the trial of this case, the plaintiff, to maintain the issue joined on his part, offered himself as a witness to prove what has been the effect of the dam in question upon the stream above the said dam and upon his lands lying immediately along the banks of said stream; but the defendant objected to the plaintiff's testifying, because the defendant's testator, Henry Harris, who erected said dam, was dead, and moved the said court to exclude the said plaintiff as a witness; and the court, sustaining the motion of the defendant, excluded the said plaintiff from testifying
691 ing as to all matters *connected with

said dam, except such as have arisen since the qualification of the defendant as executor of said Harris; to which opinion of the court the plaintiff excepted.

The question presented by this bill of exceptions is, whether, under the Code of 1873, ch. 172, §§ 21 and 22, the testimony mentioned in the said bill was properly excluded as therein mentioned.

This court is of opinion that it was, according to the express terms and the true intent and meaning of the statute, aforesaid, which need not be repeated here. That such is the case, we think, is clearly and fully shown by the cases of *Mason & als. v. Wood*, 27 Gratt. 783; *Grigsby & als. v. Simpson's ass'ee, &c.*, 28 Id. 348, and *Morris' ex'or v. Grubb*, 30 Id. 286; in each of which cases there was a full court at the time of its decision, and the court was unanimous. The prior case of *Field v. Brown & al.*, 24 Id. 74, if in conflict with the three subsequent cases aforesaid, is overruled by them. Judge Anderson says of that case, in delivering the opinion of the court in *Mason & als. v. Wood*, supra, that "this opinion may seem to conflict with the decision of this court in *Field v. Brown & als.*, 24 Gratt. 74; but the cases are not analogous. In that case the general competency of the party to testify seemed not to be questioned; but was in fact recognized by the court below, and seems to have been acquiesced in by both parties; and the only point made before this court was as to the admissibility of some of the questions and answers of the party, whose deposition had been given de bene esse. There was no objection made to his general competency, and the question was not raised in this court, nor seems to have been considered by it. In this case it is for the first time pointedly and squarely raised, and has to be met; and the court is of opinion, for the reasons given, that there is no error in the ruling of the circuit court, refusing to admit Leach and Earle, parties in the suit, to testify."

See also what is said on this subject 692 by Judge Christian *in delivering the opinion of this court in *Grigsby & als. v. Simpson's ass'ee, &c.*, supra, where the authorities on the subject are reviewed, and, among other things having an important bearing upon this case, it is said: "The plain purpose of the legislature was, to declare that where the lips of one party to the original contract or transaction, which is the subject of investigation, are closed in death, the adverse party shall not speak at all."

4. In the fourth of the said bills it is stated that upon the trial of this case the defendant, H. H. Harris, to maintain the issue joined on his part, offered himself as a witness to testify in the case; to which the plaintiff objected, upon the ground that said H. H. Harris was the defendant in the suit and part owner of the said dam, and because the plaintiff, R. S. Ellis, was incompetent to testify, and had been excluded as a witness in the case, as set out in the bill of exceptions No. 3, which is to be taken as a part of this bill. But the court overruled the motion of the plaintiff, and allowed the said

H. H. Harris to testify as a witness without restriction; to which opinion of the court the plaintiff excepted.

No notice is taken of the said 4th bill of exceptions in the petition for a writ of error in this case; no doubt because little or no reliance was placed upon it by the petitioner. But the case of *Martz's ex'or v. Martz's heirs*, 25 Gratt. 361, conclusively shows that Harris, the administrator, was not a party to the transaction, in the meaning of § 22 of ch. 172 of the Code, and therefore he was a competent witness in the case under § 21 of the same chapter, not being made incompetent by his being a party to the suit. There is no error in the opinion of the court referred to in the said bill of exceptions; which plainly appears, without the necessity of assigning any other reason for this conclusion than as aforesaid.

5. The only remaining question in this case is, as to the correctness of the action of the court in regard to the instructions 693 asked for by the plaintiff and defendant respectively, all of which were refused by the court, and the instructions which were given by the court in lieu of those asked for and refused as aforesaid. Whatever error, if any, there may have been in the refusal of the court to give the three instructions asked for by the plaintiff or either of them, it was cured and removed by the instructions actually given by the court; in which instructions there was no error at all, so far as the plaintiff was concerned, and none to the prejudice of the defendant. Whether the court erred in refusing to give the instructions asked for by the defendant as aforesaid or any of them, is a question which need not be, and therefore is not, decided, as the defendant cannot be prejudiced by any such error, the decision of the case being in his favor.

Upon the whole the court is of opinion that there is no error in the judgment of the court below, which must therefore be affirmed.

The cause of action in this case was the recovery of damages claimed to have arisen from the erection of a dam in 1848, more than 24 years before the institution of this suit in 1872. There was a regular enquiry and report as to the existence of any such damages before the order was made for the erection of the said dam, and it was then reported that no such damages existed. In 1856, an action of trespass on the case was brought by the plaintiff against the testator of the defendant to recover the damages claimed to have arisen as aforesaid. In that action issues were joined on pleas of not guilty and the statute of limitations; which issues were tried by a jury on the 7th day of October, 1859, when a verdict was found thereon for the defendant, on which verdict a judgment was on the same day rendered for the defendant.

More than thirteen years after the rendition of that judgment this action was 694 brought for the same cause, in which action, as we have seen, not guilty and the statute of limitations were again pleaded,

and again verdict and judgment were rendered in favor of the defendant.

We think the case is plainly in his favor. Judgment affirmed.

695 *First Nat. Bank of Alexandria v. Turnbull & Co.

[34 Am. Rep. 791.]

January Term, 1880, Richmond.

1. A, being the owner of a cotton factory, enters into a covenant under seal with T, which is duly admitted to record, which, reciting a previous deed of trust by A to secure advancements made or to be made by T to A, witnesses that in consideration of the premises and of the advances already made and to be thereafter made by T for the purchase of cotton or for other expenditures connected with the manufacture of cotton goods at A's factory, the said A covenants to deliver to the said T each yard of cotton goods manufactured by him at the said factory. And T covenants that he will, from time to time, advance such sums of money as may be required for the purchase of cotton manufactured in said factory, and that he will advance further sums of money as may be required to pay hands and necessary expenses incurred in running the machinery in said factory, &c. And it was further agreed between the parties that the said A shall sell no goods manufactured in the said factory, unless upon receipt of a written authority from T to that effect, specifying the amounts of goods to be sold, the price and terms of sale, and approving the credit of the purchaser; and T shall receive five per cent. for commissions and guarantee on the entire product of said factory, whether sold by T or A, by the authority of T as aforesaid. And T is to have the same security under the said deed of trust as if this covenant had been executed at the same time as the deed—**Held:**

1. Equitable Assignments of Things Not in Existence.—That the covenant by A is valid in equity to secure to T the cotton and goods thereafter purchased and made at the said factory for the repayment to him of all money advanced or paid by him for cotton to be manufactured at said factory and the expenses incurred in running the said machinery, whether said advances were made before the date of said covenant or afterwards.

696 2. Personal Property—Contracts—Recordation—Notice.—That the covenant having been duly recorded, it is notice to all parties claiming under A.

3. Equitable Assignments of Things Not in Existence—Creditors.—That the right of T to the raw cotton, cotton yarn and cotton

***Equitable Assignments of Things Not in Existence.**—See also 3 Min. Inst. (2nd Ed.) 269, 2 Am. & Eng. Enc. of Law (2nd Ed.) 1026; Brooks v. Hatch, 6 Leigh (Va.) 534; Wellsburg Bk. v. Kimberlands, 16 W. Va. 555.

†Recording.—This decision is overruled in Braxton v. Bell, 92 Va. 235, the court there holding that the statute did not require a contract in regard to personal property to be registered and that its recordation was a nullity and notice to no one, citing 2 Min. Inst. 866-7; Davis v. Beazley, 75 Va. 491; Raines v. Walker, 77 Va. 92.

cloth on hand is preferable to the right of an execution creditor of A on an execution issued since the covenant was executed.

4. Same—Right to Interplead.—A creditor of A, having levied his execution on the said raw cotton, cotton yarn and cotton cloth, T may interplead and set up his title to the property under the covenant.

This is an appeal from the judgment of the circuit court of the city of Alexandria, in which, in an action of debt brought by the First National Bank of Alexandria against Abijah Thomas, the plaintiff had recovered a judgment, an execution had been levied on certain property as the property of Thomas, when Turnbull & Co. were permitted by the court to interplead in the case; they claiming that the property levied on was their property. On the trial of the issue there was a verdict and judgment in favor of Turnbull & Co.; and the bank thereupon obtained a writ of error. The case is stated in the opinion of the court, delivered by Judge Anderson. There were instructions given and others refused; but it is unnecessary to state them.

L. Kent and S. C. Neale, for the appellants.

F. Smith, Jr., for the appellees.

ANDERSON, J., delivered the opinion of the court.

The plaintiff in error recovered judgment in the circuit court of Alexandria, against Abijah Thomas for \$4,700, with interest on \$2,200, part thereof, from the 11th of May, 1868, and on \$2,500, the residue thereof, from the 12th of May, 1868, at the rate of six per cent. per annum, *and \$9.62 costs; upon which an execution of fi. fa. was issued on 21st of November, 1868, and levied, as appears from the sheriff's return, upon twenty-eight bales raw cotton, five bales batting, three bales cotton cloth, forty-four bolts cotton cloth, and \$13,000 pounds of cotton in process of manufacture. The levy was made November 23d, 1868.

The defendants in error—Turnbull & Co.—claimed the property levied on, and were allowed to interplead in said suit, and by their plea put in issue the question whether it was the property of Abijah Thomas, and subject to the plaintiff's execution or the property of Turnbull & Co.?

The defendants in error—Turnbull & Co.—then gave in evidence an article of agreement between them and Abijah Thomas, bearing date the 12th of May, 1868, and which was admitted to record on the 26th of May of the same year; prior to the date of the said execution. The said articles, after reciting that the said Thomas had by deed, dated October 17th, 1866, and duly recorded, conveyed certain property in trust to secure Turnbull & Co. the repayment of all sums of money then due to the said firm, or to become due, on account of advances already made, or to be made for the purchase of cotton for the Mount Vernon Cotton Factory, or otherwise, and also to secure the performance by

the said Thomas of covenants on his part to be performed, specified in a certain agreement, referred to in said deed of trust, proceeds as follows:

Now this agreement witnesseth, that for and in consideration of the premises, and of the advances already made, and to be hereafter made, by the said firm of Turnbull & Co., for the purchase of cotton, or for other expenditures connected with the manufacture of cotton goods at the Mount Vernon Factory, the said Thomas doth hereby covenant and agree to deliver the said firm of
 698 Turnbull & Co. each and every *yard of cotton goods manufactured by him at the said factory.

And the said Turnbull & Co. on their part covenant and agree that they will, from time to time, advance such sums of money as may be required for the purchase of cotton to be manufactured in said factory, not exceeding —, and that they will advance further sums as may be required to pay hands and necessary expenses incurred in running of the machinery in said factory, upon presentation of the pay-rolls and the bills for said expenses. And it is further agreed between the parties hereto, that the said Thomas shall sell no goods manufactured in the said factory unless upon receipt of a written authority from Turnbull & Co. to that effect, specifying the amounts of goods to be sold, the price and terms of sale, and approving the credit of the purchaser; and Turnbull & Co. shall receive five per cent. for commissions and guarantee, on the entire product of said factory, whether sold by them or by Thomas by their authority as aforesaid, and where sales are made by Turnbull & Co. themselves, they shall receive one per cent. to cover all charges except freight and drayage. And it is further agreed between the parties hereto, that this agreement, and all matters and things herein, shall have the same effect, and that Turnbull & Co. shall be entitled hereunder to the same security and advantage of the said deed of trust, as if these presents had been executed at the time of the execution of said deed of trust.

In witness whereof the parties hereunto set their hands and seals on the day above written.

A. Thomas, [Seal.]
 Turnbull & Co. [Seal.]
 [Revenue stamp, 5c.]

Test:
 James H. Gilmore.

699 *Virginia:
 Alexandria county court clerk's office, May 26, 1868.

The foregoing agreement was received in the office, and having a U. S. internal revenue stamp thereon, properly cancelled, to the amount of five cents, admitted to record.

Test:
 J. Tacy, Clerk.

By the foregoing articles Turnbull & Co. seem to have assumed obligations to make additional advances to those which they had previously undertaken to make, to purchase

cotton which Thomas was to manufacture at his factory—"the Mount Vernon Cotton Factory"—and to advance further sums as may be required, to pay hands and necessary expenses in running the machinery, in consideration whereof, the said Thomas covenanted and agreed to manufacture the said cotton into cloth, and to deliver to the said Turnbull & Co. each and every yard of cotton goods manufactured by him at the factory. The goods were to be sold by said firm, and after deducting a commission to be allowed them for sale and guaranty, and expenses, the balances of the proceeds were to be applied to repayment of the advances they made pursuant to this agreement, and to their account for previous advances, for which it was an additional security to the deed of trust.

It is further stipulated that said Thomas shall sell no goods manufactured in said factory unless special authority is given to him in writing by Turnbull & Co., specifying the amount of goods to be sold, the price and terms of sale, and approving the credit of the purchaser, which would be in effect a sale made by Turnbull & Co. themselves. Any sale made by Thomas, consequently, would not be made by authority of the deed, but by virtue of the special authority, given

in writing, which Turnbull & Co.
 700 *are invested with a discretion to give or not to give, and consequently there is nothing in this stipulation which is inconsistent with or repugnant to the deed. The said Turnbull & Co. are to receive 5 per cent. commission and guaranty on the entire product of said factory, whether sold by them or by Thomas by their authority as aforesaid, &c. The last clause seems to have been designed to show that this agreement was intended to secure the further advances then agreed to be made and as further security for what was due upon those which had been previously made and secured by the deed of trust, just as if it had been made at the same time the deed of trust was given, and had been made a part of it, and thus to exclude the idea that it was merely intended as a substitute for the deed of trust.

The execution was levied upon raw cotton and cotton in the process of manufacture, which had been purchased and delivered at the factory under the articles of agreement as aforesaid, as well as upon the cotton cloth which had been manufactured out of the raw material. Whilst Thomas, under the articles of agreement, covenanted to deliver to Turnbull & Co. only the cotton cloth produced from the raw material, and does not covenant to deliver or to return to them the raw material, because it was purchased and delivered to him to be manufactured into cotton cloth for them, or to be delivered to them and sold, and the net proceeds thereof to be applied to the payment of what he owed them; yet, under the covenants of this deed, he had no more right or authority to divert the raw material from the uses and purposes for which it was purchased and conveyed to his factory than he had to divert the manufactured product thereof from such purpose;

and consequently he held both alike subject to the covenants of the articles of agreement, and charged with the payment of the debt he owned Turnbull & Co. He had no more right to use the raw material, under the agreement, for any other purpose

701 *than that for which it was purchased with the money of Turnbull & Co., and delivered at his factory, than he would to have used any other cotton belonging to Turnbull & Co., and which they had deposited with him as a bailee, to manufacture into cotton cloth for them. In fact, it is in proof that the cotton was purchased by Turnbull & Co., and invoiced to them, and paid for by them, and delivered at the "Mount Vernon Factory," for the purpose of being manufactured for them. Indeed, if the purchases of the cotton had been made by Thomas in person, he should be taken to have made them, under this agreement, as agent for Turnbull & Co.

But this is an assignment or a covenant to deliver to the assignee, for valuable consideration received, after acquired personal property. Is such an assignment valid, and can it be enforced against the lien of a subsequent execution?

At law it would not be a valid assignment. An assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed is void at law. *Holroyd v. Marshall*, 10 H. of Lords cases, pp. 191, 215; *Robinson v. Macdonnell*, 5 Maule & S. 228. In *Brockenbrough's ex'x v. Brockenbrough & others*, recently decided by this court, 31 Gratt. 580, several decisions are cited by Judge Burks in support of the doctrine as now stated, and qualifications of the rule explained, to which I beg to refer.

In the same case, upon the general doctrine in equity as to liens or charges upon after acquired property, he quotes as follows from Mr. Justice Story. In *Mitchell v. Winslow*, 2 Story, 630, after an examination of the authorities, Mr. Justice Story says, "It seems to me a clear result of all the authorities, that whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity,

702 as a lien or charge *upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." Judge Burks also cites numerous other cases which tend to establish the doctrine of an equitable lien or charge upon after acquired property, but does not decide the question, not deeming it essential to the decision of that case.

In the leading case of *Holroyd v. Marshall*, decided by the house of lords in 1862, 10 H. of L. Reports, p. 191, it was held that in equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property given for valuable consideration, provided it is capable of being the sub-

ject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee; which rule applies to personal property as well as to real estate. And that such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal.

I give the following synopsis of that case, as it strikingly resembles the case under judgment, so far as it affects the question involved: James Taylor was the owner of certain machinery in a mill which was purchased by the Holroyds. Taylor executed a deed (which was duly registered), by which it was declared that the machinery was the property of Holroyds. Taylor desired to repurchase it for £5,000, but had not the money to pay for it; whereupon it was conveyed to B in trust, when Taylor should pay the money, to transfer it to him, and if he did not pay the money, to hold it absolutely for Holroyds. The deed contained a covenant by Taylor to insure the machinery, and another covenant that all the machinery which, during the continuance

703 *of the deed, should be placed in the mill in addition to, or substitution for, the original machinery, should be subject to the same trusts. Taylor sold some of the original machinery, purchased new machinery, and sent to Holroyds accounts of these sales and purchases, but nothing was done by or on behalf of Holroyds to take possession of the newly acquired machinery. On the 2d of April, 1860, Holroyds served Taylor with notice of a demand for payment of the £5,000. An execution against Taylor was afterwards put in by a creditor. The only part of the machinery claimed by the execution creditor consisted of those things which had been purchased by Taylor since the date of the deed of trust. It was held, reversing the decree below, that though there had been no novus actus interveniens, the title of Holroyds was preferable to that of the execution creditor, as to the new as well as the old machinery.

Lord Chelmsford, who delivered a very clear and able opinion, which was the prevailing opinion in the case, said "at law property not existing, but to be acquired at a future time, is not assignable; in equity it is so." And again, "in equity it is not disputed, that the moment the property comes into existence, the agreement operates upon it." We think such a right may be asserted under the pleadings in this case.

That case and this are analogous in this, that both are covenants to transfer after acquired property, and to charge it with the payment of covenantor's debts to covenantee. In the former case the covenant is contained in the deed of trust, which conveys existing property; in the latter it is contained in a subsequent deed, which is prior to the execution, and refers to the deed of trust previously given on existing property, and recognizes and confirms the same. Neither is an actual

conveyance of the after acquired property. Both are covenants by deed that it shall be

charged with the payment of the debts due the covenantees; in the one case that it shall be held for that purpose; in the other that the cotton purchased by the covenantees, or purchased for them with their money, and delivered at the covenantor's factory, shall be manufactured into cotton cloth for them, every yard of which, when made into cloth, shall be delivered to them, to be sold by them, and proceeds applied to the payment of their debt. It is a trust, in the case under judgment, solemnly undertaken by Thomas, to purchase for Turnbull & Co., with their money, raw cotton, and to manufacture it into cloth—they paying the hands and the expense of running the machinery—every yard of which is to be delivered to them to be sold by them, and the proceeds, after paying their commission for selling and guaranty, &c., to be applied to the payment of their debt. No rule of law was infringed by this agreement, nor were the rights of third persons prejudiced by it. The law permits such grants to take effect upon the property, when it is brought into existence, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed, and the rights of third persons are not prejudiced. *Beall v. White*, 94 U. S. Rep. (4 Otto), p. 382, 387, citing *Story Eq. Jur.*, (9th ed.), § 1040; *Dunham v. Railway Co.*, 1 Wall. U. S. R. 254; *U. States v. New Orleans Railroad*, 12 Id. 362. Equities created by such agreements are in the nature of a trust, attaching to and binding the property at the instant of its coming into existence. In this case, it creates a lien upon the property, which attaches to it prior to the lien of the execution, and which will be enforced by a court of equity. As between the parties, Turnbull & Co. had a lien upon the raw material and the cotton cloth, which was the product thereof, which was available against the judgment or execution creditor, with or without notice; inasmuch as, according to well established principles, a judgment creditor must take the property, subject to every liability under which the debtor held it.

705 *Holroyd v. Marshall*, supra, p. *226; *Borst v. Nalle*, 28 Gratt. 423, and the numerous cases cited by J. Burks in support of the position.

In that case Lord Chelmsford, after reviewing the authorities, comes to the following conclusion: "Whatever doubts, therefore, (he says,) may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and according to the opinion of Lord St. Leonards, 'any agreement binding property for valuable consideration' will confer a similar right."

In this case the articles of agreement were duly admitted to record, which was constructive notice to creditors and purchasers, unless contracts in respect to after acquired property are not embraced in the recording acts. The language of our recording act is

very broad and comprehensive. Code of 1873, ch. 114, § 4. It is: "Any contract in writing, made in respect to real estate or goods and chattels, * * * shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract." There are no words, either expressly or by implication, excluding contracts in respects to after acquired property. And as to notice, the register would furnish the same information of the dealing with future as with existing property. Without now construing the statute with regard to all contracts in respect to after acquired property, we are of opinion the articles of agreement in this case was such an instrument as the statute authorizes to be recorded, and that it was duly recorded; which must be regarded as constructive notice to creditors and subsequent purchasers.

In the light of what has been said, we think there was no error in the refusal of the court to give the first instruction asked for by the defendants—the plaintiffs in error. Though it may enunciate abstract principles of

706 law correctly, *in the view which we have taken of the case, they were wholly irrelevant and inapplicable to the case. And as to the instruction given by the court in its stead, it was not strictly applicable to the case, as we have viewed it, but could not have prejudiced the defendant. No exception was taken to the second, third and fourth instructions given by the court, which are the same that were asked to be given by the defendant.

We are further of opinion that the verdict of the jury was right, and that the court did not err in overruling the defendant's motion for a new trial. The court is of opinion, therefore to affirm the judgment of the circuit court, with costs.

Judgment affirmed.

707 *Shadrack's Adm'r v. Woolfolk & als.

January Term, 1880, Richmond.

1. Judgment by Confession.—Judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book or any other book in his office, and the only evidence of it is an unsigned memorandum endorsed on a declaration which seems to have been filed, and the bond enclosed in the declaration, is a valid judgment and entitled to rank as such against other creditors of the debtor.

2. Same—Entry.—If the entry of a judgment confessed in the office upon the order or minute book has not been made at the time of its confession, the clerk may make the entry at any time; and if he fails to do it, the court may at any time direct him to make the entry.

This was a suit in equity in the circuit court of Orange county, brought by William T. Woolfolk, trustee in a deed executed by

Judgment by Confession.—See *Smith et al. v. Mayo*, etc., 83 Va. 913; *Alexander et ux. v. Alexander et al.*, 85 Va. 365; *McClain v. Davis*, 37 W. Va. 338.

David Pannill, by which he conveyed to said Woolfolk a tract of land in trust to secure his creditors. The bill stated that the plaintiff had found difficulty in determining the order of priority among the creditors of Pannill, and making him and his creditors parties, the plaintiff prayed that the court would administer the trusts.

Various proceedings were had in the cause, the land was sold, and accounts ordered. The only question involved in this appeal related to a claim of Shadrack's administrator against Pannill, which the commissioner reported as a judgment which Shadrack's administrator had recovered against Pannill, as of the date of March 4th, 1868.

This claim was excepted to by other creditors of *Pannill as a judgment.

The facts in relation to this claim are as follows:

In the clerk's office of the circuit court of Orange, there is a declaration purporting to be filed in said court at the March rules. This is a declaration in debt by Shadrack's administrator against Pannill, in the usual form, setting out a bond for \$1,641.69, dated on the 23d of August, 1858, and payable on demand, executed by David Pannill to Samuel Shadrack. On this declaration is the following endorsement:

1868, March 4th.

Judg't confessed in cl'k's office by def't for \$1,641.69, am't of within bond, with legal int. thereon from 23d of Aug't, 1858, till pay't, and costs.

The bond, declared on, was found enclosed in the declaration. The commissioner states that no writ or summons appeared with the paper; and the memorandum of the judgment confessed was not signed; and there was no entry of the judgment on the order book or any other book in the office, though the memorandum is in the handwriting of the clerk of the court.

The cause came on to be heard on the 6th of October, 1875, when the court sustained the exception to the claim as a judgment, and placed it in a subsequent class as a bond. And Shadrack's administrator thereupon applied to a judge of this court for an appeal, which was awarded. The court certified that the counsel for Shadrack's administrator had, upon the close of the argument upon the exceptions to the report, moved the court to authorize the clerk nunc pro tunc to spread the judgment upon the record book, according to the direction of the statute; which motion the court declined to entertain at that time. He then moved to be allowed time to prepare a petition for a mandamus to command the clerk to make the entry of

709 *said confession and judgment in the record book; but the court declined at this time to entertain said motion.

A. R. Blakey, Hundley and Hunter, for the appellant.

James G. & W. W. Field, for the appellees.

STAPLES, J., delivered the opinion of the court.

The appellant, as administrator of Samuel Shadrack, claims to be a judgment creditor

of David Pannill. His judgment is assailed by the other creditors of Pannill upon two grounds now to be stated. First. That judgment was confessed in the clerk's office in vacation of the court, without process having issued. The record, however, does not show whether process was or was not issued. All that we have on the subject is the report of the commissioner, stating "that no suit or summons appears with the papers." All which may be true, and yet a suit may have been issued, and never returned, or it may have been returned and lost or mislaid. When it is remembered how careless and negligent are many of the clerks in the management of their records, the ease with which the process may be abstracted or lost from the papers, it would be most mischievous to hold that a suit is not to be considered as instituted, unless the writ can be produced, or proved to have actually issued.

When a judgment in other respects fair is collaterally assailed by third persons, the court will always presume it is founded on regular proceedings in the absence of evidence to the contrary. *Thompson v. Tolmie*, 2 Peters R. 157, 163; *Broome's Legal Maxims*, 944-5, 952, note 2. In the case before us, this presumption is somewhat strengthened by the fact that a declaration was filed, thus indicating that counsel had been employed, and an attempt made to conduct the case in accordance with the law.

710 *But if it plainly appeared that the judgment was confessed without writ or previous process, we think it would not, on that ground, be void. In the case of *Brockenbrough's ex'x v. Brockenbrough's adm'r*, decided by this court (31 Gratt. 580), it was held that a judgment confessed in court is valid, although no action was then pending. The authorities in support of this decision are cited in the opinion of Judge Burks. No satisfactory or substantial difference is perceived between a judgment of that sort and a judgment confessed in the clerk's office. It is very true the statute provides that in any suit the defendant may confess judgment in the clerk's office.

Inasmuch, however, as the object of the writ is to notify the defendant of the claim asserted, and to afford him an opportunity of making defence, if he consents to appear, or waive the service of process, and confesses the demand, he cannot afterwards be heard to say that no process was in fact issued. To permit him to do so would be to perpetuate a fraud on the plaintiff, who has been led by the defendant's conduct into an acceptance of the judgment as valid security. Where, as in the present case, the defendant does not complain, third persons cannot be permitted in a collateral proceeding to impeach the judgment as a mere nullity. The statute provides that a confession of judgment is equal to a release of errors. The effect is to conclude the right and estop the party to object to the regularity of the proceedings. In a number of cases the judgment confessed has been considered as in the nature of a contract.

In *Newsbaum v. Keim*, 24 New York R. 325, 327, Denio, J., delivering the opinion of the court, said, "It was an ancient and well settled practice of the courts to allow judgments to be recovered by confession, either without action or pending an action. Such judgments rested, as they still do rest, upon the simplest of all foundations—that of consent. See also *Secrist v. Zimmerman*, 711 5 P. F. Smith's R. *446; *Bush v. Hanson*, 70 Illi. R. 480. In *Wells v. Morton*, 10 Wisc. R. 468, it was said that the practice of allowing clerks and prothonotaries, in vacation and in the absence of the court, or judge, and without his authority, to enter and record judgments by confession, is of very ancient date. It had its origin soon after the substitution of written for oral pleadings, and still prevails in England. And in the *Insurance Company of the Valley of Virginia v. Barley's adm'r*, 16 Gratt. 363, the President said, "To confess a judgment, especially in the office, is neither to prosecute or defend a suit, but to carry into effect an agreement of the parties." These authorities are cited simply for the purpose of showing the course of judicial decision on this subject; others might be referred to to the same effect. Some of them are cited in the brief of the learned counsel for the appellant. Indeed, it is believed that the practice has been very common with some of the clerks of taking a confession of judgment without issuing a writ. In some cases the defendant expressly waives service of process. The effect is precisely the same, for the confession of judgment itself is a waiver, and operates an estoppel. If the court should now declare all such judgments void, the result would be to multiply litigation, disturb titles, and bring great confusion into the administration of justice.

In the second place, it is insisted that under the statute every judgment confessed in the clerk's office must be entered of record by the clerk in the order or minute book; that no such entry was ever made in this case; that the only proof of the alleged confession of judgment is an endorsement upon the declaration; that this endorsement is not signed by any one, nor does it appear in whose handwriting it is.

The endorsement referred to is in the following words:

"1868—March 4th. Judgment confessed in clerk's office by defendant for 712 \$1,641.69, amount of within bond, *with legal interest thereon from 23d August, 1858, till payment, and costs \$4.62."

The bond is filed with the declaration, the commissioner states that the endorsement is by the clerk, and the calculation of the cost tends to show that it was his act, besides the presumption derived from the fact that the paper must have been in his possession and under his control. This certainly is sufficient proof of the handwriting of the clerk in the absence of any rebutting testimony. The question is, is this a valid judgment, or, more strictly speaking, is there sufficient evidence of a judgment confessed in the office?

It is very true, the statute requires the

clerk to enter the judgment in his order or minute book; but does his failure to make the entry invalidate a judgment which is proved to have actually been confessed?

Numerous cases have been cited upon the statutes of the different states requiring all judgments to be docketed. Upon this question the decisions are very conflicting. In many of them it has been held that it is the duty of the creditor to see to it that his judgment is properly docketed. If he fails to do so, he loses the benefit of the judgment lien. But in all these cases the controversy was between the judgment creditor on the one hand and the bona fide purchaser on the other for valuable consideration without notice. If, in the present case, the right of such a purchaser was involved, very different considerations might govern. This, however, is a controversy between creditors, who, it is well settled, stand upon no higher ground than the common debtor. If the judgment is valid as to the debtor, it is equally so as to the creditor, unless it can be impeached by some ground of fraud or collusion.

The authorities generally hold that the statutes relating to the recordation of deeds and docketing of judgments are merely directory, and the failure of the clerk or other officer to comply with their provisions

713 cannot affect the *rights of parties claiming under such deeds or judgments. In *Beverley v. Ellis & Allan*, 1 Rand. 102, it is decided that where a deed is duly proved, or acknowledged, and left with the clerk for recordation, it is considered as recorded from that time, although it was never recorded, but lost by the negligence of the clerk.

In *Rollins v. Henry*, 78 N. C. 342, it was held that the requirement of the statute that a judge shall sign all judgments rendered in court, is merely directory, and his omission to do so will not vitiate as to strangers; and this principle is applied even where the judgment was rendered without any case in court. See also *Hesse v. Mann et als.*, 40 Wisc. 560; *Sheldon v. Stryker*, 34 Barb. R. 120.

Without, however, multiplying citations on this point, it will be sufficient to notice the case of *Diggs' ex'or v. Dunn's ex'or*, 1 Munf. 56. In that case it was held that although the statute required that all judgments of the county court by default should be entered up by the clerk as of the last day of the term, it was nevertheless a valid judgment, notwithstanding the failure of the clerk to make the entry. Whatsoever may be the functions of the clerk in recording a confession of judgment, his duty in entering up the judgment upon the minute book, under the statute, is purely ministerial; and if he fails to do so, it is simply a clerical misprision which may afterwards be corrected by the court or by the clerk himself.

In *Humbolt M. & M. Co. v. Terry*, 11 Nevada R. 237, 242, it was conceded that the clerk had not complied with the statute in entering up the judgments confessed in vacation. But the court said the legal effect of the entry and endorsement of the

clerk is the same as if he had made it on the back of the statement, and entered in a judgment book a final judgment, in strict compliance with the provisions of the statute. In proceedings under the statute authorizing a judgment by confession, there is no suit, no recovery, no declaration.

714 The clerk is not invested with any judicial function; he has nothing to consider, order, adjudge or decree. The statute directs the judgment, and the clerk acts as the agent of the statute in writing out and filing its judgment among the records of the court. *Hempstead v. Drummond*, 1 Pinney's Wisc. R. 334; *Wells v. Morton*, 10 Wisc. R. 68. See also opinion of Judge Tucker in *Eubank v. Ralls' ex'or*, 4 Leigh. 308, 315-319, and the note of the case of *Garland v. Marx*, Id. 325.

In the case of *Crownell v. The Bank of Pittsburg*, 2 Wallace, Jr., C. C. R., pages 569, 585, Mr. Justice Grier delivered a well considered opinion, in which he discussed at much length some of the points in the case. In the course of that opinion, he said: "Assuming it in the last place to be absolutely necessary that the entry of the judgment should be copied in the folio docket, the omission to do so is a clerical error or misprision, which may be amended at any time. A court may possibly not have the power to alter or vacate its own judgments, duly recorded, after the term to which they have been entered. But that any misprision, omission or mistake of the clerk may be amended at any time when the record shows anything to amend, has never been controverted since the statute of 1 Edward, 111, c. 6. It is a power vested in every court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and other officers." In support of this proposition, he cited numerous authorities. The case of *Craig v. Alcorn*, 46 Iowa R. 560, is also a decision bearing upon the same point.

The cases cited establish, what is sufficiently obvious upon principle, that the omission of the clerk to make the proper entry will not be permitted to prejudice the creditor; and if necessary, the court will at any time, upon application, direct the omission to be supplied. The learned counsel for the appellee seems, however, to suppose that under our statute such application ought to

715 have been *made to the court at its next term after the judgment was confessed. This, however, is a mistake. After the judgment is entered on the order or minute book, it becomes as final and valid as if entered in court. It would, therefore, be beyond the control of the court but for the provision giving the court control of all proceedings in the office during the preceding vacation. These provisions were not intended, however, to limit the power of the courts in correcting the mistakes and misprisions of clerks but to give control of judgments which would otherwise be beyond the reach of the court.

The circuit court might now compel the clerk of that court to enter the judgment in

the minute book. The clerk might do so of his own accord, without such direction, because the statute requires that he shall do so, and there is no limitation as to the time in which it shall be done. It has been suggested, however, that it was incumbent upon the appellant first to apply to the circuit court, and have the judgment entered on the minute book, before he can rely upon it in the chancery court. This, perhaps, would have been the more regular course.

It seems that the appellant in the court below did ask for time that he might take the very step to have the entry made; but his request was refused. Now, it is clear that the delay asked for could not materially have affected any of the parties, and it ought to have been granted in the interests of justice, if the entry or amendment was essential to the protection of the appellant's rights.

But we think that under all the circumstances of this case no such application and no actual entry were necessary, and the authorities already cited establish the proposition. In the case of *Digges v. Dunn's ex'or*, 1 Munf., already cited, an action was brought on the judgment, and although the clerk had not entered it up upon his order book, it was nevertheless treated as a valid judgment, as of the last day of the court, under the statute. The court considered the

716 *omission as a mere clerical misprision, which could not prejudice the party, and that the judgment was equally valid, as though the clerk had performed his duty in the premises.

In the case before us, if application were made to compel the clerk to make the entry, it must of necessity be to the judge sitting in this case as a chancellor. It is not seriously pretended that the judgment was not confessed, or that there was any fraud or unfair conduct in either of the parties. The justice of the debt is not controverted by any one. The debtor himself is before the court and makes no complaint. If the entry of the judgment should be actually made, it would be upon the evidence now before us. The validity of the judgment arises from the confession, the actual consent of the defendant, and not from the entry of the clerk.

The object of the entry is to give the judgment a more enduring form; where it might be preserved, seen and inspected.

The court being fully satisfied that the judgment was confessed for a debt justly due, that there is no fraud or collusion, no good reason is perceived why it should not give effect to the judgment, without turning the party around to the law side of the court simply for the purpose of having the judgment entered on the minute book.

For these reasons we are of opinion that the circuit court erred in rejecting the judgment in behalf of the appellant confessed on the 4th March, 1868, as a judgment lien of the 3d class, as represented by its commissioner.

To that extent the decree is reversed, and remanded for further proceedings, in conformity with the views herein expressed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that
 717 the judgment alleged to have been confessed in the clerk's office of the circuit court of Orange county on the 4th of March, 1868, by David Pannill in favor of the administrator of Samuel Shadrack, deceased, is a valid judgment, and that the said circuit court erred by its decree of October 6th, 1875, in rejecting the debt of \$2,923.39, "as a judgment of the third class of liens according to the report of the commissioner.

Wherefore, for the error aforesaid, it is decreed and ordered, that so much of said decree of October 6th, 1875, as is in conflict with that decree be reversed and annulled, and that the appellants, William T. Woolfork and Dabney Minor, A. Thompson and H. T. Holladay, do pay to the appellant this costs by him expended in the prosecution of his appeal and supersedeas aforesaid here. And this court proceeding to render such decree as the said circuit court ought to have rendered, it is further ordered and decreed that the exception of the said William T. Woolfolk and Dabney Minor, A. Thompson and H. T. Holladay to the report of Commissioner John G. Wilkerson, filed September, 1875, be overruled, and said judgment so confessed as aforesaid be declared valid according to the report of said commissioner. And the cause is remanded to said circuit court to be further proceeded within conformity with this decree.

Decree reversed.

718 *Collier v. The Southern Express Co.

January Term, 1880, Richmond.

E was employed by the S Express Co. as freight clerk at P, and whilst so employed executed a bond, with sureties, by which, after reciting that whereas E is to be hereafter employed by the S Express Co. in its business of forwarding by different railroads, &c., packages of any and all kinds, and movable property, including money and securities for money, E, in consideration of said employment and the compensation he is to receive from said Co. for his services, covenants, &c., that he will well and truly perform all the duties required of him in said, employment and truly account for all money, &c., which may come to his possession or control by said employment, &c. And E and his sureties bound themselves for the faithful performance of the above covenants by E in the penalty of \$2,000. After the execution of this bond, E was raised to the office of principal agent of the Co. at P, and whilst acting as such principal agent embezzled money which came into his hands—HELD:

1. Construction of Written Instruments—Province of Court.—There being no dispute about the facts, it is for the court to construe the instrument, and the jury are bound to take the construction of the court as correct.

*Construction of Written Instruments—Province of Court.—See 19 Am. & Eng. Enc. of Law (1st Ed.), 646 et seq.

2. Embezzlement—Liability of Sureties on Employment Bond.—The obligation, by its terms, extends to any employment of E by the Express Co., and the sureties are liable to the Co. for the money embezzled by E whilst acting as principal agent of the Co. at P.

This was an action of debt in the hustings court of the city of Petersburg, brought by the Southern Express Company against Hugo G. Evans, T. T. Broocks and Robert W. Collier. There was a verdict and judgment in favor of the plaintiffs for
 719 \$868.68, with interest from the 31st of July, 1875. And thereupon Collier applied to a judge of this court for a writ of error and supersedeas; which was allowed. The case is fully stated in the opinion of the court, delivered by Judge Burks.

J. Alfred Jones, for the appellant.

R. G. Pegram and Ould & Carrington. for the appellees.

BURKS, J., delivered opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Petersburg.

The plaintiff in error was one of the defendants in an action of debt brought by the Southern Express Company on a bond, with condition, of the tenor following: "\$2,000.

"Whereas, Hugo G. Evans is to be hereafter employed by the Southern Express Company, in its business of forwarding by different railroads, steamboats and other kinds of conveyance, packages of any and all kinds, and movable property, including money and securities for money.

"Now, therefore, know all men by these presents, that I, the said Hugo G. Evans, in consideration of said employment of the compensation which I am to receive from said company for my services therein, do hereby covenant with said company, and bind myself, my heirs, executors and administrators, that I will at all times well and truly perform all the duties required of me in said employment, and well and truly account for all money and property of every description which may come into my possession or control, by reason of said employment, and make good all loss or damage which may happen to such

720 *money or property while under my control, for which I may be legally responsible; and indemnify and save harmless the said company from all liability on account of my fault or neglect. And for the faithful performance of the foregoing covenants, I, the said Hugo G. Evans as principal, and T. T. Broocks, R. W. Collier, as his surety, do hereby, jointly and severally, bind ourselves, our heirs, executors and administrators, to the Southern Express Company aforesaid, in the sum of two thousand dollars.

"In testimony whereof, we hereto set our hands and seals, this eighteenth day of March, 1872.

"HUGO G. EVANS. [Seal.]

"T. T. BROOCKS. [Seal.]

"ROBT. W. COLLIER, [Seal.]

"Witness:

"A. W. Archer,

"V. Johnson."

The declaration alleges, that after the date of the bond, Evans was employed by the plaintiff in the business described in the bond, and as such employee, on the 22d day of December, 1874, and on divers days thereafter from time to time, received from the plaintiff, in due course of his employment, sundry packages of money specified for delivery to certain persons named, which he failed and neglected to deliver and has never delivered, as was his duty to do according to the course of his employment.

The principal defendant, Evans made a formal defence, Brooks had judgment in his behalf on a plea of bankruptcy, and Collier (the plaintiff in error here) alone contested the plaintiff's right of recovery on the merits, the defence relied on being presented by two special pleas filed jointly in the names of himself and Brooks as sureties.

We perceive no difference in the two pleas. They aver, in substance, that according to the true intent and meaning of the bond declared on, the said defendants **721** were *bound, and only bound, for the faithful performance of the duties required by the plaintiff of the principal, Evans, in the employment had in view by the parties to the bond at the time it was entered into—to wit: for the faithful performance by Evans of his duties as freight clerk of the plaintiff; that while the said Evans was so employed as freight clerk, he kept and performed the condition of the bond faithfully in all respects, and committed no breach of said condition; that on the 1st day of September, 1874, the plaintiff, without the consent of the defendants or either of them, raised the said Evans from the employment of freight clerk to the higher and more responsible employment of agent, the duties and responsibilities of which latter employment were far greater, and the risks of loss far graver, the pay of which was larger and the temptation to speculation more serious, and the usual bond required was in a larger penalty, and that in said last-named employment the said defendants never agreed or contemplated becoming sureties under and by virtue of the bond sued on.

And they further aver, that the defaults alleged in the declaration occurred while Evans was employed as agent as aforesaid, and not while he was employed as freight clerk, and that therefore they are not liable for such defaults by virtue of said bond and the condition thereof.

There was no conflict in the evidence given on the trial, and it may therefore be taken as true. Briefly stated, the proof was to the effect that at the time the bond was given Evans was, and had been for some time previous, in the plaintiff's employment as freight clerk, in which service he continued, without committing any default, until 19th of November, 1873, when he was assigned to duty as acting principal agent at Petersburg, and on the 1st day of September, 1874, he was assigned to duty as principal agent at said city, in which capacity he served until July 29, 1875; and that during his **722** employment as such principal *agent,

of the funds which came into his hands as such agent he embezzled various sums of money, amounting in the aggregate to \$868.68, which he never accounted for to the parties entitled thereto; that the duties and responsibilities imposed by the plaintiff upon its employees were varied and diverse, their duties, responsibilities and pay were different, and the penalties of bonds required of them were regulated by the nature of the duties and responsibilities imposed; that the duties of the freight clerk involved the handling of packages of money and valuables, and, in the absence of the principal agent, as was occasionally the case, he filled the office and discharged for the time the duties of the principal agent, and even when said agent was present, but otherwise employed, the said Evans, as freight agent, was authorized to receive and did receive and receipt for packages of money or goods delivered to the plaintiff for transportation. It was further proved, that it was and is the custom and usage of the plaintiff to assign its employees to the performance of such duties as may be deemed proper, and not to engage them in any particular capacity, and that the bond sued on is in its terms precisely like the bond taken from all its employees since the year 1867.

After all the evidence had been given, instructions to the jury were asked for on both sides, and the court, rejecting those tendered by the defendants, on the motion of the plaintiff, gave the following: "If the jury believe, from the evidence, that Hugo G. Evans, while he was in the employment of the plaintiff in its business, and after the execution of the writing obligatory in the declaration mentioned, received in due course of his said employment the money, goods, or property in the declaration mentioned, to be forwarded or delivered to the person or persons to whom the same were directed, and that he failed to forward or deliver the same, and has failed to account for the same to the plaintiff, and to indemnify and save

723 harmless *said plaintiff from all loss and liability on account of said failure, then the said defendants are liable to the plaintiff for the amount or value of said money, goods, and property so received, but not forwarded or well and truly accounted for by the said Hugo G. Evans."

The defendants, by counsel, excepted to the giving of this instruction, and also to the refusal of the court to give the instructions asked for by them. The plaintiff had a verdict, which the defendants moved to set aside, on the ground that it was contrary to the law and the evidence. The motion was overruled, and the defendants again excepted. There was judgment for the plaintiff, according to the verdict; of which judgment the defendant Collier, as plaintiff in error here, is now complaining.

It must be conceded that if the instruction given was proper, the verdict of the jury was plainly right; for the facts on which the liability of the defendants depended, under the direction of the court, as we have seen, were fully and clearly proved.

The question then is, was the instruction proper? We think it was. It assumed, and, in our opinion, rightly assumed, the construction of the obligation sued on, and the construction given was correct.

The rule, as laid down by Baron Parke in *Neilson v. Harford*, 8 Wees. & Welsb. 806, 823, is generally accepted. "The construction of all written instruments," he says, "belongs to the court alone, whose duty it is to construe all such instruments as soon as the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law, &c. See

724 also *Brown's Leg. Max. 104, (side p.); 1 Chitty on Contracts, (11 Amer. ed.), 103; *Talbot v. R. & D. R. R. Co.*, 3 Va. Law Journal, 483, 485; 31 Gratt. 685.

There is nothing obscure, equivocal or ambiguous in any of the terms employed in the instrument, which was the subject of construction in the present case. There are no terms of art, or science, or words of a technical nature or peculiar import, but the whole writing is couched in the plain language in common use. As the evidence was not conflicting, the surrounding circumstances relied on may be accepted as facts established, in like manner as if found by the jury. It was the province of the court to construe the bond in the light of these facts, but the construction was limited, by the rules of law, to the language employed in the instrument. "The writing," says Greenleaf, "may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and reliable expression of the meaning, no other words are to be added to it, nor substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words expressed; but what is the meaning of the words they have used." 1 Greenl. Ev. § 277. See also what is said by Abbott. C. J., in *Beaumont v. Field*, 18 Eng. C. C. L. R. 334, and by Parks, J.; in *Doe v. Templeman*, 24 Eng. C. L. R. 336, 343.

Ordinarily, a reference to what are called "surrounding circumstances," observes Mr. Justice Strong in a recent case, is allowed for the purpose of ascertaining the subject matter of a contract, or for an explanation of the terms used; not for the purpose of adding a new and distinct understanding. *Maryland v. R. R. Co.*, 22 Wall. U. S. R. 105, 113.

Applying these principles, we are 725 of opinion that the *learned judge of the hustings court rightly construed the obligations of Evans and his sureties as ex-

tending to employment generally in the business of the plaintiff. The language of the bond is, "Whereas Hugo G. Evans is to be hereafter employed," &c. How "employed?" It is not said that he is to be employed specially as freight clerk, or as messenger, or as principal agent, or as acting agent, or in any particular capacity, but that he is to be "employed by the Southern Express Company"—that is, generally "in its business," which is described to be that of "forwarding by different railroads, steamboats and other modes of conveyance, packages of any and all kinds, and movable property, including money and securities for money; and the condition of the bond relates to "said employment."

Now, if the construction of the plaintiff in error is to prevail, the undertaking by the bond was limited to the employment of Evans as "freight clerk." It is necessary to that construction to add a new term to the writing, and thus the "surrounding circumstances," established by parol evidence, would be made to serve the purpose, not of explaining the language used, but of adding words, the effect of which would be to essentially alter or vary the obligation, and create a different undertaking; which would be inadmissible.

The question in the case is not one of mistake, or fraud, or deception, or anything of the kind, but of construction merely; and we are of opinion, for the reasons stated, that the court below did not err in its rulings on the instructions, or in refusing a new trial, and that the judgment complained of should be affirmed.

The action was on a parol obligation. Judgment was rendered for the sum found by the jury and for costs. Regularly, the judgment should have been for the penalty to be discharged by the payment of

726 the principal sum and *interest found by the jury, the costs. But the error is formal merely. The judgment might be amended, and, as amended, affirmed; but it is substantially correct as it is, and there is no necessity of changing the form of it.

Judgment affirmed.

727 *Shelton v. Ficklin, Trustee & als.

January Term, 1880, Richmond.

1. **Fixtures—Machinery.**—Where the machinery in a factory is permanent in its character and essential to the purposes for which the building is occupied it must be regarded as realty, and passes with the building; and whatever is essential to the purposes for which the building used will be considered as a fixture although the connection between them may be such that it may be severed without physical

***Fixtures.**—As to machinery see *Green v. Phillips*, 26 Gratt. 752; *Morotock Ins. Co. v. Rodefer*, 92 Va. 753; *Haskin & Co. v. Cleveland, &c. Co.* 94 Va. 447; 13 Am. & Eng. Enc. of Law (2nd Ed.) 664. As to what are, and are not, fixtures, see generally 2 Min. Inst. (4th Ed.) 607 et seq.; 1 Va. Law Reg. 626; 2 Va. Law Reg. 203.

or lasting injury to either. See *Green v. Phillips & als.*, 6 Gratt. 752.

2. *Same—Same.*—B, to secure a debt of \$3,000 for money lent to him by S, conveyed to C in trust a lot of land in the town of F, described as containing one acre of land on which B has erected a planing mill and spoke factory; and by the same deed he conveyed and assigned to C a policy of insurance he had taken out on the said planing mill, spoke factory and machinery, and covenanted to keep the policy in full force until the debt was paid. The lot and building independent of the machinery was not worth more than \$1,000.—*Held*: The machinery in the building passed under the deed.

This was a suit in the circuit court of Fredericksburg, brought by J. B. Ficklin, surviving trustee in a deed from Braxton & Barry, conveying all the property of the partnership to secure their debts, against John C. Shelton and W. P. Conway, trustee in a deed from Carter M. Braxton to secure a debt of \$3,000 to John C. Shelton. The only question in the case was whether certain machinery in a building conveyed to Conway passed under that deed. The case as viewed by this court is set out in the opinion of Judge Christian. There was a decree in favor of the plaintiff, and an appeal by Shelton.

728. *A. W. Wallace, for the appellant.
Marye & Fitzhugh, for the appellees.

CHRISTIAN, J. This case is before us on appeal from a decree of the circuit court of Fredericksburg.

The following facts are proved by the record: that in April, 1874, Carter M. Braxton applied to W. P. Conway, of the banking house of Conway, Gordon & Garnett, for the negotiation of a loan of \$3,000, to secure which he agreed to execute a deed of trust on a certain lot, factory and planing mill, and the machinery therein contained; the said Carter M. Braxton representing the same to be his property and to be worth the aggregate sum of \$9,000.

Upon this security the appellant, John C. Shelton, loaned the sum of \$3,000, negotiated by the said W. P. Conway, to the said Carter M. Braxton, who on the 14th April, 1874, executed a deed by which he conveyed a certain lot of land in the town of Fredericksburg, described in said deed as containing one acre of land, "on which said lot of land the said Carter M. Braxton has erected a planing mill and spoke factory," in trust to secure a debt to John C. Shelton for the sum of \$3,000, evidenced by a bond payable three years after date, with interest from the 11th day of April, 1874, (pay semi-annually) at the rate of eight per centum per annum. And the said deed further provided that whereas the said Carter M. Braxton had effected a policy of insurance on the said planing mill, spoke factory and machinery, he, by the same deed conveyed and assigned to the said Conway, for the purposes of the trusts therein declared, the said policy of insurance, and covenanted and bound himself to renew and continue said insurance in

full force until the debt secured by the said deed of trust should be fully paid off and discharged. *And the said C. M. Braxton further bound himself in said deed punctually to pay the interest on said debt and the premiums on said insurance, and that the failure of the payment of either should be such default as to authorize the trustee, Conway, upon demand of the said John C. Shelton or his heirs to execute the trusts created by said deed.

This deed of trust was admitted to record in the clerk's office of the corporation court of Fredericksburg on the 15th day of April, 1874.

It was further shown by the record before us that the said C. M. Braxton formed and entered into a co-partnership with one John C. Barry in the lumber business and for the manufacture of spokes, staves and such other articles as they should determine from time to time to manufacture. And, according to the terms of the partnership, Braxton was to put in two-thirds of the capital and Barry one-third; and the profits to be divided upon this basis. This contract of partnership, though reduced to writing, was not signed by the parties, nor was it ever recorded; but the only evidence of the partnership exhibited to the public was a sign placed over the factory and advertised in other places, in these words:

"Braxton & Barry, dealers in all kinds of lumber, also carriage and wagon spokes, at their factory and planing mill, near depot."

On the 29th day of April, 1875, Braxton & Barry executed a deed of trust to Ficklin and McCracken, trustees, by which they conveyed all the property, assets and effects of every kind and description belonging to said firm and to which said firm is in any manner entitled, embracing the following property, to wit: all the spokes, spoke timber material and other personal property at the spoke factory operated by said firm in the town of Fredericksburg; also all debts of every kind due to or to become due to said firm, and all choses in action, rights, credits

730 and "accounts belonging to said firm; also four mules and a wagon belonging to said firm, and all other property and assets of every kind and description belonging to the said firm or in which they have an interest.

This property was conveyed to the said trustees upon certain trusts declared in said deed, not necessary now to be referred to, except to remark that the objects and purposes of said deed were to secure the partnership creditors of Braxton & Barry, and to authorize the said trustees to work up the material on hand in said factory, and to sell all the property belonging to said firm conveyed by said deed, upon such terms of cash or credit as they might deem most judicious and best calculated to realize the best prices for the same.

The record further shows that the proceedings in this case were commenced by a bill of injunction filed by Ficklin, one of the trustees named in the second deed, above referred to; which bill, after reciting "that W.

P. Conway, the trustee in the deed of the 14th April, 1874, did, on the 4th August, 1874, close said deed by a sale at public auction of the said lot on which said factory stands, and did also undertake to sell the machinery in said building belonging to the partnership of Braxton & Barry, and said lot, building and machinery was knocked down to Terence McCracken at the price of \$3,375; being less than the principal and interest of the Shelton debt—the terms being one-third cash and the remainder in one and two years"; then prayed "that the said Conway and McCracken may be enjoined and restrained from paying over any of the proceeds of said sale to said Shelton, and that it may be referred to the commissioner of your honor's court to ascertain what proportion of the purchase money aforesaid represents a fair value of the machinery embraced in said sale, or such other order as may be proper to protect the social creditors of said Braxton & Barry, and that the same may be applied to the satisfaction of said partnership indebtedness, and for general relief."

731 *Conway, the trustee, and John C. Shelton, whose debt was secured by the deed of the 14th April, 1874, filed their joint answer to this bill of injunction, in which answer they admit that said three thousand dollars was loaned to Carter M. Braxton individually, and they aver and are prepared to prove that the following is the true state of the case, and of the facts connected with said loan, namely: That in the month of April, 1874, said Carter M. Braxton, who was then the owner of the freehold to the lot and factory and planing mill built thereon, and also the machinery therein, all of which lot, building and machinery was owned by said Braxton long before the partnership set out in the bill of the plaintiff, applied to said respondent, W. P. Conway, a banker of Fredericksburg, to negotiate a loan for him for \$3,000, on the lot, factory, planing mill and machinery contained in and forming part of said factory and planing mill, the said Carter M. Braxton representing the same to be his property, and to be worth in the aggregate the sum of \$9,000, and the said Braxton agreed to execute a deed of trust on all of this property to secure the payment of said \$3,000 and interest.

They further aver in their answer, that at that time, or until after said deed was executed, they had no notice of any partnership agreement existing between Braxton & Barry, but they knew the fact that the freehold had been purchased by and belonged to Carter M. Braxton; that the planing mill and spoke factory had been built on the freehold for and by the order of Carter M. Braxton, and the machinery placed in and annexed to said mill and factory by the order of C. M. Braxton, and at his individual expense, and they are now prepared to prove by the books of the said Braxton & Barry that none of said machinery was ever carried to the credit of said Braxton & Barry, as partnership assets on the books of said firm, until some seven months after the execution of said deed of trust securing said \$3,000. Upon these rep-

732 resentations made by Carter *M. Braxton, and without any notice whatever of any partnership agreement, and with the knowledge of the above facts, except that which these respondents expect to prove by the books of the said firm, and upon the consideration of the machinery (for the lot and building without the machinery was not worth \$1,000), the said respondent, John C. Shelton, loaned said Braxton the said sum of \$3,000, and the said Braxton executed the deed of trust herewith filed, marked X, by which the said Braxton and wife undertook, intended to and did convey the lot of land on which the factory and planing mill stands, together with all the machinery contained therein and affixed thereto; a list of which machinery, showing the manner it is affixed and bolted to the building, is herewith filed as a part of this answer, marked exhibit T. These respondents, therefore, deny the allegation in the bill of the complainant that the deed of trust from Braxton to Conway, trustee, did not, according to its legal construction, convey or undertake to convey the aforesaid machinery.

These respondents answering further, deny that there was ever any legal input to the partnership of the "valuable machinery," as set out in the said bill, so as to bind a purchaser of the same without notice; they deny further the allegation that "the machinery never became a part of the realty," and claim that the machinery became a part of the realty as soon as it was affixed to the building, anterior to the date of the partnership, and was part and parcel of the same at the time of the execution of the deed of trust to the respondent, Conway, and passed to said trustee by said deed, and had never, anterior to said deed, been assigned to the said partnership or otherwise—certainly not so assigned as to bind a purchaser for value of the realty (of which the machinery was part), without notice; therefore these respondents claim that none of this machinery, under any circumstances, can be liable to the satisfaction of the social debts con-

733 tracted by said firm, in *preference to the satisfaction of the debt due this respondent, Shelton.

On the 24th day of December, 1875, the cause came on to be heard upon the bill and answers and exhibits filed, and upon certain depositions taken in the cause; upon consideration whereof the circuit court was of opinion that the machinery in the bill and proceeding mentioned was liable for the payment of the partnership indebtedness of the firm of Braxton & Barry, in preference to the individual indebtedness of C. M. Braxton, and that the proceeds of the sale of said machinery made by said W. P. Conway, trustee, to Terence McCracken, on the 4th of August, 1875, was liable to the payment of said partnership indebtedness before the same can be applied to the payment of the individual indebtedness of said Braxton to John C. Shelton. And after so adjudging, the court directed one of its commissioners to ascertain and report what proportion of said sale made by Conway, trustee, repre-

sents the machinery in said spoke factory, and to report any other matter deemed pertinent by the commissioner, or desired by any party interested.

In response to this decree, the commissioner reported that the said machinery represents six-tenths of the proceeds of said sale. That the net proceeds, as appears from the report of the trustee, W. P. Conway, amounts to the sum of \$2,975.78; of which the machinery is six-tenths, equal to \$1,785.62, and of which the realty is four-tenths, equal to \$1,190.16.

This report of the commissioner was confirmed by the circuit court, and it was accordingly decreed and ordered that the sum of \$1,785.62 (ascertained by said report to represent the machinery), or so much thereof as may be required, be applied to the satisfaction of the partnership indebtedness, when the same shall be ascertained by a settlement of the trustee's account.

To these two decrees an appeal was allowed and supersedeas awarded by one of the judges of this court.

734 *I am of opinion that these decrees are plainly erroneous.

The deed from Braxton to Conway, trustee, was prior in time to the deed from Braxton & Barry to Ficklin, trustee, by at least twelve months, and was put upon record in the clerk's office of the corporation court of Fredericksburg on the day after it was executed—to wit: on the 15th day of April, 1874—and was therefore notice to all the world of the dedication of the property thereby conveyed as security for Shelton's debt. The deed to Ficklin, trustee, was not executed until the 20th day of April, 1875, and was not admitted to record until the 8th day of May following. The deed to Conway describes the property conveyed as "a certain lot lying and being in the town of Fredericksburg, containing one acre of land, on which said lot of land the said Carter M. Braxton has erected a planing mill and spoke factory."

It is abundantly proved in the record, that the chief value of this property was the machinery constituting the planing mill and spoke factory, which cost the sum of upwards of \$5,000.

It is also shown that the building and land on which it was erected were of comparatively little value, and that said building was erected and adapted solely for the purposes of the factory. This machinery was affixed to the building and constituted the most important part of the factory, without which the building would have been of little value. It is manifest from the undisputed evidence in the cause, that Conway, the trustee, and Shelton, who loaned the money, in their negotiations with Braxton, gave credit for the large sum of \$3,000 on the faith not of the lot and building, but of the valuable machinery which they knew had been attached and affixed to the same. This is the more manifest when it is remembered that in the deed conveying this property to Conway, trustee, it is stipulated that

735 Braxton should convey and assign *to

Conway a policy of insurance which he had effected on the said planing mill, spoke factory and machinery, and bound himself in said deed to renew and continue said insurance in full force until the debt secured by the deed should be fully paid off and discharged. And in this policy of insurance thus transferred by him to Conway, he (Braxton) represented himself as the sole owner of said machinery.

It thus plainly appears that in negotiating the loan of \$3,000, both Conway and Shelton looked to the valuable machinery erected and affixed to the building and on the lot conveyed as their principal security for the money loaned to Braxton.

And I think that it is equally clear that this machinery was a part of the realty and passed under the deed with the building and lot to which it was attached and conveyed to Conway, trustee.

Upon this point, the decision of this court in the case of *Green v. Phillips*, 26 Gratt. 752, is conclusive. After a review of both the English and American cases on this subject, it was said, as the unanimous opinion of this court: "The true rule deduced from all the authorities seems to be this, that where the machinery is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building, and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be served without physical or lasting injury to either."

I think it is clear, therefore, upon the principles declared in *Green v. Phillips*, (supra,) and upon authority of the cases therein cited, that the machinery put up and affixed in said building and on said lot passed to Conway, trustee, as a part of the real estate conveyed by said deed, and that said machinery, as well as the lot and building, is liable for Shelton's debt.

736 *It is insisted, however, by the learned counsel for the appellee, and this no doubt was the controlling view of the circuit court, that the machinery was regarded by both Braxton and Barry as a part of the partnership property, and that Braxton put in said machinery as his part of his input as one of the partners. It is true it is shown by the record that in December, 1874, the said machinery was transferred from Braxton's individual books to the partnership books of Braxton & Barry, as Braxton's input as capital in the partnership of Braxton & Barry. But this was not done until eight months after the deed to Conway, trustee, had been executed and recorded. This was a private transaction and arrangement between the partners, and was merely entered upon the partnership books, was never recorded except on said books, and was, therefore, notice to no one outside the partnership. Certainly no notice of this arrangement was ever brought home to Conway or Shelton; but, on the contrary, Braxton had represented that the said machinery was

his individual property, and it was proved to be his property, both from the fact that he had paid for the same, and had effected a policy of insurance upon it, in which he had represented himself as the sole owner of said machinery, and had transferred to Conway, trustee, this policy, in the very deed which conveyed to him the lot and building on which the said planing mill and machinery were erected.

It cannot be, I think, consistently or reasonably argued, as is contended in this case, that the mere fact that Barry was in possession of the planing mill and machinery was of itself such notice as would put Conway and Shelton upon the enquiry as to who was the real owner of said machinery. For it must be remembered that Braxton, who represented himself to be the owner, was as much in possession of the same as Barry was, and therefore the numerous cases referred to by the learned counsel for the appellee have no application to this case. It might as

737 *well be contended that, because the mill and building were intended to be used in the partnership conducted by Braxton & Barry, that these, too, were partnership assets, and although conveyed by a recorded deed, which gave notice to the world that they had been conveyed to secure the debt to Shelton, yet that the fact that Barry & Braxton had a secret understanding between them that the property was to be so used, and the fact that Barry was in possession of the same (but not less so than Braxton) was of itself notice, which would put Conway and Shelton on enquiry, that Barry claimed the property. Certainly such a pretension cannot be maintained, either on reason or authority.

It is a noteworthy fact, which strongly maintains the views herein expressed, that when Braxton & Barry came to make their deed in 1875—more than a year after Braxton's deed to Conway had been executed and recorded—they did not convey in said deed the machinery now claimed as part of their partnership assets, but only conveyed in general terms the material on hand, manufactured and unmanufactured, and debts due to the firm, and all their interests generally in the partnership assets.

I am, therefore, of opinion that it is plain upon the record before us that the deed from Braxton to Conway, trustee, conveying to him the lot of land described in said deed as the lot upon which he had erected a planing mill and spoke factory, carried with it also the machinery, which was affixed to the building, as part of the realty, and was therefore liable for the debt secured to Shelton, and upon the faith and credit of which he advanced his money; it being indisputably proved in the record that the lot and building, without the machinery, was not worth half the sum advanced by Shelton.

I am, therefore, of opinion that the decrees appealed from should be reversed, **738** and that the fund reported by *the commissioner to be in the hands of Conway, trustee, should be first applied to the payment of Shelton's debt.

BURKS, J. For the better understanding of the reasons which have led me to a conclusion in this case different from that reached by a majority of the court, I deem it proper to give a statement of the material facts presented by the record.

In September, 1873, Carter M. Braxton, with the view of engaging in the business of manufacturing spokes for carriages, wagons, &c., and in contemplation of a partnership in the business with John C. Barry, purchased a vacant lot in the town of Fredericksburg, upon which he proceeded to erect a factory building suitable for the machinery needed for the business, and also purchased the machinery adapted to the house and business, and paid for the whole out of his own means—\$550 for the lot, nearly \$6,000 for the machinery and putting it up, and the cost of erecting the building, whatever that was. The building, when afterwards insured, was valued at \$1,400. All of the machinery, except a comparatively small portion purchased at a subsequent time, was delivered at the factory by the 1st day of January following (1874), when the workmen, employed for the purpose, commenced putting it up, and completed the work during that month, probably by the middle of the month. On the said 1st day of January Braxton & Barry entered into the partnership theretofore contemplated. Written articles were drawn up, but for some reason were never signed. It is not necessary to notice the terms of the partnership, and the testimony relating thereto, further than to say that it was one of the terms of the agreement at the time it was entered into on the 1st day of January, and before any of the machinery was put up, that the machinery, which had been wholly paid for by Braxton, should be regarded as partnership assets, although never entered on the books of the firm

739 until *December of that year, which is explained in the testimony of each of the partners as an act of mere omission or neglect.

On the 14th day of April following, Braxton applied to W. P. Conway, a broker in Fredericksburg, to negotiate a loan for him of \$3,000 on his individual account, offering to secure it by a deed of trust on the factory lot, building, and machinery, of all of which he represented himself to be the owner. Conway negotiated the loan from John C. Shelton on the terms proposed, with the further stipulation that Braxton should cause the factory building and machinery to be insured and assign the policy of insurance as further security for the loan, to be kept in force by renewal until the loan was fully paid off. The insurance was effected as agreed upon, and a deed of trust to secure the amount of the loan was drawn and executed, in which Conway was made trustee. Previous to that time Braxton had not acquired the legal title to the factory lot which he had purchased from one Hartman. There was a balance of the purchase money unpaid. He paid this balance, (\$374.0,) out of the money borrowed from Shelton, and took a deed for the lot from Hartman of even date

with the deed of trust. The policy of insurance was assigned to the trustee by the deed of trust, and as to the other property conveyed, the grant, subject to the trusts declared, is thus expressed: * * * "The said Braxton and wife do grant with general warranty unto the said Conway a certain lot, lying and being in the town of Fredericksburg, containing one acre of land, and fully described in a deed from John Hartman and Wilhelmina, his wife, to the said Carter M. Braxton bearing even date with these presents, on which said lot of land the said Carter M. Braxton, has erected a planing mill and spoke factory." There is no conveyance of the machinery specifically and in terms, apart from the land on which the building containing the machinery is situated.

740 *In making this written application for the insurance, Braxton stated in various forms his individual ownership of the machinery, which he however described as "movable." It does not appear that Conway or Shelton ever saw this application before the loan was consummated, and they probably did not see it, as it must have been in the custody of the insurance company. There is no doubt, however, that both of them believed that Braxton was sole owner of the machinery, as he represented himself to be, and that it passed to the trustee under the deed. Otherwise, the loan of \$3,000 would hardly have been made, as the value of the property without the machinery was nothing like equal to the amount of the loan, and, of course, the policy of insurance, which probably would not have been required if the machinery had not been understood to be conveyed, was worth nothing as security unless the property insured should be destroyed by fire.

About a year after this, the firm having failed, Braxton made a deed of trust to Little & Goolrich, conveying the same lot and also specifically the machinery, to secure some of his individual creditors; and, a few days afterwards, he and his partner Barry united in a deed to Ficklin and McCracken, conveying all their social assets to secure their social creditors. This deed conveys all the social assets in general terms, describing them in part, but not specially mentioning the machinery. If, however, the machinery belonged to the firm, I think the terms of the deed are broad enough to cover it.

The controversy is between these social creditors under the last named deed, on the one side, and Shelton, the individual creditor of Braxton under the first deed, on the other, and relates exclusively to the machinery aforesaid; the question being, whether the machinery was so annexed to the freehold conveyed to Conway, trustee, as to become a part of it, and further, whether Conway and Shelton occupy the relation to the social creditors of bona fide purchasers.

741 *If there had been no partnership in this case, and Braxton had been sole owner of the machinery, as he was of the lot, and had annexed it himself, and the question was solely between Braxton as mortgagor and Shelton or his trustee, Conway, as

mortgagee, there could be no doubt that, both upon principle and authority, the machinery would be regarded as a part of the factory building and would have passed to Conway under the deed conveying the lot on which the building rested. The ancient rule, expressed in the maxim, *quicquid plantatur solo, solo cedit*—"whatever is affixed to the soil belongs thereto"—would have applied in full force. This machinery was not only annexed to the freehold in the most substantial manner, but was essential to the uses and purposes to which the building was to be applied, and was in fact applied. The building was erected for the machinery and the machinery especially designed for and adapted to the building. The building would have been of comparatively little use or value without the machinery which was attached to it.

This case does not differ essentially in its features from *Green v. Phillips & others*, 20 Gratt. 752, as to the character and uses of the machinery and the mode and extent of annexation, and upon the authority of that case, and numerous other cases, which need not be cited, the machinery would have passed as a fixture under Conway's deed as against Braxton, the mortgagor, if he were the only one disputing the title.

But the social creditors of Braxton & Barry intervene, claiming that as to them, under the facts of this case, the machinery never was so annexed to the freehold as to become a part thereof. They claim that Braxton & Barry as partners, were tenants under Barry, and that under the law determining fixtures between landlord and tenant, the machinery was never a part of the realty, and moreover, that it was expressly agreed between the partners, at the

742 *commencement of their partnership and before any of the machinery was put up in the building, that it should be considered and treated, and was so considered and treated by them, as partnership assets, and on both accounts that it never ceased to be personal property, and therefore did not pass under the deed to Conway.

The old rule, before referred to, has certainly been greatly relaxed in modern times in favor of tenants of a limited interest; but the general doctrine on the subject need not be discussed in the present case, as the rights of the parties must be determined by the agreement made.

The legal effect of that agreement was to preserve the character of the machinery as personalty, at least as between the parties, although annexed in such a manner as otherwise to make it realty. The law would seem to be well settled that in annexing chattels, where, as in this case, they are not so incorporated as to render identification and severance without serious damage to the freehold impracticable, they may retain the nature of chattels, if the parties so agree. There seems to be no limitation concerning the kind of severable chattels which may be owned by one person upon another's land. *Campbell, J., in Crippen v. Morrison*, 13 Mich. R. 23, 34. It was said by Martin, C. J., in the same case, that whatever may be the rule of the

common law respecting fixtures, in the absence of any agreement of the parties, it is well settled at this day that the contract of the parties will fix the character and control the disposition of personal property, which, in the absence of a contract, would be held to be a fixture; in other words, the parties interested may control the legal effect respecting such property by express agreement. See other cases cited in 1 Wait's Actions and Defences, 372, § 4. It has been recently declared by this court, (Judge Christian delivering the opinion), as a principle firmly settled by numerous decisions, that where a building is erected

by one man upon the land of another, 743 by his permission, upon *an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it. *Andrews, Ordway & Green v. Auditor, &c.*, 28 Gratt. 115, 118, and cases there cited.

Such agreements may be valid and effectual between the parties, but how are the rights of third parties affected by them? A bona fide purchaser of the freehold, for example, or a mortgagee, who stands on the same footing? There is a class of authorities, perhaps the larger class, which hold that such bona fide purchaser or mortgagee acquires no title to a chattel annexed by the owner or some other person by his consent to the land of another, under an agreement that the title to the chattel shall not pass to the owner of the freehold or only upon conditions, if in such case the chattel can be disannexed without serious injury to the freehold. These cases proceed upon the broad ground that the chattel so annexed does not cease to be a chattel by reason of the annexation, and does not, therefore, pass to a bona fide purchaser of the land. Many of them are cases of conditional sales. Such was the case of *Godard v. Gould*, 14 Barb. R. 662, relied upon by the learned judge in the court below in support of the decree now under review. Certain machinery was manufactured and set up by the plaintiffs in the mill on another, under an agreement that the plaintiffs should remain owners of the machinery until it was paid for. It was annexed to the mill in a very substantial manner, and could not be removed as a whole without cutting away the walls of the building, but could be taken apart and removed without injury to the building. The owner of the mill sold and conveyed it to a bona fide purchaser, who claimed the machinery under the deed. It was held that the machinery did not, by the annexation, become part of the realty, so as to pass by the deed, but

744 that it continued to be personal *property, and to belong to the plaintiffs, so long as the purchase money remained unpaid. *Strong, J.*, in delivering the opinion of the court, concurred in by the other judges, (*Selden and Johnson*), said "that the machinery being personal property, the grantors could not convey a greater interest in it than they had. It is not material whether or

not it would have passed by the deed without the special clause embracing fixtures and as a part of the land, but for the agreement that the plaintiffs should remain the owners; it was in either case personal property belonging to others, whose title the grantors could not transfer. Nor does the fact that the defendants are bona fide purchasers in the conveyance make any difference. * * * I am not aware of any principle upon which it could be held that the plaintiffs have lost their title." Decided cases, recognizing the same principles, are numerous. See *Mott v. Palmer*, 1 N. Y. R. 564; *Russell v. Richards*, 10 Maine, 429; *Dame v. Dame*, 38 N. H. 429; *Cross v. Marston*, 17 Ver. 533; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377; *Kinsey v. Bailey*, 9 Hun. 452. See also what is said in *Chippen v. Morrison*, 13 Mich. 23, 28, and cases cited in opinion of Campbell, J.

There is another class of cases which hold, that where the chattel is annexed by the owner or with his consent, under an agreement that the title shall not vest unless and until certain conditions are complied with, if the annexation is such as to present to a beholder the appearance of permanency and apparent title in the owner of the freehold, although the agreement may be effectual between the parties, the fixture will pass as realty under a conveyance of the land to a bona fide purchaser or mortgagee without notice of the agreement. These cases would seem to be grounded on the principle of equitable estoppel.

The case of *Davenport v. Shauts & others*, 43 Verm. R. 546 (decided in 1871), was

745 substantially this. Root sold *to Shauts & Co. certain machinery to be put up in their mill or factory, the sale being on condition that the machinery should remain the property of the vendor until paid for. Root knew or had reason to suppose that the machinery would be put up, and it was put up, in the mill, before it was paid for. It was substantially annexed, so that it would pass under a mortgage of the real estate. The greater portion of the purchase money for the machinery being unpaid, Shauts & Co. mortgaged the premises, the mortgagee having no notice of the agreement aforesaid between Root and Shauts & Co. It was held, that the equity of the mortgagee, without notice of the vendor's claim and in reliance upon the vendee's title being absolute, was paramount to that of the conditional vendor.

In delivering the opinion of the court, *Peck, J.*, said, "The defendant Root must have understood, when he sold the property to Shauts & Co. that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it necessarily must be annexed to the realty, substantially in the manner in which it was, and thereby became apparently parcel of the realty. What he knew or had reason to suppose, and did suppose, was to be done with the property, he must be taken to have consented to, as he did not object.

Root, therefore, having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shauts & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between

746 him and an innocent purchaser *or mortgagee of real estate without notice, who advances his money on the faith of a perfect title."

In *Haven v. Emery*, 33 N. H. 66, the plaintiffs had sold and delivered to a railroad company a quantity of iron with a stipulation that it should be laid on a designated portion of the road, and upon payment of a specified price, the rails should become the property of the company, but that, until such payment, they should remain the property of the plaintiffs. The rails were laid on the road as it had been agreed; and the greater portion of the purchase money for the rails being unpaid, the company gave a mortgage on the road. The bill, among other things, charged that the mortgagees, when they took their mortgage, had notice of the agreement aforesaid between the company and the vendors of the rails. The case was heard and decided on demurrer to the bill. Notice being admitted by the demurrer, it was held, that the agreement was good between the parties, and that the mortgage did not affect the title of the vendors of the rails.

Parley, C. J., in delivering the opinion of the court, adverting to the doctrine of the first class of cases hereinbefore cited, and especially *Mott v. Palmer*, supra, that a purchaser of land would be bound by an agreement of the seller, which gives to what would otherwise be part of the land the character of personal property, and vested the title to it in another, though the purchaser had no notice of the agreement, took occasion to say, "We are not yet prepared to acquiesce in such a doctrine. Primarily, and in the absence of notice to the contrary, the purchaser would seem to have a right to suppose that he was buying with all the incidents and appurtenances which the law, as a general rule, annexed to his purchase; and we should hesitate before we held that he could be affected by a private agreement, not brought to his knowledge, which changed the natural and legal character of the property. But if the purchaser buy with notice of the agreement, and of the party's rights under it, he will be bound by it."

747 **Hurt v. Bay State Iron Co.*, 97 Mass. 279, [decided in 1867,] is very much the case of *Haven v. Emery*, supra. There, too, iron had been sold and delivered to a railroad company on the same condition as in *Haven v. Emery*, the iron laid, and, before it was paid for, a mortgage given by the company. In the opinion of the court by Foster, J., it is said, "There can be no doubt

that the rails, when laid upon the road bed and fastened there so that engines and cars could pass over them, would have become annexed to the realty and ceased to be personalty, in the absence of any agreement changing the ordinary rule of law." After citing cases from New Hampshire to the effect that rails so laid would be regarded as still the personal property of the vendors, as between the vendor and the railroad company, but not as to mortgagees without notice, and like cases in Massachusetts, and regarding the laying of the rails on the track as making them realty, he adds, "Upon the question whether the character of property can be changed from realty to personalty as against a bona fide purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be and by its ordinary nature is a part of the realty. *Elwes v. Mawe*, 3 East. 38; 2 Smith's Lead. Cas. 228, and notes. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion in land titles." See also *Breenan v. Whitaker*, 15 Ohio St. 446; *Ewell on Fixtures*, 319.

This author, adverting to the rule supported by the first class of cases above cited, observes that it has been often disapproved; and that the sounder rule, and one more in

accordance with the policy of the recording laws of this *country, is to require actual service or notice of a binding agreement to sever in order to deprive the purchaser or a creditor levying upon the land and fixtures of the right to the fixtures or appurtenances to the freehold.

In the view I take of the case in judgment, it is not material which of the two classes of cases referred to propounds the true doctrine. If the first, it is clear that the machinery, being regarded personalty as to all parties, did not pass under the deed to Conway. If the second, he and the beneficiary (*Shelton*) cannot be considered as in the attitude of bona fide purchasers, if they had notice of the agreement between *Braxton* and *Barry*, that the machinery was partnership assets; and I am of opinion that they did have such notice. They had actual notice of the partnership. That is admitted. They, moreover, had knowledge that the partners were in possession of the factory and machinery annexed and were operating the same. This possession was open, continuous, exclusive, and unequivocal. It was, in law, notice of the interest which the partners had in the property. It was sufficient to put a prudent man, dealing in relation to the property, on enquiry. It made enquiry a duty, which, duly pursued, would have led to knowledge of the existing facts as to the title and the rights of the occupants in respect thereto. Indeed, *Conway* had knowledge during the treaty for the loan, and before it was con-

summed, that Braxton had not then acquired the legal title to the lot. This was an additional circumstance to stimulate enquiry; and, it appears further, that the title to the machinery was a matter brought to the attention of Conway during the negotiation, as the record abundantly shows. Whether Braxton volunteered to represent that he was the owner of the machinery, or whether his representations were in response to enquiries addressed to him by Conway, does not appear, nor is it very material. Neither Conway nor Shelton could be acquitted of want of due diligence without extending *their enquiries to Barry.

If they had enquired of him, as in law they were bound to do, they would have learned the true state of the title to the machinery, and they must be taken to have the knowledge which enquiry, imposed as a legal duty, duly made would have furnished. They had the means of knowledge, and the law imposed the duty to use these means; and means of knowledge, with the duty of using these means, is, in equity, equivalent to knowledge itself. *Cordova v. Hood*, 17 Wall. 1; *Long & others v. Weller's ex'or & others*, 29 Gratt. 347, and notes. See also *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. (4th ed.), Part 1, top. pp. 180-189, where the question of notice by possession is discussed, and numerous cases are referred to and commented on.

I shall refer more particularly to only one case, *Kerr & others v. Kingsbury & others*, 17 Amer. Law Reg. N. S. 638, decided by the supreme court of Michigan in 1878. That case, which was cited in argument by the learned counsel for the appellees, very closely resembles the one now before us.

Kingsbury, being the owner of certain premises in the city of Grand Rapids, leased them for a number of years to the firm of Long & Bennett, who took possession and occupied them for the purposes of a coal and wood yard. The lease contained a provision allowing the lessees thirty days, on its termination, for the removal of the buildings. There were two other leases, but they need not be remarked upon, as they seem to have no bearing on the question of notice, which was raised in the case. During the term, *Kingsbury* purchased of Long his interest in the co-partnership of Long & Bennett, and assumed his place in the business, which was thereafter carried on in the name of *Kingsbury and Bennett*. Buildings have been erected on the premises by the tenants, *Kingsbury* gave to *Kerr* a mortgage on the premises, and the firm, having afterwards failed, made an assignment for the benefit of their creditors. *The buildings were claimed by *Kingsbury's* mortgagee as having passed as realty under the mortgage, and by the assignee of the firm as tenants' fixtures reserved under the lease. One of the questions in the case was, whether *Kerr*, the mortgagee, at the time he took the real estate mortgage, had notice that rights in the buildings were claimed by *Kingsbury & Bennett* as tenants, and the decision of that question depended solely

on the solution of the further question, whether the possession of the tenants was notice or not.

Judge Cooley delivered the opinion of the court, and disposed of the question as follows: "It is true," said he, "as a general rule, that the possession of a grantor or mortgagor is no notice to his grantee or mortgagee that he claims any rights in the premises as against the conveyance he gives: *Bloomer v. Henderson*, 8 Mich. 395; *Dawson v. Danbury Bank*, 15 Id. 489. But here *Bennett*, as well as *Kingsbury*, was in possession, and *Bennett's* rights could not be taken away by any act of *Kingsbury's*. As to *Bennett*, the buildings remained chattels, and it was the duty of *Kerr* to take notice of his rights. If he had done so, and made the necessary enquires, he would have ascertained that the buildings were personalty; for they could not be realty as to one interest and personalty as to another: *Adams v. Lee*, 31 Mich. 440."

Upon the whole matter, I am of opinion that the circuit court did not err in holding that the machinery was first liable to the social creditors of *Braxton & Barry* under the deed made by the firm to secure these creditors, and that the decrees appealed from should be affirmed.

MONCURE, P., and ANDERSON, J., concurred in the opinion of Christian, J.

STAPLES, J., concurred in the opinion of Burks, J.

751 *The decree was as follows:

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court of Fredericksburg is erroneous. It is therefore decreed and ordered that the said decree of the said circuit court be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal and supersedeas here. And this court, now proceeding to enter such decree as the said circuit court ought to have entered, doth adjudge, order and decree that the net proceeds of the sale made by the said W. P. Conway, trustee, as shown by his report in this cause, be paid over to the appellant, the said John C. Shelton, this court being of opinion that the whole fund in the hands of the said trustee is liable, first to the debt secured to the said John C. Shelton by the deed of trust executed by the said Carter M. Braxton and wife on the 14th of April, 1874, to the said W. P. Conway, trustee, to secure said debt.

Decree reversed.

752 **Simmons v. Lyles, Adm'r & als.*

January Term, 1880, Richmond.

I. A widow remains in the mansion house, having with her her two infant children, who she supports, and no assignment of dower is made to her. She

pays a balance of the purchase money due for the property, and secured by the vendor's lien, and she pays the taxes due upon the property. As against judgment creditors of her late husband—**Held:**

1. **Mansion House—Payment of Taxes by Widow—Liens.**—She is entitled to be paid the amount of the taxes she has paid, and they are the prior lien upon the property.

2. **Same—Purchase Money—Payments by Widow—Liens.**—She is to be paid for so much of the purchase money paid by her as was properly payable by the heirs; and this is also a prior lien on the property as against the creditors.

3. **Same—Dower—Interest on Purchase Money.**—Having held the mansion house, and the heirs being infants unable to assign dower, she must be considered as holding as to one-third of the house as dower, and liable to pay one-third of the interest of the said purchase money during her life.

4. **Same—Same—Purchase Money—Payments by Widow.**—It being necessary to sell the property, and therefore to fix the present amount chargeable to her on account of said interest, the annual interest is to be treated as an annuity, to be computed for so many years as she may be supposed to live, regard being had to the state of her health; and the sum so ascertained, in gross, is to be deducted from the amount of the purchase money paid by her.

5. **Same—Same—Rent.**—There being accounts to be taken in the cause, so that the property cannot be sold at once, the court should appoint two or more discreet persons to fix a rent upon the house; and if the widow will take it at the rent so fixed—she to pay two-thirds thereof—it should be rented to her; and as the court has funds of hers under its control sufficient to pay the rent, no security should be required of her.

This is the sequel of the case of *Simmons v. Lyles & als.*, 27 Gratt. 923. After the cause was returned to the circuit court of the town of Danville, there was a decree directing a commissioner to take, among other accounts, an account of the debts against the estate of William T. Simmons, deceased, whether by judgment or otherwise, with the order of their priority. And commissioners were appointed to ascertain whether the lands were susceptible of division in kind, or whether it was practicable to assign to the widow of said Simmons her dower in

***Right of Married Woman to Redeem Mortgage.**—In *Gatewood v. Gatewood*, 75 Va. 407, it was held that a woman who has relinquished her dower in order that the land might be mortgaged may redeem the mortgage, and thereby prevent a disastrous foreclosure and sale of the property including her dower interest.

Priority of Taxes.—See *Thomas v. Jones*, 94 Va. 756; *Comm. v. Ashlin*, 95 Va. 145. The principal case is distinguished in *Dillard's adm'r v. Dillard et al.*, 77 Va. 823.

†Dower—Mansion House.—In *Devaughn v. Devaughn*, 19 Gratt. 556, it was held that the widow is not entitled as of right to have the mansion house included in the dower assigned to her; and that such assignment should be based upon both the annual and fee simple value of the property.

kind, and they reported that it was impossible so to assign it.

The commissioner reported the debts of Simmons' estate at \$10,006.39. Of these there were three reported as due to Mrs. Simmons, and as entitled to priority over all others. The first was for money paid by her to Jamieson, the original plaintiff, for the balance of purchase money due upon the land, \$319.53. 2d. for money paid by her for taxes and assessments upon the mansion house in which she lived. 3d. For money paid by her for improvements on the property, \$723.69. There were five judgments, which had been recovered as early as 1857 or 1858, against Simmons, as a member of a firm which before that time was engaged in business at Pittsylvania courthouse.

Four of these judgment creditors did not set up their claims against the estate until after the cause went back; and they were all reported as having priority over the debt of Lyles.

The only real estate of Simmons which remained unsold appears to have been his mansion house in which he lived. After his death his widow, Mrs. Simmons, continued to live in it with her two infant children, who

were supported by her—no dower having been assigned to her. She paid the balance of the purchase money due upon it, as ascertained by a previous decree in the cause. She also paid the taxes and assessment on the house; and she paid for repairs upon it; but these repairs, though they amounted to a considerable sum in the whole, seem to have been only such as was necessary to render the house comfortable.

The creditors filed several exceptions to the report of the commissioner. The second was—To the credit to Mrs. Simmons for the balance of the purchase money paid by her. The third was—To the credit for the taxes paid by her. The fourth was—To the charge for repairs and improvements to the house.

The cause came on to be heard on the 6th of May, 1878, when the court overruled the second exception, and sustained the third and fourth; and recommitted the report with instructions to settle the account of Simmons' administrator, and to take a further account of debts and their priorities. And it appearing that dower in the realty could not be assigned, and the court being of opinion, that a sale thereof before the accounts directed have been taken would be premature, decreed that H. E. Barksdale, who is hereby appointed a commissioner for the purpose, after two weeks' advertisement in the *Danville News*, and by printed handbills posted at three or more public places in the town of Danville, proceed to rent at public auction to the highest bidder, the house and lot in the proceedings mentioned, on the premises, for the period between the date of said renting and the 1st of January, 1879, for one-fourth cash, the balance in two, four and six months, with interest from date, requiring the lessee to execute bond with approved security therefor; and if the widow of said decedent shall be the highest bidder, said commissioner

shall deduct from the rent to be paid one-third—she being entitled to the same as dowager. But before Commissioner Barksdale shall, &c.

755 *And thereupon, Mrs. Simmons applied to a judge of this court for an appeal; which was allowed.

H. Robertson, for the appellant.
Jno. A. Meredith, for the appellees.

STAPLES, J., delivered the opinion of the court.

This is a controversy between the appellant, the widow of William T. Simmons, on the one hand, and the judgment creditors of said Simmons on the other. The appellant has been in possession, with her infant children, of the mansion house of the deceased husband since his death, without having dower assigned to her. During that time she has paid the taxes annually chargeable upon the property, and she now claims the right to be subrogated to the lien of the commonwealth, and to have the amount so paid refunded to her out of the property. This claim is resisted by the creditors on various grounds. The statute defining the rights of the appellant is as follows:

"Until her dower is assigned her, the widow shall be entitled to demand of the heirs or devisees one-third part of the issues and profits of the other real estate which was devised or descended to them, of which she is dowerable; and, in the meantime, may hold, occupy and enjoy the mansion house and curtilage without charge." Sec. 8, ch. 106, p. 854, Code of 1873.

This provision is a substitute for what is known at common law as the widow's quarantine—a right to hold and occupy the capital message or mansion house for forty days after the husband's death, and during that time to be provided with all necessities at the expense of the heir, and, before the termination of forty days, to have her dower assigned her. If, however, the forty days expired without her dower being
756 assigned, she might be turned *out of possession, and put to her action for the recovery of her dower.

Under the statute, the condition of the widow is greatly improved; for she has the right to remain in the mansion house, without charge, until the heir, or some one for him, assigns her dower. 1 Lomax Digest, p. 109.

It is a matter of more difficulty to determine the precise nature of the widow's interest in the mansion house under this statute. On the one hand, it has some incidents of a life estate, which is defined to be a freehold interest in land, the duration of which is limited to the life or lives of a particular person or persons, or to the happening or not happening of some uncertain event. For it has been held, it matters not how contingent or uncertain the duration of the estate may be, or how probable is its determination, if it is capable of enduring for a life, it comes within the category of estates for life. 1 Washb. on Real Property, 103. Inasmuch, therefore, as the assignment of dower may never be made, as

the widow may remain in the mansion house during her lifetime, it is argued that she is to be regarded as having a life estate; and so it has been held in New Jersey under a statute somewhat similar to ours. *Ackerman v. Shelp*, 3 Halst. R. 125; *Craige v. Morris*, 25 New Jer. Eq. Re. 467. And this doctrine has been cited with seeming approbation by Chancellor Kent. 4 Kent Com. p. 62.

On the other hand, the supreme court of Alabama, consisting at the time of very able judges, in the construction of a similar statute, has decided that the widow has no vested estate in the mansion house, "but a mere right to hold and occupy until dower is assigned her. It is but a permissive possession, determinable whenever the heir or person holding the fee elects to assign dower." *Weaver & Gains v. Crenshaw*, 6 Alab. R. 873; *Inge v. Murphy*, 14 Alab. R. 289; *Shelton v. Carroll*, 16 Alab. R. 152.

A like decision has been made by **757** the supreme court of *Kentucky. *Porter's heirs v. Robinson*, 3 A. K. Marshall's R. 1113.

We are inclined to think the doctrine of the Alabama court is in the main the more correct exposition of the statute. At common law, upon the death of the husband the freehold is cast upon the heir; the widow has no estate in the land until dower is assigned her. She has neither seizin nor a right of entry, but a mere inchoate interest, a right of action for the recovery of her dower. 2 Scribner on Dower, p. 26. Whilst, under the statute, she has the privilege of occupying the mansion house, it is at the pleasure of the owner of the fee. He may enter at any time, assign dower, and put an end to her possession and interest. A possession thus held at the mere will of another is of too precarious a nature to be termed a freehold estate in land.

Again, one of the duties devolving almost universally upon a tenant for life is to prevent the buildings and fences from going to decay by proper and suitable repairs, and also to keep down the interest accruing upon existing encumbrances. The rule with regard to the interest is said to be so inflexible that the tenant is required to pay it, even if it takes the whole of the rents and profits of the estate. *Poindexter's ex'ors v. Green's ex'ors*, 6 Leigh, 504.

If the widow occupying the mansion house, under the statute, is to be regarded as tenant for life, and therefore bound for the taxes, the learned counsel will find it difficult to assign a good reason why she is not equally bound to the performance of the other duties usually recognized as incumbent upon the tenant for life. 1 Wash. on Real Property, 135. We think the interest of the widow under the statute is more analogous to a tenancy at will than a life estate. It is not meant to say it is actually such a tenancy, because that, perhaps, can only arise under contract; but that it has most of the features of an estate at will. For a tenancy at will is a tenancy at the will of either

758 *party. It may arise by implication of law: as where the tenant is in pos-

session by consent of the owner for an indefinite period with some other intention than to create the relation of lessor and lessee. 1 Washb. 510. The effect of the statute is merely to extend the quarantine. The object manifestly was to coerce the heir to assign dower, and until this was done, to protect her in the enjoyment of the homestead and the rents and profits accruing therefrom.

It is also to be borne in mind that our laws have provided no mode of compelling the widow to pay the taxes accruing upon the mansion house during the period of her occupation.

Upon the death of the owner intestate, his real estate descends upon his heirs. It is charged to them upon the commissioner's books, and to them exclusively the law looks for the payment of the accruing taxes. The widow occupying the mansion house is not known, nor is her interest recognized in the various statutes relating to the collection of the public revenues. *Blodget v. Brent*, 3 Cranch. C. Ct. R. 394. If the heir is in default in paying them, her goods and chattels on the premises cannot be held liable. She does not claim under the heir as tenant, but independently of him, and by appointment of law. Code 1873, ch. 4, § 37.

It is very true that the commonwealth, having a lien on the property for taxes, may enforce that lien against the widow, not because she is personally liable, but because the estate is bound for the commonwealth's dues, even in the hands of an innocent alienee.

And if, through the default of the heir, the widow, to save her estate, is compelled to pay what the law requires him to pay, she may compel him to refund the amount so paid for his benefit.

In all this, the heir has no just cause of complaint. If he is unwilling to pay the taxes whilst the widow is in the occupation of the mansion house, all that he has to do is to assign her dower, and thus relieve

759 himself of the taxes *upon one-third of the estate. Failing in this, it is fairly to be presumed he is content to bear the burden upon his inheritance, notwithstanding the widow may be in the possession and enjoyment of it.

These views are undoubtedly correct as applied to an adult heir, whose duty it is to assign dower, and who is delinquent in the performance of his duty.

But the rule is by no means so clear as applied of an infant heir of tender years, without other guardian than the mother, and who continues to reside in the mansion house without applying for an assignment of dower.

In such case the heir, being under control of the mother, cannot himself assign dower. He cannot take a step towards the protection of his rights. The widow may choose to remain in the occupation of the mansion house, to demand one-third of the rents and profits of the other real estate, and thus cast upon the heir the entire burden of paying the taxes upon the whole estate. In a case of that sort, and in other cases of like kind, it may

be a grave question whether the widow as the natural guardian of the heir, being in default with respect to the dower, would not be held to contribute her ratable proportion of the taxes. The case of *Grayson & wife v. Moncure*, 1 Leigh, 449, although not involving this precise point, was decided on grounds analogous to those now presented.

The revisors of 1849 reported a provision giving to the widow the right to occupy and have the issues and profits of the mansion house, and the tract of land on which it is situate, until the assignment of dower; but if she be the guardian of the heirs, she shall account with her wards for two-thirds of the said issues and profits. 2d Report of Revisals, p. 566, §§ 8-9. The legislature, however, struck out so much of the section reported as gave to the widow the right to occupy the land, and imposed upon her a liability for two-thirds of the rents and profits, and adopted the statute as it now stands, giving to her the possession of

760 *the mansion house and curtilage, without charge; thus indicating plainly a purpose to exempt the widow from all liability during the period of her occupancy, even though she might be in default in failing to apply for an assignment of dower. Possibly the legislature may have supposed that where there are infant heirs, they would generally reside with the mother in the mansion house, and upon her would devolve the whole burden of their support. Whatever advantage she might derive from the use of the property would generally be met by a corresponding burden in taking care of and maintaining the infant heirs. We do not deem it necessary now to decide what are the cases in which the widow, as between herself and her infant children, would be precluded from asserting against them, or against the estate, a claim for reimbursement of taxes paid by her. In the present case, we think she is entitled to have refunded her what she has so paid. Bearing in mind that the appellant, according to the views already presented, is not legally liable for the taxes; that they are not charged to her on the commissioner's books; that the law has made no provision by which they can be collected from her, but that they constitute a lien on the property as against the heirs and against the creditors in favor of the commonwealth—let us enquire whether, in this case, she is not entitled to be substituted to that lien. In the first place, then, the infant heirs are not interested in the present controversy. The claims of creditors in any aspect of the case are more than double the value of the property. The contention is, therefore, between the appellant on the one hand and the appellees on the other, as creditors. Whilst the latter have liens, by judgment, on the property, they have no claim, even against the heirs, to rents and profits, until a decree of sale or sequestration. As against the widow, they have no pretense of claim for such rents and profits, until assignment of dower. As against them, she is legally entitled to the use and occupation,

761 *rents, issues and profits of the mansion house and curtilage, free of all

charge, until that assignment is made. The lien of the commonwealth for taxes is paramount to the lien of their judgments, and must first be satisfied.

If these taxes are not or cannot be paid by the heir, some one must pay them while the litigation is pending in order to preserve the property from a forced sale by the commonwealth. The obligation of the widow to pay them for the protection of her interest is no greater than that of the executors to pay for the protection of theirs. As the statute gives her the right to occupy without charge, they cannot impose upon her the duty of discharging the taxes, as a condition of her occupation. If one of them should pay in order to prevent the commonwealth's sale, he would have the right to be refunded the amount so paid. She stands upon ground equally high. If it be said she has the use and occupation of the property, in the meantime, the answer is that under the statute she is entitled to it without charge; but if she be compelled to pay the taxes, then to that extent she is charged for the privilege of remaining in the mansion house. The further answer is, that in this case during all the period of the occupation of the mansion house by the widow, she has maintained and supported the two infant heirs out of her own scanty means. If, therefore, they have sustained any loss by the widow's failure to have dower assigned her, and by her occupation of their two-thirds, they have been more than compensated by the support and maintenance furnished them. The appellees cannot complain of this, for if the appellant had not paid the taxes, they must have remained a charge upon the property, to be finally satisfied by a process of sale, or the appellees must have paid them as they accrued during the process of litigation. The original bill in this case was filed in July, 1868, merely for the purpose of enforcing a vendor's lien, for a small balance of unpaid purchase

762 money, which was *ultimately paid by the appellant out of her own means. At that time it was not known or believed there was any other debt of any magnitude against the estate. Two years afterwards, in 1870, R. W. Lyles filed his petition claiming to be a judgment creditor of the intestate. In November, 1871, the circuit court rendered a decree for the sale of the property, without having assigned the appellant her dower, or even ascertaining its commuted value. Upon appeal, that decree was reversed by this court in 1876, and remanded for further proceedings.

When the commissioner proceeded to take the account directed by the decree of this court in 1878, then for the first time, all the claims against the estate, with one single exception, were asserted. With reference to these claims the commissioner reports, "They are all antiquated judgments recovered, not against the intestate individually, but against him as one of a long since defunct concern, which have slept in the archives of the courts of Pittsylvania county for many years, and have been now, after the decedent's death, dragged forth, and therefore the commis-

sioner has been inclined to look more favorably upon the claims of the widow." Without stopping now to enquire into the correctness of this conclusion of the commissioner, it is certain the taxes were paid by the appellant out of her own scanty resources during the pending of the litigation, and in entire ignorance of the claims which have been since asserted against the estate. It so happens that the only creditor who exercised any diligence in preferring his demand, R. H. Lyles, is entirely excluded from any participation in the fund by the prior liens of the creditors who did not appear until 1878, and who now claim that the discharge of the commonwealth's lien by the appellant shall ensue to their exclusive benefit.

Subrogation is the creature of the chancery courts. It is not founded upon any idea of contract, but upon principles of equity and good conscience. It is a mode 763 which *equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it. Brandt on Suretyship, § 260. It is not essential that the party invoking the remedy should technically occupy the position or relation of surety for the debt. It is enough that he is required to pay for his own protection and indemnity, or to relieve his estate of a subsisting lien or incumbrance accruing by operation of law, or created by act of the party in whose behalf the payment is made. The appellant, in paying the taxes, cannot be considered a volunteer. The property of which she has possession under the statute was debtor to the state, and she had the right to make the payment for her own protection and indemnity, and to look to the property for reimbursement.

It has been said, however, this principle could not be applied in this case, because it would carry with it also the commonwealth's right of distress for taxes. But this is not a legitimate conclusion.

A creditor may have a lien by execution on his debtor's personal property, and a lien by judgment on his realty. When the surety pays the debt, the lien of the execution is gone, but a court of equity keeps alive the lien of the judgment on the real estate for the benefit of the surety. And so when the taxes are paid by one standing in the relation of surety, the remedy at law by distress is gone, but the lien would still be preserved in the equity forum, upon the real estate, if necessary, for purposes of justice. If that court cannot give to the party all the remedies of the commonwealth, it is no reason it should not afford such as are appropriate to its jurisdiction.

For these reasons we are of opinion that the circuit court erred in sustaining appellee's third exception to the commissioner's report and in refusing to allow appellant a lien upon the house and lot in controversy for the taxes paid by her.

The next question is whether the 764 appellant is to be paid *for the improvements upon the property she claims to have made during the time of her occupancy. There is no doubt that these improvements

were of some advantage to the property, and probably contributed to its increased value. The appellant appears to have paid over \$700 in that way, principal and interest. An examination of the several items of the account will, however, show that the expenditures were of such a character as the occupying tenant might well make in the way of repairs in consideration of the use and enjoyment of the property. And although she was not bound to make them, they contributed to her own beneficial enjoyment and comfort. We are therefore of opinion she is not entitled to be repaid these outlays.

We think, in allowing her for the taxes paid and rejecting the account for improvement, the equity of the case is fully attained and justice done to all the parties. We are therefore of opinion the circuit court did not err in sustaining appellee's fourth exception to the commissioner's report for alleged improvements made by her.

This brings us to the question of the appellant's right of substitution to the lien of James Jamieson, the vendor of the property for the balance of the purchase money, which was paid by the appellant. There is no doubt of the appellant's right to be substituted to this lien, a right which appertains to her as occupant of the property under the statute, and also by virtue of her title to one-third of the premises upon the assignment of dower. The commissioner reported in favor of her claim, and the circuit court rightly sustained the report.

A question has been presented with respect to the appellant's obligation as doweress to contribute to the discharge of this lien on the estate, which is paramount to her right of dower. The rule is well settled in such cases, and is, that where the whole debt due the mortgagee or vendor is to be paid, the widow must pay in gross a sum equivalent to one-third of the annual interest **785** during her life. That *sum is ascertained by fixing the present value of an annuity equal to the interest upon one-third of the debt, computed for so many years as she may be supposed to live, according to the tables of the chances of life, and to the state of her health. 1 Wash. on Real Estate, 111-2-18, 291.

In this case the appellant has paid off the incumbrance, but the rule is not thereby varied.

The amount for which she is liable must be ascertained in the mode already indicated, and the sum deducted from what she has paid in discharge of the vendor's lien. The balance due her constitutes a lien on the property, in her behalf.

The last and only remaining point to be considered is that part of the decree which directs the property to be rented out until the accounts can be taken and a sale made.

It is said this is erroneous because the appellant has the right to occupy the mansion house free of charge until dower is assigned her; and if that cannot be done, then she has the right to occupy till the sale is made and the commuted value ascertained and

paid to her. The circuit court, after proper enquiries upon this point, determined that it was impracticable to assign dower in kind, and that a sale of the property was necessary; and the appellant does not complain of this. It is, of course, impossible to ascertain the commuted value of the dower interest, or to pay it until the property is sold. The decree for a sale could not, however, be entered immediately because certain accounts were necessary to settle the priorities of those having claims against the estate. In the meantime, it would be unjust to the creditors for the appellant to occupy the whole property free of charge. The court has done all it could do in the way of assigning her dower, and the fact that it is wholly impracticable to do so should not place her

786 in a better position than she would be had dower been *assigned. The most that she can require is, that she be permitted to remain in possession, paying rent on two-thirds of the property. The decree is, however, erroneous in two particulars: First, in directing the property to be publicly rented out to the highest bidder, and in requiring the appellant to give bond, with approved security, for the payment of the rent.

The effect of such a proceeding would probably, or might be, to force the appellant either to pay an excessive rent or to vacate the premises; and besides, she might be unable to furnish the required security. The amount due the appellant by reason of her dower, and her claim for taxes, constitutes an ample fund, under the control of the court, to secure the payment of the rent.

The proper course to be pursued was to appoint two or more discreet commissioners to fix the rental value of the property, with the privilege to the appellant to take it at that value; and in the event of her refusal, then to expose the property to the highest bidder at public outcry. And in either event, if the appellant becomes the vendee, the court to retain a lien on the amount due her, or so much as seems necessary, as security for the payment of two-thirds of the rent agreed to be paid.

For the reasons already stated, the decree of the circuit court must be reversed, and the case remanded to that court to be there proceeded with in conformity with the views herein presented.

MONCURE, P., concurred in the result.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellant is entitled to be substituted to the lien of the commonwealth for the taxes paid by her upon the property in controversy, **787** according *to the report of Commissioner Harrison of the 16th April, 1878; and that the said circuit court erred in sustaining the exceptions of appellees, James C. Silleman & Son and R. W. Lyles, administrator, to so much of said report as allows the appellant a lien for said taxes in preference to the claims of other creditors. The court is further of opinion that the

appellant is entitled to be substituted to the lien of James Jamieson, the vendor, for the balance of purchase money which has been paid by appellant, and the circuit court did not err in so holding. But the court is further of opinion that as the appellant is liable for the interest accruing during her life upon one-third of said unpaid purchase money, she ought now to be charged with a sum in gross, to be ascertained by fixing the present value of an annuity equal to said interest to be computed for so many years as she may be supposed to live, regard being had to the state of her health; the sum so ascertained in gross to be deducted from the amount so paid by her, and the balance to constitute a lien in her behalf on the proceeds of sale under the control of the court.

The court is further of opinion that the circuit court, instead of a public renting of the property in controversy to the highest bidder, ought to have appointed two or more discreet commissioners to ascertain and assess the rental value of said property, reserving liberty to the appellant to become the lessee at such valuation; and if she declined or refused so to be, then the property is to be rented out to the highest bidder. But in either event, if the appellant shall become the lessee, the court, instead of requiring her to give bond with approved security, should retain a lien upon the fund belonging to her under its control as security for two-thirds of the rent.

It is therefore decreed and ordered that for the errors aforesaid the decree of the said circuit court, to the extent here mentioned, be reversed and annulled, and 768 in all other respects affirmed; and that the appellees, James C. Silleman & Son and R. W. Lyles, administrator, out of the assets, &c., do pay to the appellant her costs by her expended in the prosecution of her appeal and writ of error aforesaid here. And it is further ordered and decreed that the cause be remanded to the said circuit court to be there proceeded with in conformity to this decree.

Decree reversed.

769 *Carter & al. v. Grant's Adm'r.

January Term, 1880, Richmond.

1. **Rent—Distress—Bond—Proof.**—On proceedings upon a forthcoming bond given on a distress for rent, whether by motion or by action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out.
2. **Same—Same—Judgment.**—On such proceeding, though the warrant of distress was for more rent than was due, the plaintiff may have judgment for the less amount due.

In January, 1866, James H. Grant made oath before a justice of the peace that S. S. Carter and E. H. Monteiro, partners, under the style of Carter & Monteiro, were indebted to him for rent of a house in the city of Richmond for three months, due the 1st of January, 1866, \$1,000. Upon this affidavit the

justice issued a warrant of distress for the rent of \$1,000, which went into the hands of the high constable of the city, who levied the same on the property of Carter; and Carter thereupon executed a forthcoming bond, with Parker Campbell as his surety. In February, 1866, Grant gave notice to Carter and Campbell that he would move for judgment and award of execution upon this bond. And nothing further seems to have been done in the case, except to revive it in the name of Grant's administratrix, until May, 1876; when the case was taken up, and the court rendered a judgment in favor of Grant's administratrix for \$2,060.20—the penalty of the bond—to be discharged by the payment of \$500, with interest thereon at six per cent. per annum, from the 1st of January, 1866, till paid.

770 *In the progress of the cause, the defendants took two bills of exceptions to the rulings of the court, and applied to a judge of this court for a writ of error and supersedeas; which was allowed. The case is stated by Judge Burks in his opinion.

Wm. W. Crump, for the appellants.
Johnston, Williams & Boulware, for the appellee.

BURKS, J., delivered the opinion of the court.

This a writ of error to a judgment of the hustings court of the city of Richmond, awarding execution against the plaintiff in error on a forfeited forthcoming bond taken on a warrant of distress for rent.

After plaintiff had proved notice of her motion, and had shown in evidence the forthcoming bond, the distress warrant, the officer's return thereon, and the affidavit on which the warrant was issued, the defendants, resisting the motion, stated, through their counsel, "that their defence was that there was no such contract of rent as is set out in said affidavit and claim, and demanded that the plaintiff should prove the contract as alleged; but the court refused to require the plaintiff to make any further proof than that contained in the said papers, until the defendants showed by evidence such defence as is allowed by the statute; the court being of opinion that, upon this state of the case, the plaintiff was entitled to award of execution; to which opinion and decision of the court the defendants, by their counsel, excepted."

The defendants, however, did not rest on this exception, but proceeded to give evidence to sustain the defence before stated; the plaintiff adducing no evidence in addition to that already mentioned as offered by her in opening the case.

771 *After hearing the evidence and arguments of counsel, the court gave judgment against the defendants for the penalty of the forthcoming bond, to be discharged by the payment of five hundred dollars, (the amount of rent ascertained to due), with interest thereon, and for the plaintiff's costs on the motion. To this judgment the defendants, by counsel, also ex-

cepted; and the court certified the facts proved on the hearing.

There are but two questions arising on the record.

The first is, whether, on the plaintiff's evidence, without any proof by the defendants, she was entitled to award of execution. Or, in other words, whether, after the defendants stated the grounds of their defence and demanded proof of the contract under which the plaintiff claimed the rent specified, the plaintiff was entitled to award of execution, such proof not being furnished. Substantially, the question is, in the state of the case as presented, upon whom was the burden of proof? Was it upon the defendants to show that there was no contract of lease, or none on which rent claimed accrued, or was it for the plaintiff to prove a contract and rent reserved under it?

Certainly, if the rent claimed was not due by contract, there was no right of distress. It was of the essence of the right to distress, that there should have been a contract. In the absence of a contract, the distress was illegal.

When the action of replevin was in use, the landlord in his avowry set forth his title, the contract of demise and tenancy thereunder, which, of course, included a statement of the term and amount of rent to be paid, and he also alleged the amount of rent in arrear, and then avowed the taking of the goods and chattels of the tenant as for a distress for the rent so in arrear.

If the tenant wished to put the contract in issue, he did so by proper plea, which was either non demisit or non tenuit. These pleas concluded to the contrary, and upon
772 *issue joined thereon, the burden was on the avowant, and he was held to the strictest proof of the contract as laid in the avowry. If there was no rent due at the time of the distress, there was an appropriate plea for such a case, styled in law French, *riens in arriere* (nothing in arrear).

Such a plea admitted the demise and tenancy, and averred the single proposition that the rent was not in arrear when the distress was made. *Alexander v. Harris*, 4 Cranch, 299. On the trial of this issue, it was for the tenant to show the truth of the plea. *Cooper v. Egginton*, 8 C. & P. 743, (34 E. C. L. R. 618). There were other pleas not necessary to be noticed, in which the onus was on the plaintiff or defendant, as one or the other might have the affirmative of the issue.

When the action of replevin was abolished at the revival of 1849 (Code of 1873, ch. 145, § 4), the new remedy for illegal distress, resorted to in the present case, was substituted. The tenant was allowed to give a forthcoming bond,* and in any action or motion on such bond, it is provided, that "the defendant may make defence on the

ground that the distress was for rent not due in whole or in part, or was otherwise illegal." Code of 1873, ch. 185, § 4.

As was said by the President of this court, in the opinion delivered in *Allen & others v. Hart*, 18 Gratt. 722, the substituted remedy "was professedly intended to be, not only a simpler and easier remedy than the old one, but at least as beneficial, especially as to the tenant;" and further, that the tenant "acquires the right of making, in the action or motion of the bond, all the defences which he could formerly have made in the action of replevin, including the defence of set off."

The forthcoming bond does not estop him.

It is provided as a means of securing
773 the rent distrained for, without prejudice to his right of contesting the legality of the distress, when any attempt is made to enforce the security. In some measure, it stands in the place of the replevin bond under the former remedy. When executed it operates to release the property distrained and restore it to the possession of the tenant. The landlord may proceed on the bond, when forfeited, either by regular action, or in a more summary way, by motion. If he bring his action, a plea to the effect that there was no contract for the rent claimed would be admissible, and a good plea in bar: for, if true, the distress was illegal. If issue were taken on such a plea, he would hold the affirmative, and, on familiar principles, it would devolve on him to prove the contract, as much so as on the plea of non demisit or non tenuit in an action of replevin. The case is not altered, when he proceeds by motion, in which there are no formal pleadings. It is sufficient, that the defendants deny the contract, and call upon him to prove it. This is certainly no hardship on the landlord, the power of distress being an extraordinary power, and, as has been said, "almost the only case wherein a party is his own carver." Pratt, C. J., in 5 Geo. 3, as quoted in 6 Rob. Prac. 542. See also what was said by Judge Lyons in *Tuberville v. Self*, 4 Call. 580, 588.

We are of opinion, therefore, that when the defendants stated the grounds of their defence and demanded that the plaintiff should be required to prove the contract under which the rent distrained for was claimed, the hustings court erred in not requiring such proof to entitle the plaintiff to award of execution, the onus probandi in that state of the case being on the plaintiff; and if the defendants had rested their case on the exception taken to the ruling of the court on this point and proceeded no further, the judgment must have been reversed for error. But they did proceed further, taking the laboring oar, and undertook themselves to
prove and did prove a contract of

774 lease *under which the plaintiff's claim arose, and therefore the error committed by the court in the ruling complained of was not to the material prejudice of the defendants on the hearing.

This brings us to consider the second and only remaining question, whether there was any error in the judgment on the merits.

*NOTE BY THE JUDGE.—See act approved March 12, 1878, (Acts of Assembly, 1877-78, ch. 226, p. 211) dispensing with forthcoming bond on certain conditions, and allowing defence to be made without giving bond.

From the certificate of the facts, it appears that the plaintiff's intestate, James H. Grant, demised the premises to the defendant Carter and to Monteiro for a term commencing on the 1st day of January, 1865, and ending on the 1st day of January, 1866. In April, 1865, Carter and Monteiro agreed to pay rent for the premises at the rate of \$3,000 for the remainder of the year. In July, it was further agreed between the parties the tenants should pay at the rate of \$1,000 additional, upon condition that they should have the refusal of the premises as lessees for the ensuing year (1866). Between July, 1865, and January, 1866, one thousand dollars were paid on account of rent, and some time before January, 1866, Grant rented the premises to one Smith for the year 1866, without giving to Carter and Monteiro the option, stipulated for in the agreement of July, to renew the lease for that year. Carter and Monteiro removed from the premises at or about the end of the year 1865, and Smith entered in possession on about the 1st day of January, 1866. Grant claimed \$1,000 as rent for the last quarter, three months, ending on the 1st day of January, 1866, for the recovery of which, payment being refused, the distress warrant was issued. Upon these facts, the court gave judgment against the obligors in the bond for \$500, just one-half of the amount for which the distress was made.

The bill of exceptions does not state the reasons which conducted the judge to the conclusion he reached as to the amount of rent in arrear, but they seem to be clearly deducible from the certificate of facts. According to the agreement of April, 1865,

775 the rent for each successive *quarter was \$750. By the agreement of July, the rent for the two remaining quarters was increased to \$1,000 for each quarter, and the rent (\$1,000) for the first of these quarters was paid. The court must have considered that, as the contract of July was conditional, and the condition was not kept by Grant, he was not entitled to the benefit of that agreement, but must stand on the agreement of April, under and according to which the last quarter's rent would be \$750 only, instead of \$1,000 as claimed under the agreement of July; and inasmuch as the amount (\$1,000) paid for the first quarter under the latter agreement was in excess of the sum (\$750) actually due under the agreement of April, that excess (\$250) was deducted from the true amount (\$750) due for the last quarter, and judgment given for the remainder (\$500).

The main, if not the only objection urged against this judgment by the plaintiff in error is, that the amount of rent in arrear, as shown by the evidence and ascertained by the judgment, is less than the amount claimed in the distress warrant and the proceedings thereon, and that for this variance the forthcoming bond should have been quashed, and judgment rendered for the defendants.

In the action of replevin, under the strict rules of pleading applied, the contract must be proved as laid in the avowry. In *Brown v. Sayce*, 4 Taunton, 320, cited in argument,

the avowry was on a contract for 110 pounds rent, and the demise proved was for 111 pounds. The variance, though slight, was regarded by Lord Mansfield as material; but he gave leave to amend. The variance, it will be observed, related to the contract. Greater liberality seems to be indulged where the variance is between the amount of rent avowed to be in arrear, for which the distress is made, and the amount shown to be due. In such case, the general rule appears to be that, notwithstanding the variance, the avowant shall be allowed to recover a less sum

than he has claimed in the avowry as **776** in arrear. *In *Forty v. Imber*, 6 East 433, Lord Ellenborough said, that there had been no case since the statute of 11 Geo. 2. c. 19, § 22, where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much as was due. It is, he said, the constant practice. And in *Johnstone v. Hudleston*, 4 B. & C. 922. (10 E. C. L. R. 471, 475), it was observed by Bayley, J., that if a defendant in replevin claims more than is due to him, he may recover what is due, provided that be part and parcel of that which he claims by his avowry. The variance, however, was deemed material in *Roskrige v. Caddy*, 7 Wels., Hurlston & Gordon, 839. (Excheq. Rep.). The statute—11 Geo. 2.—referred to in *Forty v. Imber*, supra, provided for general avowries, and was intended to relieve landlords from the difficulties which they before labored under in making avowries, and a similar statute was enacted in this state March 19, 1833. (See acts of assembly 1833-4, p. 76). This enactment was subsequent to the decision in *Southall v. Garner*, 2 Leigh, 372.

But the rules pertaining to the action of replevin cannot be applied with any strictness to the remedy which has been substituted for it. It was, in part, to get rid of the niceties and difficulties attending that action that it was abolished, and a simpler remedy provided. The tenant may still make any defence that shows the distress to be illegal, but the parties are not to be trammelled by the rules of pleading peculiar to the old proceeding. A warrant to distrain for rent must be "founded upon an affidavit of a person claiming the rent, or his agent, that the amount of money or other thing to be distrained for, (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract, from the person of whom it is claimed." Code of 1873, ch. 134, § 10.

The "amount of money or other thing to be distrained for" should be truly stated, **777** but it was not every variance *that would defeat a recovery. Where the variance appears in an action or motion on the forthcoming bond, it may be aided by the statute concerning amendments. Code of 1873, ch. 173, § 7. It is true that the statute in terms applies only to trials by jury, but a motion to be decided by a court comes within its spirit. The act provides that "the court may direct the jury to find the facts, and after such finding, if it consider the variance

such as could not have prejudiced the opposite party, shall give judgment according to the right of the case." So, we think, it may give judgment where the facts are found by the court in a case to be decided by it without the intervention of a jury. In our opinion, the defendants were not prejudiced by the variance which appeared in the present case. According to the proof, there was a contract of lease for one year, the terms of which were not shown, and that contract was modified in April of that year, and again in July. The plaintiff was certainly entitled to the rent in arrear for the last quarter. It was doubtful, especially as the defendants had acted under the agreement of July by paying rent under it, whether he was entitled to the amount as fixed by the agreement of April or that of July. He distrained for the latter. The court decided that he was entitled to the former—to wit: to the sum of \$750. Judgment might have been given for that sum without abatement; but as he had received under the agreement of July \$250 in excess of what he was entitled to receive under the agreement of April, which the court considered the true contract, the defendants were credited by that sum, although they filed no claim of set off or asked for any deduction for such excess. We think the judgment was properly rendered for the amount of rent in arrear shown to be the just amount by the defendants themselves.

Something was said in the argument about the fees and commissions of the officer included in the forthcoming bond. The commissions were calculated as \$1,000, 778 whereas *the rent adjudged to be due was only \$500. Whatever cause of complaint there might have been, if the judgment had embraced the commissions charged, the defendants were not injured by including these commissions in the bond, as the judgment rendered included neither the fees nor commissions. It was given only for the \$500 and interest and costs of the motion. Of this omission, the plaintiff might complain, at least to the extent of commissions on \$500, but she does not. It certainly was not to the prejudice of the defendants.

We are of opinion that the judgment of the hustings court should be affirmed.

Judgment affirmed.

779 *In re Broadus. In re Walsh.

January Term, 1880, Richmond.

Absent, Staples and Burks, J's.*

1. Judges—Term of Office—Constitutional Provision.†—Under the constitution of Virginia it is provided that the terms of the judges of the

*Judge Staples' brother was interested in the question, and Judge Burks was personally interested in a kindred question.

†**Judges—Term of Office—Constitutional Provision.**—In *Jameson v. Hudson*, 82 Va. 281, the court, referring to the holding of the principal case, said: "The correctness of this construction, it is true, was denied by a majority of the court in the cases of *ex parte Meredith*, *Bland & Giles Co. Judge*

county courts shall commence on the 1st of January, and they shall hold their office for six years, and until a successor is elected and qualified. The term of a judge having ended on the 31st of December, 1879, his successor was elected on the 12th of January, 1880—*HELD*: His term commenced on the 1st of January, 1880; and he is the judge of the county from the time of his qualification, and authorized at once to exercise the authority and discharge the duties of the office.

Edward C. Minor was elected in 1873 as judge of the county court of Henrico. He went into office on the 1st of January, 1874, and his term of office ended under the constitution and law on the 1st January, 1880. On the 12th of January, 1880, Edmund Waddill, Jr., was elected judge of the county court of Henrico, and was duly commissioned and qualified. And the question having been raised as to the time when the said Waddill's term of office commenced, and there being many other cases of the same kind in the state, it was agreed by the said Minor and Waddill, to make a case which might be at once brought before the court of ap- 780 peals, by which the question might *be judicially settled. Accordingly at the February term of the county court, Judge Minor opened the court, and made an order committing the deputy sheriff, William Walsh, for a contempt in disobeying an order of the court. Judge Minor then adjourned the court. Judge Waddill then opened the court, and made a like order, committing John E. Broadus, and he then adjourned the court. Walsh and Broadus then applied by petition to this court for a writ of habeas corpus, each insisting that he was illegally in custody, because the judge who committed him had no legal authority to act as judge at the time.

John S. Wise and W. W. Gordon, for the petitioner Walsh.

William L. Royall and A. H. Sands, for the petitioner Broadus.

MONCURE, P. The constitution of Virginia which is published in the Code of 1873, pp. 60-101, contains the following provisions which seem to be material to be considered

Case, and Estes v. Edmondson, reported in 33 Grattan; but these cases must be regarded as overruled, and as not containing the correct doctrine upon these points.

In *Burks v. Hinton*, 77 Va. R. 1, these same provisions of the constitution came again under review, when this court, upon great consideration, deliberately adopted the construction which had been previously put upon them by Judges Moncure and Anderson, and in that case, Judges Lacy and Richardson, in opinions, evidencing both research and ability, demonstrate in the most convincing manner the perfect soundness of that construction. That case has been followed by other cases in this court, and in all of them the same interpretation is put upon these provisions of the constitution. *Howison v. Weedon*, 77 Va. R. 708; *Watlington v. Edmondson*, 10 Va. L. J. 286. And by these repeated decisions this construction has been so firmly established as the proper one, that we cannot allow it to be again questioned."

in the decision of the question now before the supreme court of appeals, in regard to county court judges.

Code, p. 84, article VI, § 1. "There shall be a supreme court of appeals, circuit courts and county courts."

P. 85, § 5. "The judges shall be chosen by the joint votes of the two houses of the general assembly, and shall hold their office for a term of twelve years."

P. 86, § 11. "For each circuit (of the sixteenth judicial circuits into which, by § 9 of the same article, the state was directed to be divided), a judge shall be chosen by the joint vote of the two houses of the general assembly, who shall hold his office for a term of eight years, unless sooner removed in the manner prescribed by this constitution."

781 *P. 87, § 13, (headed "county courts").

"In each county of this commonwealth there shall be a court called the county court, which shall be held monthly, by a judge learned in the law of the state, and to be known as the county court judge: provided, that counties containing less than eight thousand inhabitants shall be attached to adjoining counties for the formation of districts for county judges. County court judges shall be chosen in the same manner as judges of the circuit courts. They shall hold their office for a term of six years, except the first term under this constitution, which shall be three years, and during their continuance in office they shall reside in their respective counties or districts. The jurisdiction of said courts shall be the same as that of the existing county courts, except so far as it is modified by this constitution, or may be changed by law."

P. 89. "General provisions."

"Sec. 22. All the judges shall be commissioned by the governor, and shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Their terms of office shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin."

"Sec. 23. Judges may be removed from office by a concurrent vote of both houses of the general assembly; but a majority of all the members elected to each house must concur in such vote, and the cause of removal shall be entered on the journal of each house. The judge against whom the general assembly may be about to proceed shall have notice thereof, accompanied by a copy of the cause alleged for his removal, at least twenty days before the day on which either house of the general assembly shall act thereon."

782 *"Sec. 25. Judges, and all other officers elected or appointed, shall continue to discharge the duties of their offices, after their terms of service have expired, until their successors have qualified."

The foregoing are all the provisions of the constitution which seem to have a material bearing on the subject under consideration.

The last term of six years of the county

court judges of the state commenced on the first day of January, 1874, and ended on the last day of December, 1879. The succeeding term of six years of the said judges commenced on the first day of January, 1880, and will end on the last day of December, 1885. The judges elected for the last term ceased to be judges at the end of that term, except that, under § 25 aforesaid, they are to "continue to discharge the duties of their offices, after their terms of service have expired, until their successors have qualified."

As soon as their successors have qualified, then, of course, they will instantly cease to discharge those duties.

The election of judges of the county courts for the term of six years, which commenced on the first day of January, 1880, devolved on the present legislature; which certainly entered upon the discharge of that duty in due time. Some, and perhaps many, of those judges were elected and qualified before the first day of January last, and no question has been raised, nor, I presume, can be raised, as to the legality or regularity of their appointment.

But all of the appointments were not made before that day. Why, not does not appear. Doubtless different reasons existed in different cases. Some of those reasons may have concerned the old incumbents of the office and the question of their reappointment. Some of them may have concerned the question as to a propriety of choice between competitors for the office in various cases. At all events, the legislature, for some cause or other, deemed it proper to delay the completion of the election for a few days

783 after the first day of last January; after the lapse of which few days they completed the election, and the persons so elected qualified according to law, and proceeded to enter upon the execution of the duties of their office. But in some of the cases, at least, the old incumbents denied their right to do so, and claimed a right for themselves to hold on to the offices, and perform all their duties, and receive all their emoluments, until the first day of January, 1881, notwithstanding the election and qualification of their successors, and the offer of the same to enter upon and perform immediately and henceforth the duties of their offices. The said old incumbents placed their claim alone upon the ground of the appointment and qualification of their successors after, instead of on or before, the 1st day of January. If such appointment and qualification had been on or before that day, they would have made no difficulty and raised no question on the subject.

Now, can it be that this accidental delay for a few days in the appointment of the successors in these offices is to have such an important effect as would be produced by sustaining the views of the old incumbents who are competing in this case?

Could the framers of the constitution have intended that a circumstance so apparently slight and immaterial as a few days difference in the time of the appointment of a judge of the county court who might be

appointed on the 31st day of December, 1879, or on the 1st day of January, 1880, should have such an important effect as that on the former case, he would go into office and become entitled to receive his salary immediately from and after the former day; whereas in the latter he would not, until about twelve months thereafter—as that, in the former case, the old incumbent would be entitled to nothing; whereas in the latter he would be entitled to continue to hold the office and receive the salary for twelve months after the expiration of the term

784 for which he was elected, *while his successor would be entitled to receive nothing on account of his office until after the expiration of about twelve months from the time of his election and qualification as such? I think that such could not have been the intention of the framers of the constitution. They could not have intended anything so unreasonable; and to warrant the court in deciding that they did, the evidence of such an intention should plainly appear in the constitution. Does such an intention so appear in the constitution? I think not.

The only provision in the constitution which can create any doubt or difficulty on the question is that it contained in section 22 of article 6, page 89, of the Code. The language of that section is: "All the judges shall be commissioned by the governor, and shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Their terms of office shall commence on the first day of January next following their appointments; and they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin."

Now, the framers of the constitution evidently designed that the terms of office of all the judges should commence on the first day of January next following their appointment; and such is the express language of the constitution. This provision was made with a view to the organization of the machine of government and setting it in motion. They determined to fix upon a certain day for the commencement of the terms of office of all the judges, and they fixed on the first day of January for that purpose. But before the arrival of that day next after the adoption of the constitution, it was necessary that the duties of their respective offices should be discharged by some person. By whom were they to be discharged? The constitution expressly declares. After

785 providing in regard to all the *judges, that "their terms of office shall commence on the first day of January next following their appointment," it thus proceeds: "And they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin."

The constitution was adopted and put in operation some eight or nine months before the 1st day of January, 1871. In fixing on a day for the commencement of the terms of

office of the judges, the first day of January next following their appointment was selected for that purpose. There was a long interval between that day and the day of the appointment and qualification of the judges under the constitution; and it was necessary that provision should be made in the constitution for the discharge of such judicial duties as might be necessary in the state during that long interval. Therefore it was provided, in section 22 as aforesaid, that the judges "shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin." This sentence is separated by a semi-colon, only, from the one which immediately precedes it, in these words: "their terms of office shall commence on the first day of January next following their appointment;" thus showing that the whole section has relation to the time when the constitution was adopted, which was very shortly before the time of the first appointment and qualification of judges under the same. If we read the section in this view of the facts, we can have no doubt or difficulty about its meaning or the priority of construing it in reference to the first day of January next succeeding the first appointment and qualification of the judges.

On or before the said first day of January a judge was no doubt elected by the general assembly for each county of the state, for the term of three years from the 1st day of January, 1871; and on or before the **786** 1st day of January, 1874, *a judge was probably elected by the general assembly for each county of the state, for the term of six years from the last named day. On or about the 1st day of January, 1880, the time came for making another election of county judges, some of whom were elected before the first day of January; as to the validity of whose election no question is raised. Others of whom were elected a few days after the 1st day of January. But it is contended by some of the old incumbents of a county judgeship that an election made after the first day of January last cannot take effect until the 1st day of January, 1881; twelve months after it would have taken effect if it had been made a few days before it actually was made; that is, on or before the first day of January last.

Now, here is a case in which all the county judgeships of the state became vacant on the 1st day of January, 1880, and the duty of filling the vacancies by new elections on or about that day devolved on the general assembly which was then in session. Some of the vacancies were accordingly filled by elections so made on or before that day; while the filling of the others was delayed for a few days for the sake of convenience, and under a bona fide belief on the part of the electors that such delay could make no difference. But is now contended by some of the judges, whose terms of six years expired on the first day of January last, that they are entitled to hold on to their offices till the first day of January next, because the appointment and qualification of their successors

took place a day or two after, instead of on or before the first day of January last.

I think the constitution ought to receive not a strict and narrow, but a liberal and reasonable construction. The legislature is invested by the constitution with the elective franchise in this case, for the benefit, of course, of the state. It is intrusted with the duty of filling the county judgeships, all of which have become vacant. Its right

787 to perform *this duty is disputed because not performed on or before a certain day, though performed a day or two thereafter. A judge whose term of service has expired claims to be entitled to hold his judgeship a year longer, because his successor was not appointed and did not qualify on or before the first day of January last, though he was and did a day or two thereafter. Now, this delay of a day or two could not have injured, but may have benefited the state, for which latter purpose it was doubtless incurred.

The first day of January was regarded both by the convention that framed the constitution and the legislatures convened under it, as the proper day for the commencement of a term of a judgeship. The 1st day of January, 1871, being the first after the adoption of the constitution, some nine or ten months before, was therefore fixed as the day for the commencement of the first terms of the judgeships under the constitution; and provision was made therein for the immediate appointment and qualification of the judges whose judicial terms were to commence on the first day of the next succeeding January, but who were to discharge the duties of their respective offices from their first appointment and qualification as aforesaid until the commencement of their terms.

Now, a term of six years of the county court judgeships of the state commenced on the 1st day of January, 1880; a like term of the same judgeships having ended on the preceding day—to wit: the 31st day of December, 1879. No doubt it was expected and intended that all the judges who were to act as such on and after the 1st day of January, 1880, would be appointed and would qualify on or before that day. But as we have seen, only a portion of the said judges then was appointed and qualified, while the rest of them, for different reasons, were not appointed and did not qualify for several days thereafter. Still, whether they were appointed and qualified on, before or after that day, the term of the office to which

788 they were appointed *respectively commenced on the same day—to wit: the 1st day of January, 1880, and was to continue for the period of six years thereafter. Certainly it was not the intention of the framers of the constitution that the terms of the particular judgeships might begin and end on different days. They intended the contrary, and fixed upon the 1st day of January as the proper day for that purpose, though that day was a long way off when the constitution was adopted and went into operation.

The result of my opinion is, that the peti-

tioner, John E. Broadus, is legally detained in custody under a commitment issued by Edmund Waddill, jr., as judge of the county court of Henrico, on the 9th day of February, 1880, and that the said Waddill, jr., was, at the time of issuing said commitment, the judge of the said court, duly appointed and qualified as such under the constitution and laws of the state; and therefore the petition of said Broadus to be discharged from said custody must be denied. And that the petitioner, William Walsh, is illegally detained in custody under a commitment issued by Edward C. Minor, styling himself judge of the county court of Henrico, on the — day of February, 1880, and that the said Minor was not, at the time of issuing the said last mentioned commitment, the judge of the said court, duly appointed and qualified as such under the constitution and laws of the state; and therefore the petition of said Walsh to be discharged from said custody must be granted.

CHRISTIAN, J., I concur in the results of the opinion just delivered by the President of the court. But I do not concur in some of the views expressed by him or in some of the reasons which lead him to the conclusions he has reached. I will, therefore, very briefly state the grounds upon which, in my opinion, the question before us should be determined.

They are purely legal questions arising
789 out of the true construction to *be given to two clauses of the constitution, which two clauses are in these words. Art. VI, § 22, reads as follows: "All the judges shall be commissioned by the governor, and shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Their terms of office shall commence on the first day of January next following their appointment, and they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin."

Section 25 of this Art. reads as follows: "Judges and all other officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired, until their successors have qualified."

The only remaining provision of the constitution necessary in my opinion to be noticed is the 13th section of the same article, which limits the term of office of the county judges (except the first term) to the period of six years.

The Hon. Edward C. Minor commenced his second term of office as county judge of the county of Henrico on the first day of January, 1874, which expired on the first day of January, 1880. By the express terms of the constitution his term ended on that day. But under the provision of the 25th section, although his term of service had expired, he was authorized to hold over until (and only until) his successor had qualified.

But it appears from the admitted facts that on the 12th of January, 1880, Edmund Waddill, Jr., was elected by the legislature as

judge of said county, and received his commission from the governor and duly qualified under the same before the expiration of thirty days, as required by the statute. So that it is plain that under the 25th section, Minor, whose term of office was limited by the constitution to the 1st day of January, 1880,

could only hold over until his successor had qualified. Now it is true *that the 22d section prescribes "that the term of office of judges shall commence on the 1st day of January next following their appointment," and if this was all of the 22d section it would be plain that Waddill could not enter upon the duties of the office until the 1st day of January, 1881. But immediately following this provision are these words, "and they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin."

We cannot ignore these words, nor detach them from their connection in this section. Upon the most familiar rules of construction, we must give to each clause of the instrument to be interpreted (upon the subject under investigation) its full meaning and effect in order to carry out the intention of the framers of the instrument.

It has been argued, and with much force, that this clause applied solely to the judges first elected under this constitution. But I think this is too narrow a view of the question. If that had been the design, it would more properly be affixed to the schedule, and not have had a permanent place in the constitution.

Of course all constitutional provisions must be regarded as permanent in their character upon general principles. And I think it cannot be maintained, either from the grammatical construction of the language or the plain meaning of the words in the connection in which they are used, that it was the intention to limit this provision so as to apply it alone to the judges first elected after the adoption of the constitution.

I think, on the contrary, it was designed to meet contingencies which might arise, and of which this case is a striking illustration.

It might often happen that from some unforeseen cause or accident, the legislature could not, from mere physical impossibility, elect all the county judges before the first day of January, there being about

eighty in all. And *this manifest difficulty would often arise, that while their terms of office all expired on the 1st day of January, each one would hold over one year longer than the term fixed by the constitution.

I think it is plain that Judge Minor could only hold until his successor qualified, and not until the regular term of office of such successor commenced, which was postponed by the accidental circumstance that he was elected after the 1st day of January, instead of before that day.

Waddill was certainly Minor's successor; for he had been appointed by the legislature, which was by the constitution invested

with the power of appointment. He has received his commission under this appointment, and has duly qualified; and by the express terms of the 25th section, Minor could only hold until his successor was qualified, and not afterwards. And Waddill, under the last clause of the 22d section, must discharge the duties of the office until his term begins, and then enter upon it for the period of six years from the 1st day of January, 1881.

ANDERSON, J., concurred in the opinion of Moncure, P.

Judgment in favor of Walsh and against Broadus.

792 *City of Richmond v. Courtney.

January Term, 1880, Richmond.

I. In an action by C against the city of Richmond to recover damages for an injury sustained by falling on a sidewalk of one of the streets, it appeared that a small space of the pavement had been broken up, and some loose bricks lay about, against one of which the plaintiff struck her foot and fell. But it appeared also that she was well informed of the condition of the pavement, and only fell from inattention.—HELD:

1. **Defective Sidewalk—Personal Injury—Liability of City—Quære.**—Whether the defect in the sidewalk was such as to subject the city to liability for an injury sustained there.

2. **Same—Same—Contributory Negligence.**—The inattention of C having contributed to the injury she is not entitled to recover damages for it from the city.

This was a writ of error to a judgment of the circuit court of the city of Richmond, in an action on the case brought by Elizabeth Courtney against the city of Richmond, to recover damages for an injury sustained by her, by reason of a defect in one of the sidewalks of the city. There was a verdict and judgment for the plaintiff for \$1,500; and the city obtained a writ of error. The case is fully stated by Judge Christian in his opinion.

Keiley, for the appellant.

Wise & Hobson, for the appellee.

CHRISTIAN, J. This is a writ of error to a judgment of the circuit court of the city of Richmond.

*The suit was an action of trespass on the case, brought by the plaintiff, Elizabeth Courtney, against the city of Richmond, to recover damages for injuries received by her in consequence of a fall on

***Contributory Negligence.**—See also *Moore v. City of Richmond*, 85 Va. 543; *Piedmont, etc., Co. v. Patterson's adm'x*, 84 Va. 771; *Richmond, etc., R. Co. v. Morris*, 31 Gratt. 200. Cities are not insurers of the safety of their streets and sidewalks; but they must use reasonable care to keep them in a safe condition for travel in the ordinary modes by day and by night, and for the negligent failure so to do they are liable to one who, while so traveling and exercising reasonable care, is injured by reason of their negligence. See *note*, 1 Mun. Corp. Cas. 58.

one of the streets of said city, produced by an alleged defect on the sidewalk caused by the negligence of the defendant. In the court below the defendant demurred to the plaintiff's evidence, and the jury found a verdict subject to the demurrer for the plaintiff and assessed her damages at the sum of \$1,500.

And thereupon the court overruled the demurrer, and entered judgment for the amount of damages assessed by the jury.

To this judgment a writ of error was awarded by one of the judges of this court.

The question we have to determine is, whether, giving full effect to all the evidence introduced by the plaintiff, and all fair and legal inferences to be deduced from the same, such a case is made out as entitles the plaintiff to recover, and fixes liability upon the defendant for injuries received by the plaintiff.

To determine this question it becomes necessary to examine minutely and in detail the evidence produced by the plaintiff.

It was proved by the plaintiff that at the time of the accident—October 12th, 1876—she lived on Leigh street, in the city of Richmond, four squares form the scene of the accident; that her niece was on her death-bed, and the attending doctor—D. Davis—gave a prescription which he said she must have immediately; that witness would not wait for niece's husband to return, but started to the drugstore herself for the medicine required; that in going she went on the side of the street opposite to that on which she fell returning; that when she came out of the drugstore she was in a hurry, and about twenty steps from the drugstore she struck her foot against a loose brick in the sidewalk, and fell; that she was stunned

794 for awhile, and *when she got up and went home she suffered much pain, but did not go after a doctor until 9 o'clock next day, when she went to Dr. James' office, who set her arm; that the gas was lit in the street lamps at the corner of the street, some twenty paces off, but the light was behind her; it was getting dusky at the time, and she could hardly see at all; that she knew of the broken place in the sidewalk, but was in such a hurry and such trouble about her niece's health that she did not think of it; the pavement was broken up, and she fell right in among the loose bricks; that some five years ago she had an attack of neuralgia, which resulted in her partial blindness, but she was cured of that; that she is in her sixty-fifth year; and upon being asked by her counsel to tell the time of day on a clock about twenty-six feet distant, about a foot across the face, could not tell it; and on being asked the color of an inkstand about twelve feet distant, testified that it was blue—which it was; that at the time of the accident, and ever since the marriage of her niece, shortly after the war, she had lived with her, waiting in the house; that she had lived since before the war in the neighborhood, and had been dealing with Mr. Saunders, where she went for the medicine, ever since he started business at that place

—a year or more before the accident; that she has no use of her left arm—the broken one—and has to give up sewing, and cannot work; that she is now living with another niece; that she is not in the habit of going out at night—never liked to travel after dark, even when she was a girl; that she used to work in a factory, but since the war only waited on her niece; that she had passed over the broken place once or twice on other occasions without stumbling.

The plaintiff exhibited her arm to the jury, which had the appearance of stiffness and a large knot at the point of fracture.

And the plaintiff showed to the jury, by Dr. M. L. James, another witness, that

795 the plaintiff came to his office *about the time specified, with a fracture of the two bones—the radius and ulna—of her left lower arm, near the wrist joint; that the fractures were so near the wrist that it was difficult to keep the portions accurately in place by splint; that all fractures near the joint are serious; that the fracture healed slowly, as was to be expected in one of her age; that the plaintiff, being an old woman, will probably never regain the use of her arm; that her age would doubtless contribute to that result; that she was, as he believed, very poor; that he never attended her for any defect of eyesight, and was aware of none; that if there had been any serious defect he would probably have noticed it—his profession inducing him to notice such things more particularly than a layman; that in his judgment the delay in her seeking professional aid had not affected the result.

And the plaintiff showed to the jury, by another witness, Charles W. Epps, that he is, and was at the time of the accident, and for several years before, a captain of police of the city of Richmond, and that his station house is on Brooke avenue, at the corner of Marshall street, and immediately across the street from the point at which the accident happened; that his duty as to such defects was to report the same to the chief of police, and he (the chief) reported them to the city engineer; that he (witness) was acting chief of police at the time and for two weeks afterwards; that he kept no record of his reports, but is satisfied he reported this defect, as he did all cases of needed repair, to the chief; that the defect had continued, he supposed, three or four months; that it consisted of a place in the pavement 3x5 feet, or thereabouts, from which bricks had been removed, and a few bricks were lying about loose in the opening; that he was not certain he reported to anybody, but if he did, it was to the chief—certainly not to the city engineer or city contractor; that the method of repairing streets was to report to the

796 chief of *police, and he would report to the city engineer, who notified the city contractor to do the work; that whenever the defect was dangerous he reported at once to the city engineer as well as the chief of police; that these defects are at all times numerous; that within the past week he had reported 222 similar defects in his district.

(that portion of the city west of fourth street), and their habit was and is, every three or four months, to make a thorough overhauling of the streets, and make up their report of defects; that this was simply a case of a sidewalk out of repair from use; that there was no excavation, and that he had never heard of anyone else ever stumbling there; that he himself had walked over the place many a time, and never thought it dangerous; that the street—Brooke avenue—had recently been paved and graded for a long distance, including this portion, and it was necessary to relay the curbing and paving; that the whole sidewalk had to be relaid; and he supposed the contractor, if he knew, was waiting for this general repair, but this is only supposition.

And the plaintiff proved by another witness, Thomas M. Saunders, that he had noticed the defect in the sidewalk before the accident; that it had existed for four or five months, and had told policemen that it ought to be fixed; that he had not reported it at the station house, but to policemen casually in his store; that he could not say it was a dangerous place, but thought some one might fall there and get hurt, and had so told the policemen; that it was repaired thirty or sixty days after the accident, and that he never heard of any other accident there; that he remembered seeing Mrs. Courtney in his store that evening, but knew nothing of the accident; that he observed no defect in her eyesight.

And the plaintiff showed by William J. Orange, another witness, that he is and was at the time a policeman of the city of Richmond, belonging to the district where
797 the *accident occurred; that no one ever called his attention to this broken place in the sidewalk, but that he had himself noticed it; that it consisted of a few displaced bricks and no hole; that it was not calculated to trip any one who took care, for Brooke avenue at that point was a great thoroughfare, and no one else that he ever heard of had tripped there; that he never reported it to anybody, as he did not think it at all dangerous.

And the plaintiff further showed by another witness, William Baldwin, that he was the husband of the plaintiff's niece; that the plaintiff had lived in his family for many years, waiting on his wife and looking after his children; that he had often noticed the defect in the sidewalk, and having to pass it every day, he used to go down the street on the other side to avoid it; that the bricks were knocked about and the sand underneath scattered, he supposed, by boys playing at the spot. On the night in question when he came home he found the plaintiff suffering very much, and much troubled in mind as well as body; that he had to get another niece to come and wait upon his wife, who died some six weeks after, and in the following July broke up house, when the plaintiff went to live with another niece; that since his marriage the plaintiff had lived with him, doing no work, except as stated, and after the accident she could not

do this work; that he was willing to give her support for the work she did. She was of great use to him, and after the injury she could do no work; that he had to break up housekeeping because she was of no further use to him; that she is now living on the charity of another niece.

This is all the evidence introduced by the plaintiff, and we have to determine, upon the defendant's demurrer to this evidence, whether such case is made out as entitles the plaintiff to recover. In determining this, upon well recognized principles repeatedly declared by this court, we must give full

credit to the plaintiff's evidence as
798 true and *uncontradicted, and also such fair and legal inferences as a jury might draw from the facts proved. But conceding to the plaintiff the benefit of these rules, I am of opinion that the defendant, the city of Richmond, cannot be held liable in damages for the injuries received by the plaintiff.

In the first place, it is to be remarked that there is no express statute which imposes upon the city of Richmond in express terms the duty of keeping its streets in any prescribed order, or declaring its liability for a failure so to do.

In the absence of any express statute, the only responsibility for which the city can be held to account, which arises from the implied liability of all municipal corporations who have conferred upon them powers respecting streets and sidewalks within their limits, is that duty which they owe to the public to keep the same in a safe condition for use in the usual mode by travelers.

A municipal corporation is not an insurer against accidents upon its streets and sidewalks.

Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day. It is not to be expected, and ought not to be required, that a city should keep its streets at perfectly level and even surface. Slight obstructions, produced by loose bricks in the pavement, or by the roots of trees which may displace the pavement, from the very nature of things cannot be prevented. And so there cannot be perfect uniformity of a level surface where curbstones and culverts are necessary to be constructed on the streets. In a large city, with many miles of paved streets, it must often happen from the very nature of the material out of which the pavement is constructed, that the bricks from the very wear and tear of the use to which they

799 are subjected, will become broken *and displaced so as to cause the fall of a person not careful in walking over them. Certainly if the obstructions are of such a character as those indicated, and which would not cause the fall of a person exercising ordinary care, the city in such case could not be held liable.

It is essential to such liability that the plaintiff should show reasonable and ordinary care to avoid the accident, or, in other

words, was free from any such fault or negligence on his or her part as will in actions for negligence defeat a recovery. (See *Dillon on Corporations*, § 789, and numerous cases cited in notes).

The defect in the pavement for which the city is sought to be held liable for negligence is described by various witnesses for the plaintiff.

The plaintiff herself described it as a broken place in the sidewalk and says that she struck her foot against a loose brick in the sidewalk and fell. She says further, that the pavement was broken up and she fell in among the loose bricks. Another witness, Charles W. Epps, then captain of police, describes the defect as follows: "It consisted of a place in the pavement 3x5 feet or thereabouts, from which bricks had been removed, and a few bricks were lying about loose in the opening;" * * * "there was no excavation, and that he had never heard of any one else stumbling there; that he himself had walked over the place many a time and had never thought it dangerous."

Policeman Orange describes the defect complained of as follows: "It consisted of a few displaced bricks and no hole; that it was not calculated to trip any one who took care; that that point on Brooke avenue was a great thoroughfare, and that no one else that he ever heard of was ever tripped there; that he had never reported it to any one as he did not think it at all dangerous."

Another witness, William Baldwin, nephew of the plaintiff, describing this defect in the pavement says, that "the *bricks were knocked about and the sand underneath scattered, he supposed by boys playing at the spot; that he had noticed this defect in the sidewalk, and used to go down the street on the opposite side to avoid it."

The only other witness said he had noticed this defect in the sidewalk, but he could not say that it was a dangerous place but thought that somebody might fall there and get hurt.

I do not think that upon this testimony, and giving full effect to the strict rules applicable to a demurrer to evidence, the plaintiff has made out such a case of negligence on the part of the city as will render it liable in damages for the injuries received by her fall. Mrs. Courtney in her hurry and distress in going to the drugstore on the night of the accident to procure medicine for her dying niece, might instead of striking her foot against a loose brick on the pavement, have well, by mere accident, have stumbled over a curbstone or cellar door or any other uneven projection common in all streets and have met with the same unhappy accident and injury, for which no one could say that the city was liable in damages.

But if it be conceded that the defect in the pavement, as proved by the plaintiff's evidence, was of such a character as to bind the city, for negligence, yet in my opinion the plaintiff cannot recover. For, according to her own evidence, she well knew of the broken place in the sidewalk where her fall occurred, and went on the opposite side of

the street in going to the drugstore to avoid it. Knowing the defect, she might, with ordinary care have avoided the defective sidewalk by simply passing on the same side of the street on which she had walked to the drugstore. Reasonable care and diligence on her part would have prevented the injury. The law is well settled that it is always essential to fix liability for injuries received by accident that the plaintiff should use reasonable and ordinary care to avoid the accident.

801 *The party complaining of injury caused by the negligence of another cannot recover, if it appears that by want of ordinary care and prudence on his part, he contributed directly to the injury.

Where negligence is the issue, it must be a case of unmixing negligence to justify a recovery. *Dillon on Corporations*, § 789, and cases there cited. *Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind. R. 185; and also *Judge Burk's* opinion not yet reported in *Danville R. R. Co. v. Morris*.

Upon the whole case I am of opinion that the judgment of the circuit court is erroneous and must be reversed.

MONCURE, P., concurred in the opinion of Christian, J.

ANDERSON, J., concurred in the judgment.

STAPLES, J., said he was not prepared to concur in so much of the opinion of Judge Christian as declares that the city of Richmond is not guilty of negligence with respect to the defect in the pavement. He thought, however, it plainly appeared from the plaintiff's own testimony that she was guilty of contributory negligence and therefore not entitled to recover. Upon this latter ground he was for reversing the judgment, and to that extent he concurred in the opinion of Judge Christian.

BURKS, J., concurred.

The judgment was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons

802 stated in writing and *filed with the record, that the judgment of the said circuit court is erroneous. It is therefore considered by this court, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error its costs by it expended in the prosecution of its writ of error and superseas here. And this court now proceeding to enter such judgment as the said circuit court ought to have rendered, it is considered by the court, that the demurrer to the plaintiff's evidence be sustained, that the defendant go thereof without day, and that the plaintiff in error recover against the defendant in error its costs by it expended in the said circuit court.

Judgment reversed.

803 *Dinguid v. Schoolfield.

January Term, 1880, Richmond.

Notes—Acknowledgment of Debt—Limitations.—A deposition of the maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of the statute of limitations in an action on the note by the obligee against him.

This was an action of debt in the circuit court of Lynchburg, brought in April, 1875, by Henry O. Schoolfield, surviving partner of himself and N. B. Thurman, deceased, against George A. Dinguid, surviving partner of himself and D. P. Dinguid, deceased, to recover the sum of \$555.09, with interest from the 2d of July, 1858, the amount of a note of that date, payable one day after date, executed by said D. P. & G. A. Dinguid to said Schoolfield & Thurman. There was a judgment for the plaintiff, and an exception by the defendant; and upon his application a writ of error was allowed. The case is fully stated in the opinion of the court, delivered by Judge Burks.

James F. Johnson, for the appellant.

Kean & Kean, for the appellee.

BURKS, J., delivered the opinion of the court.

This was an action of debt in the court below against G. A. Dinguid, surviving partner of himself and D. P. *Dinguid, deceased, on a promissory note of the firm, dated July 1, 1858, and payable one day after date. The suit was commenced on the 29th of March, 1875. There were several pleas, but the only defence was under the plea of the act of limitations. To this plea the plaintiff replied specially under the statute a promise of the defendant in writing, within five years before action brought, to pay the debt in the declaration demanded. Neither party demanding a jury, the court proceeded to try the issue joined on this replication, and, having heard the evidence, gave the plaintiff a judgment for a balance due on the note, with interest and costs; to which judgment the defendant excepted, and was allowed a writ of error by one of the judges of this court.

The only evidence introduced on the trial was the note sued on and a portion of the record of a chancery suit lately pending in the corporation court of the city of Lynchburg. That suit appears to have been instituted by some of the heirs and distributees of the decedents, Samson Dinguid and D. P. Dinguid, against the defendant, G. A. Dinguid, (among others), as one of said heirs and distributees, and also as surviving partner of the late firm of D. P. & G. A. Dinguid, for the purpose of settling up and distributing the estate of the said Samson Dinguid and of settling the partnership transactions of the said firm of D. P. & G. A. Dinguid.

It is shown by the final decree in said cause, which is set out in the bill of exceptions, that under a previous decree the plaintiff in error here (G. A. Dinguid) had become the purchaser of a cabinet shop and lot in the city of Lynchburg, which was a part of the estate of the decedent, Samson Dinguid, and had given his bonds, with surety, for the purchase money. In that estate the plaintiff in error was entitled to a one-third interest as heir, to another third as purchaser from other heirs, and the remaining third belonged to the heirs of D. P. Dinguid, the *deceased partner of the firm of D. P. & G. A. Dinguid, chargeable, however, with the debts of the said firm. Some of these debts had been paid by the plaintiff in error as surviving partner, and others were outstanding and unpaid, and among the latter was the debt which is the subject of the present action.

To ascertain these debts, an account was ordered to be taken by a commissioner of the court. In taking the account, the plaintiff in error was examined as a witness by the commissioner, and his deposition, subscribed and sworn to by him, was filed with the commissioner's report.

The first question propounded on the examination was this: "What debts against the estate of Samson Dinguid, your father, are now outstanding and unpaid?"

The answer to the question, or so much of it as pertains to the case before us, is as follows: "I know of only two debts or claims against the estate of Samson Dinguid, deceased.

1. A debt due to Schoolfield & Thurman. This debt was assumed by D. P. & G. A. Dinguid, and on a settlement made between the said D. P. & G. A. Dinguid and the said Schoolfield & Thurman, some years since, the said D. P. & G. A. Dinguid executed their note to the said Schoolfield & Thurman for the sum of \$555.09, that being the balance due them as a settlement in full up to the date of the settlement. Since the date of that settlement, payments have been made to said debt, yet there is a balance of \$— yet outstanding and due to the said Schoolfield & Thurman, it being the net balance after application of payments. This is a just claim now against D. P. & G. A. Dinguid."

In answer to a further question asking for a statement of the outstanding debts of D. P. & G. A. Dinguid, the deponent refers to a previous report of the commissioner for an account of those debts, and after specifying sundry payments since the report was made, says, "My intention *has always been to pay every debt against D. P. & G. A. Dinguid, and I think I have paid same other amounts, but cannot say what debts they are."

The other portions of the deposition have no relevancy to the question before us. Upon this deposition, the commissioner made a report of the outstanding debts of D. P. & G. A. Dinguid, including the debt which is the subject of the present controversy. That debt was stated and the payments referred to

*See *Rowe v. Marchant*, 86 Va. 182.

in the deposition were applied, ascertaining a balance of \$538.36, principal money, to be due and unpaid as of the 15th day of January, 1864. It was for this balance that the circuit court rendered the judgment complained of.

The commissioner's report was returned within fifteen days after the deposition was taken. There was no exception to it, and on the hearing of the cause at the succeeding term the court made a final decree, by which, after reciting that it appears that the said G. A. Dinguid is entitled to an interest of two-thirds in the estate of Samson Dinguid, deceased, "and that as surviving partner of the firm of D. P. & G. A. Dinguid, he is charged with and will have to pay on account of said firm more than double the amount of the value of the third interest of D. P. Dinguid's heirs in the said estate of Samson Dinguid, and that there will be nothing left for distribution to the heirs of D. P. Dinguid after a settlement of his debts and liabilities," it was adjudged, ordered, and decreed, "that the three several bonds for the purchase of the cabinet shop and lot on Main street, in Lynchburg, belonging to the estate of Samson Dinguid, executed by G. A. Dinguid, the purchaser of said property, with — Davidson as surety, each for the sum of \$——, be canceled by Commissioners Craig-hill and Daniel, to whom they were payable; and that said commissioners do proceed to execute a deed in fee simple for the cabinet shop and lot, to G. A. Dinguid, with special warranty of title."

807 *It was upon the evidence, which has been substantially recited, and more particularly upon the deposition of the plaintiff in error, subscribed and sworn to by him, and given without compulsion and in his own interest, in a suit to which he was a party, and upon which deposition mainly, if not wholly, a decree was based for his own relief and benefit, that the judgment complained of was rendered.

The judgment is alleged by the learned counsel of the plaintiff in error to be erroneous on two grounds, which will be more conveniently considered in the inverse order in which they are stated in the petition:

1. It is not open to question that the debt referred to in the deposition as a debt due to Schoolfield & Thurman is the same debt for the recovery of which the present action was brought. The identity is beyond dispute; but it is insisted that the acknowledgment relied on is of an unascertained balance, and too general and indeterminate to raise an implied promise of payment. There is no doubt the plaintiff, to maintain the issue on his part, was bound to prove the promise alleged in his replication. He was not required to prove an express promise. It was sufficient for him, under the statute, to establish an acknowledgment in writing, from which a promise of payment might be implied. Code of 1873, ch. 146, § 10. Such acknowledgment, to be effectual, must not consist of equivocal, vague and indeterminate expressions; but ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is

liable for and willing to pay. Story, J., in *Bell v. Morrison & others*, 1 Peters' P. 351, 362. The same rule is laid down, with some variety of expression, by other judges. A distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implies a promise to pay. Tindall, Ch.

J., in *Linsell v. Bonsor*, 2 Bingh. N. **808** Cas. 241, (29 Eng. C. L. *R. 319). If an acknowledgment is relied on, says Judge Parker, it ought to be a direct and unqualified admission of a present subsisting debt, from which a promise to pay would naturally and irresistibly be implied. *Sutton v. Burruss*, 9 Leigh, 381. If there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it. Johnson, J., in *Young v. Monpoe*, 2 Bailey. (So. Car.), 278. It is needless to multiply authorities for the proposition stated, but the following may be consulted: *Bangs v. Hall*, 2 Pick. R. 368; *Bailey v. Crare*, 21 Pick. R. 323; *Russell v. Copp*, 5 N. Hamp. R. 154; *Head's ex'x v. Warner's adm'rs*, 5 J. J. Marshall R. 255; *Peebles v. Mason*, 2 Dev. R. 367; *Aylett's ex'or v. Robinson*, 9 Leigh, 45; *Sutton v. Burruss*, Id. 381; *Butcher v. Hixton*, 4 Leigh, 559; opinion of Moncure, J., in *Bell v. Crawford*, 8 Gratt. 110.

Recurring to the statements contained in the deposition, a very slight examination will suffice to show that the balance there admitted to be due is by no means uncertain and indeterminate. It is true it is stated to be "a balance of \$—— yet outstanding and unpaid"; but it is also stated as "being the net balance after application of payments."

The deduction of the payments would show the "net balance," and it was the business and duty of the commissioner to make that deduction upon the evidence furnished by the plaintiff in error for that purpose. That evidence was furnished, the payments applied, statement made, and balance definitely ascertained. The acknowledgment was, in substance, of the balance thus to be ascertained, and a calculation of the simplest character was all that was necessary to show the amount. The old maxim, *id certum est quod certum reddi potest*, applies.

2. The next and only remaining **809** ground of error alleged *is, that the plaintiff not being a party to the suit in which the deposition was taken, the statements therein cannot be construed as admissions or acknowledgments made to him, and that no promise of payment can be implied from an acknowledgment of a debt so as to take it out of the operation of the act of limitations, unless such acknowledgment be made to the creditor to whom the debt is owing, or to some person representing him by authority.

In *Joynes on Limitations*, 120, the learned author says of the question here presented that "since it has been established that a new promise, express or implied, is necessary to

defeat a plea of the act of limitations, and that such new promise operates as a new cause of action, it has been frequently held, as it was before, that the promise need not be made directly to the creditor himself, or to any person representing him, or entitled to demand payment of the debt, but may be made to a third person, or inferred from an acknowledgment *inter alias*;" and he cites many cases in which the principle is applied.

He refers also to several elementary works, among them 2 Story's *Eq. Juris*. 909 (ed. 1843), in which the contrary doctrine is laid down and the authorities for it cited, which, in his opinion, do not sustain the text. But he concludes what he has to say on the subject with the remark (p. 123), that "the doctrine in question certainly furnishes a valuable security against the inference which has too often been drawn from careless conversations with third persons, and tends strongly to advance the policy of the legislature."

Since the publication of 1844 of this excellent treatise on limitations, there have been numerous decisions, both in England and the United States, adverse to the views expressed by the distinguished author, and it is said, in a recent work of merit, that according to the very decided weight of the latest decisions in this country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who

810 does not pretend to have had "any authority from the creditor to call upon the debtor in relation to the debt, will not avoid the bar of the statute. In support of this proposition the following cases are cited, which we have examined, and they seem to be in point: *Ringo v. Brooks*, 26 Ark. R. 540; *Gillingham v. Gillingham*, 17 Penn. St. R. 302; *Moorehead v. Wriston*, 73 N. Car. R. 398; *Parker v. Sherford*, 76 Id. 219; *Wachler v. Albee*, 80 Ill. R. 47; *McGrew v. Forsyth*, Id. 596; *Kisler v. Sanders*, 40 Ind. R. 78; *Sibert v. Wilder*, 16 Kans. R. 176; *S. C. 22 Am. Rep. 280*; *Fletcher v. Updike*, 3 Hun. 350; *Cope, Girarden County v. Harbinson*, 58 Mo. R. 90; *Trousdale v. Anderson*, 9 Bush. (Ky.) R. 276. See also the cases referred to in notes of the American editors to *Whitcomb v. Whiting*, 1 Smith's Lead Cas. Part 2, marg. p. 728, where it is said to be well settled, both on authority and principle, that the debt will not be revived by an entry or memorandum, not forming part of a mutual account, on the books or papers of the debtor, or by a mere declaration or admission to a third person, meant only for his ear, and not intended to be communicated to the creditor.

The diversity in the earlier and later decisions is attributable, for the most part, to the different and somewhat antagonistic theories entertained at different periods concerning the design and policy of the statute. Under the leadership of Lord Mansfield, it was for a long time considered and held that under the statute lapse of time raises a mere presumption of satisfaction, which, like other presumptions, might be repelled, and hence that a new promise of the debtor, whether express or implied, was only evidence of the

pre-existing debt and gave no new cause of action. Subsequently, this theory was overturned and succeeded by a course of decision, initiated and fostered by Chief Justice Best, which regarded and construed the statute as one of repose, and the new promise as a new contract and actionable as such. This

811 view is now generally *accepted. *Sibert v. Wilder*, 16 Kans. R. 176, and cases cited. It would seem to follow logically that the promise, to be sufficient to take a case out of the statute, should be made directly or mediately to the creditor, or at least for his benefit, so that he may be able to maintain an action upon it. It is said that the declaration or admission to a third person is deemed insufficient, not so much because the acknowledgment is made to a stranger as because there is no sufficient evidence of an intention to contract. 1 Smith's Lead. Cas. Part 2, marg. p. 976.

We do not consider the judgment under review as conflicting with the recent decisions which have been cited. The deposition of the plaintiff in error was given, probably, at his own instance, for the very purpose of establishing, among other claims, the validity and binding force upon him of the debt, the recovery of which is now sought to be defeated by reliance on the act of limitations, and it was because of his sworn statements that he received credit for the debt on his bonds. He must therefore be understood to have intended that his acknowledgment of the debt, under the attending circumstances, should be accepted as such and confined in and acted upon by the creditor to whom the debt was due. He cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation.

For the reasons stated, we are of opinion that there is no error in the judgment of the circuit court, and that it should be affirmed.

MONCURE. P., concurred in the result.
Judgment affirmed.

812 *Payne & als. v. Hutcheson & als.

January Term, 1880, Richmond.

Absent, Moncure, P.

I. In March, 1862, H sells the farm on which he lives for \$22,500, a Confederate contract. His wife refuses to join in the deed, and he proposes to her to buy land and build on it, and have it conveyed in trust for her and her children; and upon that consideration she does execute the deed. H does buy the land for \$3,200, and builds on it; and they live on it and it is recognized as hers; but the deed to the trustee is not made until April, 1867. At the time of the contract H is not indebted seriously, and these debts are paid off before April, 1867. In April, 1867, H qualifies as administrator of D's estate and wastes it, and dies in 1871 insolvent. Upon bill by the distributees of D to set aside the deed—*Held*:

1. Deed from Husband to Wife—Validity against Husband's Creditors.—There having been no fraud in the arrangement between H and his wife, the contract between them is

valid, and though the deed to the trustee was not made until April, 1867, the title of the wife is good against creditors of H; they having become such since the date of the agreement between H and his wife in 1862.

- 2. Same—Value of Contingent Right of Dower.**—At the time of the agreement in 1862, H being forty years of age and his wife thirty-two, according to the tables of mortality the land settled on his wife was at that time in excess of the value of her contingent right of dower in the farm sold; but H having died before the suit was brought to set aside the deed, it is not in excess of her right of dower in the farm sold by H, after his death; and looking at all the facts in the case, the settlement is not more than a just equivalent for the interest relinquished by the wife.

813 *This was an appeal from a decree of the chancery court of the city of Richmond made on the 18th of April, 1876, in a suit brought in 1871 by Virginia Payne and others, creditors of John A. Hutcheson, deceased, against the administrator of said Hutcheson, and his widow and children. The only part of the case brought up to this court refers to the charge by the complainants that a deed executed by William Winkler's executrix to R. A. Patterson, in trust for Mrs. Hutcheson and her children, was fraudulent and void as to the creditors of John A. Hutcheson. The facts are as follows:

On the 27th of March, 1862, John A. Hutcheson sold a farm on which he lived, called Windsor, a few miles from Richmond, for \$22,510—a Confederate contract. Mrs. Hutcheson was not informed of the sale until after it was made, and when she heard of it was very much dissatisfied, and refused to join in the deed. Hutcheson thereupon proposed to buy a piece of land lying near to Windsor, owned by William Winkler, and to build upon it, and have it conveyed in trust for her and her children; and on this consideration Mrs. Hutcheson consented to execute the deed for the conveyance of Windsor to the purchaser. Accordingly Hutcheson did purchase of William Winkler forty acres of land, at the price of \$3,200; of which \$300 was to be paid in cash, and the balance in three years, with five per cent. interest. The dates of this agreement and of her acknowledgment of the deed are the same, viz: April 3d, 1862.

Winkler died in 1865, and his executrix seems to have filed a bill against Hutcheson to enforce this agreement; and in that suit it appeared that Hutcheson had paid to or for Winkler, in his lifetime, the whole of the purchase money, except \$32.83; and by deed bearing date the 1st of November, 1867, Winkler's executrix conveyed the land to R. A. Patterson, in trust for Mrs. Hutcheson and her children.

814 *Soon after the purchase of the land from Winkler, Hutcheson built upon it, and resided upon it until his death, which occurred in 1871; and during all this time the property was spoken of and treated as purchased under the said agreement between Hutcheson and his wife.

At the time this purchase was made, Hutcheson was the owner of a considerable

property, an active man of business, and owed little in comparison to the value of his property. But in April, 1867, he qualified as executor of Thomas S. Dicken, deceased, and seems to have wasted the estate; and after his death his estate proved to be insufficient to pay his debts.

In April, 1862, Hutcheson was forty years of age, and Mrs. Hutcheson was thirty-two, and according to the tables, her contingent right of dower in Windsor at the time of the sale, in March, 1862, was but \$816.

The court below dismissed the bill, so far as it sought to subject this property to the payment of the debts of Hutcheson, and the plaintiffs obtained an appeal from one of judges of this court.

F. M. Conner, for the appellants.

Cannon & Courtney, for the appellees.

STAPLES, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Richmond. The evidence satisfactorily establishes that John A. Hutcheson, in the month of March, 1862, sold a tract of land near the city of Richmond, known as Windsor, for the sum of \$22,570 in Confederate money; that his wife, Mrs. Emily T. Hutcheson, when she was informed of the sale, was greatly disturbed and dissatisfied with it, and peremptorily refused to relinquish her contingent dower interest therein. After repeated consultations

815 *on the subject, Mr. Hutcheson agreed that he would purchase another tract, and settle it on his wife, if she would unite with him in the deed of conveyance to the purchaser of the Windsor farm. With this understanding Mrs. Hutcheson executed the deed, and relinquished her dower interest in the Windsor farm. Shortly afterwards—not later than the 3d of April, 1862—Mr. Hutcheson accordingly purchased what is known in the record as the Winkler farm, containing about forty acres, at the price of \$3,200. Confederate money. There is good reason to believe that Mrs. Hutcheson did not sign the deed for the Windsor place until her husband had actually purchased the Winkler land; nor is there a shadow of doubt but that this latter purchase was made for the purpose of carrying out in good faith the agreement between Mr. and Mrs. Hutcheson. No deed was, however, executed till November, 1867, when Winkler's executrix conveyed the property to a trustee for the benefit of Mrs. Hutcheson and her children.

The delay in executing the deed grew out of causes connected with the war and certain litigation which need not be explained here, as it is not material to the present enquiry.

After the purchase, however, Mrs. Hutcheson was recognized as the owner, the property was understood in the community to be hers, and in due time it would be secured to her and her children. These facts are fully established by the testimony of witnesses.

That such agreements between husband and wife, when executed, will be sustained by

courts of equity, or, if not executed, will be specifically enforced, is now will settled. It is only necessary to refer to Davis' widow *v. Davis'* creditors, 25 Gratt. 587; Burwell's ex'or *v. Lumsden*, 24 Gratt. 443, and the authorities there cited, for a full discussion of the principles involved in this class of cases.

816 *The next point of enquiry is whether the settlement is either fraudulent or excessive. There is not the slightest proof of fraud in the transaction. On the contrary, all the circumstances tend to repel any such idea.

If Mr. Hutcheson owed any debts at the time, they were very small compared with the value of his estate, and they have long since been paid off.

It seems, however, that Mr. Hutcheson qualified in April, 1867, as the administrator of Thomas S. Dickens, and entered into bond in the penalty of \$13,000 for the faithful discharge of his duties. He wasted or mismanaged the estate, and his liability thus incurred is the foundation of this suit by the legatees to impeach the settlement. It is very true that this liability relates to the time of the qualification as executor, which was anterior to the execution of the deed to Mrs. Hutcheson's trustee, but the agreement to make the settlement was entered into in 1862, nearly five years before Mr. Hutcheson's qualification as executor, and before any liability had occurred from the administration of the estate. The appellants are therefore subsequent creditors, and as such, in the absence of actual fraud, occupy no higher ground than their debtors. The equity of the appellee, Mrs. Hutcheson, is as strong against them as against her husband.

If, therefore, the settlement should be regarded as voluntary or excessive, it would still be valid as against the appellants.

But discarding this view entirely, let us enquire whether the settlement is in fact excessive. And here it may be proper to say the court will not interfere with the settlement unless it plainly appears that the property conveyed to the wife greatly exceeds the value of the dower interest. As was said in Burwell's ex'or *v. Lumsden et als.*, it is extremely difficult to determine, with anything like accuracy, the value of the wife's contingent right of dower,

817 the husband *being still alive. No fixed rule can be laid down on the subject. The most that can be said is, that in the absence of fraud, the settlement will not be disturbed unless it plainly appears to be grossly excessive.

In the present case, according to the report of the commissioner, if we go back to 1862, and make a conjectural estimate of the wife's contingent dower interest, founded upon the tables of mortality, it would seem that the settlement is excessive. But it appears that Mr. Hutcheson died in 1871, and if we look to the actual value of the dower as now appears after the death of the husband, Mrs. Hutcheson has not received more than a just equivalent for what she relinquished. It may be admitted that

when the suit is brought to impeach the settlement while the husband is alive, resort must of necessity be had to the tables of mortality to ascertain the value of the contingent right of dower after the death of the husband. This rule, in many cases, could not be adopted with safety after the death of the husband, or with justice to all parties. The calculation of the chances of life must be made, not only with reference to the wife, but the husband also; his health, peculiarities of constitution, and other attending circumstances.

Without a full understanding of these matters, no commissioner can fix a reliable estimate of the husband's expectancy of life; no court could safely pronounce a settlement excessive upon any calculations made in the absence of such data.

An estimate of the value of the dower interest in 1862, made after his death in 1871, without reference to the circumstances affecting his expectancy of life, must of necessity be unreliable. The delay of the appellants, in instituting their suit, renders it necessary and proper that the court should look at all the facts as they existed before and since the death of Mr. Hutcheson, in order to form a just estimate of the settlement.

818 *In the light of these facts, it is manifest that the wife has not received more than a just equivalent for the interest relinquished by her. No injustice has been done the creditors. The appellants certainly have no just cause for complaint. We are therefore of opinion that the decree of the chancery court is correct, and should be affirmed.

Decree affirmed.

819 *Major's Ex'or & als. v. Major's Adm'r.

March Term, 1879, Richmond.

1. Bequests—Time of Vesting.—Testator, after directing the payment of his debts, says: I direct that all the property I have, or in which I have an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of the sale to be divided into four parts, namely: my brothers J, W and L, to have each a fourth part, and the other fourth part to be divided among my brother W's children, each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from my brother W, I give to him—**Held:** The bequests to the children of W did not vest at the death of the testator, but only as and when each child arrived at the age of twenty-one; and, therefore, the children dying before attaining that age took nothing under the will.

This was a suit in equity in the circuit court of Culpeper county, brought in March, 1875, by the administrator of Edmund P. Major, deceased, and of Bettie Major, deceased, to recover from John C. Major, the executor of Samuel Major, deceased, the share of the estate of Samuel Major to

*See *Sellers v. Reed*, 88 Va. 377; *Chestnam v. Gower*, 94 Va. 390.

which the plaintiff claimed that his intestates were entitled. The whole case turned upon the construction of the will of Samuel Major, deceased. The will was written by himself, and contains but a single clause, which is as follows: First, I direct that all my debts be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executor from any portion of my estate, either real or personal. Also I direct that all the property I have, or in

which I have an interest, both real and personal, be sold as is customary *in such cases, and the net proceeds of the sale to be divided into four parts, namely: my brothers, John C. Major, Winfield S. Major, and Langdon C. Major, to have each a fourth part, and the other fourth part to be divided among my brother William Major's children, each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from my brother, William Major, I give to him. All other debts due me to be collected and divided in the same way as moneys arising from the sales of my property. I do hereby appoint my brother, John C. Major, or Langdon C. Major, executor of this my last will and testament.

In witness whereof, I, Samuel Major, have hereunto set my hand and seal, this 29th day of November, 1851.

SAMUEL MAJOR, [Seal.]

The three brothers, John, Winfield and Langdon, had each received their share of the estate; and the question was when the share left to the children of William vested, whether at the death of Samuel Major, the testator, or when the children came of age. If the first, the intestates of the plaintiff were entitled to shares; but if the latter, as they died before arriving at the age of twenty-one years, and before any one of the children attained that age, they had no interest in the estate.

It appears that there were two children of William who was born in the lifetime of the testator, who were alive and had arrived at the age of twenty-one years, and there was one born since the death of the testator who was still an infant.

The cause came on to be heard on the 7th of September, 1875, when the court held that the bequest in favor of the children of William Major vested on the death of the testator, and made a decree in favor of the plaintiff for the sum of \$1,266.66, to be paid by the executor, John C. Major, out of his own estate, it being agreed that this sum *of \$1,266.66 was the amount due to each child under the construction of the will given by the court. And from this decree John C. Major in his own right, and as executor, and the other adult children of William Major applied to this court for an appeal; which was allowed.

Wm. J. Robertson and P. B. Hiden, for the appellants.

James W. Green, Williams and Spilman, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The only question we have to determine in this case is, whether the legacy bequeathed by the will of the testator, Samuel Major, to the children of his brother William Major, vested in them at the death of the testator, or at the time they arrived at the age of twenty-one years. This question must be solved by the true construction to be given to the following clauses of the testator's will. After providing first for the payment of his debts, he makes the following disposition of the balance of his estate in these words: "Also I direct that all the property I have or in which I have an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of such sale to be divided into four parts, namely: my brothers, John C. Major, Winfield S. Major and Langdon C. Major, to have each a fourth part, and the other fourth part to be divided among my brother William Major's children, each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from brother William Major, I give to him. All other debts due me to be collected and divided in the same way as moneys arising from the sales of my property."

The circuit court declared by its decree, now before us for review, "that the direction of the will of the testator.

*Samuel Major, that the other fourth part of his estate to be divided among his brother William Major's children," was in itself a bequest of said fourth part to said children, equally to be divided between them; and that the subsequent direction that "each one to have the amount of his share when he arrives at the age of twenty-one," had reference only to the time when the possession to said legacies was to be delivered to said legatees severally by the executor, who until such time was to hold or invest said legacies for the use of said legatees as a trustee or quasi testamentary guardian; and that the legacies vested in the children of said William Major on the death of the testator, Samuel Major, and subject to be divested pro tanto by the birth of any other child before any of them attained the age of twenty-one years, for the purpose of letting in such afterborn child or children; and that the defendant, Analle Major, although born after the testator's death, is nevertheless entitled to share with those born in the testator's lifetime in said fourth part of his estate." And in accordance with this opinion, the circuit court adjudged, ordered and decreed, "that under the true construction of the will of the testator, Samuel Major, the plaintiff's intestates, Edmund P. Major, and Bettie Major, as also the defendants, William Major, Jr., Samuel Major, Philip Major, and Analle Major, each took a vested legacy of one-sixth part of said fourth of the testator's estate, bequeathed, as aforesaid, to the children of his brother William Major; and that on the death of said Edmund P. Major and Bettie Major, their said share passed to their personal representatives, the plaintiffs."

The court is of opinion that this decree

and opinion of the circuit court construing the will of the testator, Samuel Major, so as to give to the children of his, brother William Major, legacies which vested in them at his death, are erroneous.

It is not necessary in this opinion to enter upon a discussion *of the technical rules which the courts have established, and the refined distinctions and exceptions to these rules, by which the lines, sometime shadowy, are drawn between legacies which are contingent and legacies which are vested. It is sufficient to say, in general terms, that where a future time for the payment of a legacy is defined by the will, the legacy will be vested or contingent according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy or to the gift of it.

In ascertaining the intention of the testator in this respect, courts of equity have established two rules of construction: First, that a bequest, payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators; for the words payable or to be paid are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time.

A second rule of construction established by the authorities is, that if the words to be "paid" or "payable" are omitted, and the legacies are given at twenty-one, or if, when, in case or provided the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy.

While these two rules of construction seem well established, there is still another, which is the all controlling one, and which explains and limits to their proper application the various exceptions and refinements of distinctions *to be found in the cases. It is this: the intention of the testator, as appearing from the whole will, must predominate over all technical words and expressions.

Applying these rules to the will before us, we think it is plain that the legacies bequeathed to the children of the testator's brother, William Major, were not legacies which vested at the testator's death, but contingent upon the legatees arriving at the age of twenty-one, and consequently the legacy of those who died before the age of twenty-one did not pass to their personal representative.

It is to be observed that the testator uses the words not "to be paid," or "payable," but the words "to have"—"each one to have the amount of his share when he arrives at

the age of twenty-one." These words "to have" are used three times in the clause of the will we are to construe, and we must fairly presume he used them each time with the same meaning. He directs that all the property, real and personal, I have be sold, &c., and the net proceeds to be divided into four equal parts: "My brothers, John C., Winfield S., and Langdon C., each to have a fourth part; the remaining fourth to be divided among the children of my brother William, each to have the amount of his share when he arrives at the age of twenty-one."

This language and these expressions thus repeatedly used by the testator in the same clause of his will plainly indicate that the enjoyment and title to said legacies were limited to the definite time or period when the legatees arrived at the age of twenty-one years. This is the more manifest, and is put beyond all doubt, when the intention of the testator is indicated from the whole scope and directions of the will.

It will be observed that the testator had four brothers, who were his nearest relatives and the objects of his bounty. To three of these brothers he leaves one-fourth each of his whole estate, the remaining fourth he bequeathes, not to his brother William, the fourth brother, but to his children.

*All he bequeathes to his said brother William are the debts which are due from him to the testator.

This indicates very plainly, from the will itself, that the reason why the fourth part of his estate was bequeathed to the children of his brother William instead of being given directly to him was, that his brother William was in debt, and the testator well knew that whatever was bequeathed to him would be taken by his creditors. It was therefore plainly his purpose to secure the legacy (which no doubt otherwise would have been directly bequeathed to him) to his children. And the same reason induced the testator to limit the enjoyment of said legacy to the period when the children arrived at the age of twenty-one years; for otherwise the share of any one child dying before that period, during the life of the father, would have gone to him and been subject to his debts.

The court is therefore of the opinion that, according to the rules of construction established by the authorities heretofore referred to, as well as from the intention of the testator, plainly indicated by the terms of the will itself, the legacies to the children of William Major did not vest in them at the death of the testator, but were contingent upon the fact that the legatees should arrive at the age of twenty-one years, and that therefore the plaintiffs, as personal representatives of the legatees, who died before the age of twenty-one, are not entitled to receive the amount of said legacies decreed to them by the court below.

The court is therefore of opinion that the decree of the circuit court of Culpeper county is erroneous, and that the same be reversed.

The decree was as follows:

The court is of opinion; for reasons stated

in writing and filed with the record, that the decree of the said circuit court is erroneous; it is therefore adjudged, ordered **826** *and decreed that the said decree of the said circuit court be reversed and annulled, and that the appellee, out of the estates of his intestates in his hands to be administered, do pay to the appellants their costs by them expended in the prosecution of their appeal and writ of supersedeas here, together with their costs by them expended in the said circuit court. And this court, now proceeding to render such decree as the said circuit court ought to have entered, and being of opinion that under the true construction to be given to the will of the testator, Samuel Major, the legacies bequeathed to the children of his brother, William Major, did not vest in them at the death of the testator, but whenever said children should arrive at the age of twenty-one years.

It is therefore decreed and ordered that the said bill of the appellee, the plaintiff in the court below, be dismissed, but without prejudice to the appellee, Analle Major, when she arrives at the age of twenty-one years, or of any of the other children of said William Major who are now of age, to demand and receive of the executor of said Samuel Major the amount admitted, or which may be proved, to be in his hands due to the said children of the said William Major.

All of which is ordered to be certified to the said circuit court of the county of Culpeper.

Decree reversed.

827 *Purdie & Wife v. Jones & als.

March Term, 1879, Richmond.

J., by his will, gave to his widow H, for her life, a tract of land, and directed that at her death it should be sold, and two-thirds of the money he gave to his brother W, and the rest to other relations. In 1857, in a friendly suit in which the widow H and W were plaintiffs and the other parties interested were defendants, there was a decree for the sale of the land, on a credit, except for the expenses of the sale, of one, two and three years, with interest from the day of sale. The sale was made by R as commissioner, and W became the purchaser at \$4,000. At the October term 1859, the report of the sale was confirmed, and the court, being of opinion that it was unnecessary to dispose of the principal of the proceeds of sale, appointed R a commissioner to collect the interest then due on the bonds and thereafter as it became due, and pay the same to H. In May, 1863, without any notice to H, W obtained a decree in the cause appointing U a commissioner to collect the bonds of W for the purchase money of the land, and invest the same in interest-bearing bonds of the Confederate States, or the state of Virginia, the investment to be made in the name of U as commissioner, the interest to be paid to H during her life; and upon payment of the bonds to convey the land to the purchaser. U collected the bonds, and after deducting expenses invested the money in a Confederate bond of \$3,700. The commissioner made his report, and on the 27th of October, the court made a decree confirming it, and directing U to

deliver the bond to H, upon her giving bond and security to account for it to the parties entitled on her death, and to report his proceedings to the court. The commissioner reported that H refused to receive the bond. In May, 1866, H presented her petition for a rehearing of the decrees of May and October, 1863, alleging that the decrees were made without her knowledge; and she filed with her petition the affidavit of R, who had been the

828 counsel of all parties in obtaining "the sale, which went to show that the decree of May, 1863, was obtained by U, as the counsel of N, and without notice to H. The court allowed the petition to be filed, but in October, 1873, dismissed the petition with costs—*Held*:

1. Interlocutory Decrees—Rehearing.—

The decrees of May and October, 1863, were interlocutory decrees, and may be reheard upon petition.

2. Decrees—Notice.—It was error to make the decrees without notice to H.

3. Same—Investments in Confederate Bonds.—It was error to authorize the investment of the purchase money of the land in Confederate securities.

4. Rehearing—Affidavit—Appeal.—The affidavit of R having been filed with the petition for a rehearing, and not having been objected to in the court below, cannot be objected to in the appellate court.

This was an appeal by John R. Purdie and Henrietta E., his wife, from the decree of the circuit court of Surry county, made on the 30th of October, 1873, dismissing their petition for a rehearing of two decrees made—one on the 11th of May, 1863, and the other on the 27th of October, 1863—in a cause depending in said court, in which said Henrietta E. Jones and others were plaintiffs, and Blair Pegram and others were defendants. The case is fully stated by Judge Anderson in his opinion.

O. G. Kean and Grattan, for the appellants.

S. D. Davies and Jones & Bouldin, for the appellees.

ANDERSON, J., delivered the opinion of the court.

At the October term, 1857, of the circuit court of Surry county, a decree was pronounced in a chancery cause therein depending, wherein Henrietta E. Jones, the widow of Boling Jones, deceased; William C. Jones,

***Interlocutory Decrees—Rehearing.**—See *Fultz v. Brightwell*, etc., 77 Va. 742; 4 Min. Inst. (2nd Ed.) 1389.

†Decrees—Notice.—In *Fultz v. Brightwell*, etc., 77 Va. 750, the court following the principal case, said: "In the case of *Beery v. Irick*, 22 Gratt. 614, it was held that an order of the circuit court was void, which was obtained without notice, in 1862, authorizing a purchaser of land, which had been sold in 1857 under a former decree in the cause, to pay to the receiver general of the court the balance of purchase money due by him, to be invested in state bonds, and the payment in Confederate currency under the order did not discharge the purchaser. See also *Myers v. Nelson*, 26 Gratt. 729; *Purdie and Wife v. Jones*, 32 Gratt. 827."

a brother and legatee of said decedent, and William E. B. Ruffin, his executor, were parties plaintiff, and the other heirs and distributees of said decedent, some of whom
 829 were infants, *were defendants, directing the sale of a tract of four hundred and eleven acres of land, which said decedent, by his last will, devised to his wife, the said Henrietta, for and during her natural life, and which he directed to be sold at her death, and two-thirds of the proceeds of sale to be paid to his brother, the said William C. Jones. He also gave a legacy of \$2,500 to his niece, Minerva E. Pegram, to be paid at the death of his wife, the said Henrietta, which it seemed to be understood by all the parties was to be paid out of the sale of the land. The residue of the proceeds of the sale of the land, if any, was undisposed of by the will.

The said decree seems to have been made in a friendly suit for the sale of the land, in accordance with the wishes of all the parties, and in which the infants answered by guardian ad litem, and in fact could not have been sold then, except by agreement of the parties in interest, as the will provided for its sale only at the death of the widow. The sale was made by W. E. B. Ruffin, the executor, who was appointed a commissioner for the purpose; and the said William C. Jones became the purchaser, at the price of \$4,000. By the terms of the decree the sale was on a credit of one, two and three years, with interest from day of sale, except a sum sufficient to pay costs, which was to be paid in cash.

The sale was reported by the commissioner to the court, and at the October term, 1859, was confirmed; and the court, being of opinion that it was unnecessary at that time to dispose of the principal of the proceeds of the sale of the land, adjudged, ordered and decreed that Commissioner Ruffin collect the interest now due on said bonds, and thereafter, from time to time, as the same becomes due, and pay the same to the plaintiff H. E. Jones, and make report to court of his proceedings thereon. But before proceeding to execute said decree, he was required to execute bond, with good security, in the
 830 penalty of \$500, conditioned *for the faithful performance of his duty under said decree. And the said commissioner executed a bond in the penalty of \$500, conditioned for the faithful performance of his duty under said decree, which was, as is recited, to collect the interest then due and the interest thereafter to become due, &c.

At the May term, 1861, by consent of parties, it was decreed that Robert H. Whitfield be appointed a commissioner in the place of William E. B. Ruffin, who was then deceased, to collect the interest, upon executing a bond similar to the one required of said Ruffin.

No other order seems to have been made in the cause until the 11th of May, 1863, when W. S. Underwood was appointed a commissioner to collect the bonds, and to invest the same in interest bearing bonds or certificates of the Confederate States or the state of

Virginia, or any other sufficient bonds or securities of or within the said state, and to return the said bonds, with a report of his proceedings, to the court. And said commissioner was ordered, upon payment of said bonds by the purchaser, to convey the land to him with special warranty. But said commissioner, before entering upon these duties, was required to give bond in the penalty of \$8,000. Said commissioner afterwards reported to the court that he had collected the bonds, amounting, May 13th, 1863, to \$3,887.85; that he had invested \$3,700 in a bond of the Confederate States, bearing seven per cent. interest from June 29th, 1863—leaving a balance, after paying expenses, of \$91.10 in his hands, subject to the order of the court.

On the 27th of October, 1863, there was a decree of the court confirming said report, and directing the commissioner to pay the said sum of \$91.10 to Henrietta E. Jones, taking her bond, and security from her, to return it upon the termination of her life, and to file the bond so taken with the papers in the cause. And further to transfer and assign to her for life the bond of thirty-
 831 seven hundred *dollars, upon her giving bond and sufficient security to account for the same, or the proceeds thereof, to the parties entitled upon the termination of her life, and to report his proceedings to court. And the said commissioner made report to the court, under said decree, that he tendered to Mrs. H. E. Jones, through her agent, Col. Jas. S. Clark, the bond of the Confederate States for \$3,700, in the said decree mentioned, and also ninety-one dollars and ten cents in Confederate treasury notes, and that she refused to accept the same or either, and that the said bond, and the said sum of \$91.10, is filed in the papers of this cause in the clerk's office of said court. There is no date given to this report, nor any entry made showing when it was returned.

Commissioner Underwood seems to have acted very promptly in executing all the previous orders of the court, and no reason appears why he should have been dilatory in the performance of this order; but there is good reason why he should have acted promptly in this instance too, and not have postponed the execution of this order. The Confederate bond and treasury notes were in his hands, and were depreciating every day, and it is natural that he would be desirous to be relieved from the responsibility of holding such securities, and indeed he might have incurred responsibility by holding them up and delay in executing the order of the court. It is most probable that the tender was made and refused soon after the decree of October, 1863, was pronounced; and this conclusion is very much confirmed, as we shall see, by the testimony of R. H. Whitfield.

No other order seems to be made in the case until the 11th of May, 1866. On that day John R. Purdie, and Henrietta E., his wife—Henrietta E. Jones that was—a plaintiff in this cause, by leave of the court, filed their petition for a rehearing of the cause,

and praying that said decrees may be reversed and set aside. And on the same day they excepted to the report of the **832** commissioner, that *he had "collected the bonds he was directed to collect by decree of May term, 1863, in Confederate treasury notes, which said decree did not authorize."

It is true that the decree does not expressly authorize him to collect the bonds in Confederate currency, but it authorizes him, when collected, to invest the fund in interest bearing bonds or certificates of the Confederate States. The commissioner in his report does not say expressly that he received payment of the bonds in Confederate treasury notes, but he says that he invested what he received, after paying expenses, in a bond of the Confederate States, except \$91.10, which the commissioner says, in a subsequent report, he tendered to Mrs. Henrietta Jones in Confederate treasury notes. There can be no doubt that the commissioner received payment of the bonds in Confederate depreciated currency, and that in so doing he did not go counter to the order of the court. It was evidently the intention of the court to authorize a change of the investment to a Confederate security, and to allow the purchaser to discharge his obligations with Confederate currency, which would be available in the purchase of Confederate bonds; and that the action of the commissioner was in conformity with the order of the court. And the question is, was said order erroneous, and ought it to have been reversed and set aside upon the plaintiff's petition?

Mrs. Henrietta Jones, now Mrs. Purdie, had only a life estate in the land, and consequently in the proceeds of the sale. The purchaser, Wm. C. Jones, was entitled to remainder, at her death, to two-thirds of the purchase money, and other parties to the suit, and the said Wm. C. Jones, inclusive, were entitled to the balance at the death of the life tenant. The decrees of October, 1859, and of May, 1861, which authorized the commissioner to collect only the interest, were doubtless in accordance with the wishes of the purchaser, and of all who were interested in the remainder. Such a decree

833 could only have been made with *the consent of the purchaser, who had a right, under his contract, to pay the purchase money as it fell due. But he doubtless regarded it as favorable to himself, that he was permitted to retain the principal, and required to pay only the interest, especially as two-thirds of it were his at the death of the life tenant. And we may infer that the decree allowing the purchaser to retain the principal, and requiring and authorizing only the interest to be collected, was made pursuant to a friendly arrangement and understanding between all the parties. For, from the first it was a friendly suit between them all, and the counsel who conducted it for them, Messrs. Graves & Whitney, were counsel for all, and neither of them were counsel for one adversely to another. And doubtless all the proceedings in the cause, up to the 10th of May, 1861, were

pursuant to the understanding and agreement of all, and most probably would have been adhered to by all but for the change which took place in the monetary affairs of the country.

In May, 1863, the court made a decree, changing the arrangement, that only the interest of the purchase money should be collected, and appointed W. S. Underwood a commissioner, and required him to collect the principal.

In the decree of October, 1859, the court gave as a reason for requiring only the interest to be collected that, in its opinion, it was unnecessary at that time to dispose of the principal. There was no more necessity for it in May, 1863. The life tenant was still living, and there could be no distribution of the fund to those entitled in remainder. The court does not intimate any change of opinion, or assign any reason for changing what seemed to have been the arrangement agreed upon by the parties themselves. But Mrs. Henrietta Purdie avers in her sworn petition that said decree was obtained without her knowledge or consent, "and that it was obtained by counsel employed by the purchaser, William C. Jones, for the sole purpose of discharging his said bonds in

834 Confederate money, *then largely depreciated; being then worth, as compared with gold, six for one." This averment is proved by the testimony of Robert H. Whitfield, who testified that the said Underwood told him that he was employed as counsel by William C. Jones, to move the court for leave to pay off his bonds given for the price of the land. Said Underwood had not been employed as counsel before in this friendly suit, and was then brought into the cause by William C. Jones for this belligerent purpose. I have treated the affidavit of R. H. Whitfield as testimony in the cause, as it was relied on as evidence in the court below, without exception; and it fully sustains the material allegations of the petition. It is true, as before remarked, that a debtor has a right to pay his debt when it is due. But he has not a right to pay a debt, which he contracted for in specie, with depreciated paper currency, without the consent of the party to whom it is due. And it was error in the court by the decrees of the 11th of May and 27th of October, 1863, to change the arrangement which had evidently been made by the parties, to the effect that the purchaser, William C. Jones, should retain the principal of the purchase money in his hands, and pay the interest annually to the life tenant, without notice to her—an arrangement upon which she was evidently relying, and which was evidently the foundation of that provision in the decrees of 1859 and 1861, and which had been acted on and carried out, up to the said 11th of May, 1863; and especially was it error to authorize the debtor to pay a specie debt in a paper currency so depreciated that six dollars of it were worth only one of gold, the medium in which, by the contract, the debt was payable, without the consent of the life tenant, and further to require her to receive it, nolens

volens, and to give bond and security that it should be returned after her death to William C. Jones and the other parties to whom it would be due. And not only so, but to allow her to receive the interest then
835 accrued, which *was absolutely hers, only upon condition that she would execute her bond, with security, for its return to them after her death.

It is contended that inasmuch as she did not except to the report of the commissioner setting out that he had received payment in confederate currency, and had invested \$3,700 of it in a Confederate States bond, that she cannot in the appellate court object to it, or that it was too late for her afterwards to object to it in the same court. She did except to it, it seems, as soon as she could, after she was informed of it, in the court below. But it seems to me that was unnecessary. The report of the commissioner shows that he acted pursuant to the decree. If there was no error in the decree, there was none in his report. But the fault was in the decree; and if that was wrong and invalid, the actings and doings of the commissioner in its execution could be of no value, and must fall with it; and in order to avail herself of any illegality in the decrees, it was not necessary that she should have excepted to them. It was competent for her to have impeached them, if they were interlocutory, by petition, or if they were final, by bill of review, though she had previously taken no exception to them. It was in time for either.

The decree of October, 1863, was not final, but interlocutory. It effectuated nothing more than was done by the decree of 11th of May of the same year, except that it confirmed the report of the commissioner of what he had done under the former decree. True it directed him how to dispose of the Confederate security, in which he had invested most of the fund, and the uninvested portion of the fund which he had received from the purchaser in Confederate treasury notes. But those provisions of the decree were conditional, and proved ineffectual and nugatory, as Mrs. Henrietta Jones was unwilling to comply with the condition upon which they depended, as

was shown by the report of the commissioner returned to the *court, and it was
836 not in the province of the court to coerce her. The disposition of those securities consequently remained to be provided for; and the further action of the court was as necessary to dispose of them subsequent to the decree of October, 1863, as it was before. That decree was, therefore, not final, as this important matter, as well as the question of costs, were not finally disposed of by it. And the court did not regard it as final, but evidently had further action in contemplation, as it required the commissioner to report his proceedings under that decree to the court; which he did, though his report had not been acted on when John R. Purdie and wife filed their petition for a rehearing of said decrees of 1863 with the affidavit of R. H. Whitfield, on the 11th of May, 1866.

On that day a decreetal order was entered in the cause, recognizing the marriage of the

plaintiff, Henrietta E. Jones, with John R. Purdie, and the filing of their said petition by leave of the court, and suggesting the death of W. E. B. Ruffin, and it was ordered that the suit be continued in the names of John R. Purdie and Henrietta, his wife, and of William J. Ruffin, executor of W. E. B. Ruffin, and the heirs of the said W. E. B. Ruffin.

On the 11th of May, 1867, the death of William C. Jones having been suggested, it was ordered that this cause proceed in the names of J. B. Jones and Charles P. Jones, his executors, and in their own right, of Mary Jones, widow of said W. C. Jones, and the heirs of said William C. Jones who are named.

At the October term, 1867, the following order was entered:

This cause came on this day to be again heard on the papers formerly read, and proceeding to consider the petition of Purdie and wife, heretofore filed in this cause, praying for a rehearing of this cause and the reversal of the interlocutory decrees herein of May and October terms, 1863, and being

of opinion that there is sufficient matter *referred to and stated in said petition to authorize a review and examination of the said interlocutory decrees, it is considered by the court, and thereupon ordered, that the prayer of said petition be granted, and the cause reheard; and for such purpose, without deciding any principle in the case remaining undecided, the cause is continued, to be again heard.

A paper purporting to be a certificate of Mary, widow of William C. Jones, the clerk certifies was found filed among the papers in the cause. How it got amongst them, or when it was filed, it does not appear. It is acknowledged before a commissioner in chancery on the 30th of April, 1873, but is not sworn to, and it is presumed was not filed anterior to that date.

At the October term of the court, 1873, the following decree was entered:

This cause came on this day to be reheard on the papers formerly read, and was argued by counsel: on consideration whereof, the court doth adjudge, order and decree that the petition of John R. Purdie and wife be dismissed, and that said Purdie and wife pay the costs of said petition, and that the unpaid costs accrued up to the filing of said petition be paid by the executors of W. C. Jones, deceased.

This appears to be the first final decree entered in the cause, and that was upon the rehearing. And from this review of the proceedings it is obvious that the court who pronounced the decrees of 1863 regarded and treated them as interlocutory, and not final, and, we think, properly.

Mrs. Jones was not represented by counsel when those decrees were pronounced. Mr. Graves does not appear to have been present, and indeed was not counsel for her to resist that motion. He died soon after the war. And Mr. Whitfield, as well as Mr. Graves, was engaged as counsel only to get a
838 decree for the sale of the land, and *was as much William C. Jones' counsel as hers. After that was attained, he regarded

himself as *functus officio*, and did not consider himself any longer counsel in the cause. Neither he nor Graves were ever counsel for the tenant for life, as against William C. Jones. They were counsel for them both, and for the other parties in a suit in which all concurred in the objects and purposes for which it was brought. This was a motion by the purchaser, made, it is true, in the same suit, but not as an original party to that suit, but only a quasi party as purchaser, and it was not made by either of the counsel who had been retained in that suit, but by an attorney, retained by W. C. Jones for the purpose; and it was in reference to a matter which was extraneous, and wholly collateral, to the design and objects of that suit, and involved new matter, antagonizing William C. Jones, in this new relation of purchaser, with the interests of the life tenant. It seems that Mr. Whitfield was told by Mr. Underwood, that he had been employed by the purchasers to make the application to the court, when he at once informed him that he was not counsel for the life tenant, and suggested to him the propriety and necessity of his giving her notice. He seems to have taken it for granted that the purchaser would proceed by petition, and that of course he would not proceed without notice to the life tenant. He was not then a resident of the state, and gave himself no concern about it, having informed the counsel of the purchaser that he was not counsel for the life tenant.

The life tenant, in her petition, denies on oath that she had notice of the proceeding; which put the purchaser on proof of the notice. She says she had no knowledge of said decrees until after the rendition of the decree of October, 1863, a short time before the tender to her by the commissioner under said decree; which tender she through her agent refused, and immediately directed

counsel to take the necessary steps to
 839 remedy the wrong done her by *said decrees, but from which he was prevented by the pending of the war and the non-organization of the courts. Mr. Whitfield testifies that Mrs. Jones did apply to him to have the error corrected, and that he was about to file exceptions or a petition for her; he is not clear in his recollection which. His impression was for some time that it was at the October term, 1863, but was now inclined to think it was after October court, 1863. The last impression must be correct. Because it was the decree of October, 1863, that required Mrs. Jones to receive the Confederate States bonds, &c., which could not have been tendered to her until after that decree, and it was most probably, as she avers, the tender of it to her by the commissioner that gave her the first notice of the decree, and of the proceeding against her. And very soon after that she applied to Mr. Whitfield to take such steps as was necessary to relieve her from the grievance. And of this he is positive, that whether it was to except to the report at the October term, 1863, or to file a petition afterwards, the opportunity for doing so was foiled for the reasons he had alleged, resulting from the state of public affairs, the

country being then desolated by war, and the courts suspended.

In *Berry v. Irick*, 22 Gratt. 614, as in this case, the land was purchased by Irick at a judicial sale prior to the war. The sale was made under a decree of 1857, and the purchaser was allowed to retain one-third of the purchase money, the portion in which the widow had a life estate, paying the interest to her yearly. Whether this arrangement was by a provision in the decree, or by agreement of parties, did not appear. The record of the suit had been destroyed by fire by the enemy during the war. But this plan was carried out by the purchaser paying two-thirds of the installments of purchase money to the heirs, as they respectively fell due, and the interest on the remaining third to the widow, until the year 1862, when,

840 without notice to *the widow and heirs, he obtained an order of the court authorizing him to pay the principal, and actually paid it to the receiver of the court, in obedience to its order, in Confederate currency. This court held that the widow and heirs, though parties to the suit, ought to have had notice of the creditor's motion; and that the order directing the payment by the purchaser was void, and the same was set aside and annulled, and the purchaser and his surety were held liable for the same, and the land bound. In that case the widow and heirs did not proceed by petition, but by bill in chancery, to set aside said order. But in the subsequent case of *Myers v. Nelson*, 26 Gratt. 729, the proceeding was by rule, after the war ended, in the same suit against the purchaser for the purchase money which had been paid into the hands of the receiver of the court, in Confederate money, under an order or decree of the court of 1863, but which the party to whom it was due refused to receive; and that proceeding was sustained by this court. The decree of 1863, which directed payment by the purchaser to the general receiver, and a conveyance to him thereupon, and the payment which had been actually made in Confederate currency, and the deed which had been executed by the commissioner, were rescinded and annulled; and a decree was pronounced against the purchaser for the purchase money, as if the decree of 1863 had never been made and no payment had been made under it; and in case the purchaser failed to comply with the decree in the payment of the purchase money, the land was to be resold. Reference is also made to the case of *Crickard's ex'or v. Crickard's legatees*, 25 Gratt. 410, which is confirmatory of the foregoing views. Also *Tosh & als. v. Robertson & al.*, 27 Gratt. 270.

That the court below did right to give leave to Purdie and wife to file their petition for a rehearing, and that there is error in the decrees of 1863 complained of, for which they should have been reversed and annulled, is established. *we think, by the cases above cited. The material allegations of the petition are sustained, for the most part, by the evidence of the recorded

proceeding. The affidavit of Whitfield was filed with the petition, which refers to it, for six or seven years prior to the final decree, and was relied on by the life tenant as testimony in her behalf. In the meantime, the death of Wm. E. B. Ruffin, the executor of Boling Jones, and the death of Wm. C. Jones, were suggested on the record at different terms of the court, and the cause was directed to proceed in the names of their respective representatives. Yet no answer has ever been made to said petition, though they had a right to answer it; and no exception was ever taken to the affidavit of Whitfield as testimony in the cause, and no testimony adduced by the party contesting the rehearing. The paper purporting to be the certificate of Mary Jones, the widow of Wm. C. Jones, found amongst the papers, not being on oath, and in no sense testimony, was not, it seems, considered by the court in its decree. But if it had been, it could not weigh as a feather against the evidence of the proceedings of record and the sworn testimony in the cause.

Upon the case as it is presented by the record, there is not a doubt upon the minds of the court as to the merits of the cause, or how it should be decided; and we do not think that after such delay, and the opportunities of those who resisted the rehearing to perfect their defence, that further time and opportunities should be allowed them to prepare their case and to keep alive this litigation, but that the matters in controversy should now be decided as they are presented by the record.

We are therefore of opinion to reverse the decrees of the circuit court of 1863 and of 30th of October, 1873, with costs, and to remand the cause for further proceedings to be had therein as are necessary to a final decree in conformity with the principles declared in this opinion.

842 *BURKS, J., thought that the case, as presented in the record, was for the appellants; but thought the case ought to be sent back to give the appellees an opportunity to make their defence to the petition for a rehearing by Purdie and wife.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the court below did not err in granting John R. Purdie and Henrietta, his wife, formerly Henrietta Jones, a rehearing of the decrees of 11th May and 27th October, 1863, and that said decrees were erroneous, and that said decree of 30th October is erroneous in not revising said decrees and annulling the same, and in dismissing the petition of said Purdie and wife for a rehearing. It is therefore ordered and decreed that the said decrees of 1863 and of 30th October, 1873, be reversed and annulled, and that the appellees, the personal representatives, and widow and heirs of Wm. C. Jones, pay to the appellants their costs expended in the prosecution of their appeal here. And this cause is remanded to the circuit court of Surry county for fur-

ther proceedings to be had therein, in order to a final determination of this controversy, in conformity with the principles declared in this order, and in the opinion filed with the record.

Decree reversed.

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***Terry v. Fitzgerald & al.**

March Term, 1879, Richmond.

I. T conveyed to S a tract of land of eleven hundred and seventeen acres, in trust to secure a debt of \$4,000, with interest, to F, and the deed provided that the trustee should sell the land, or so much as should be necessary to pay the debt. S declining to act, F has R, who was his counsel and was insolvent, substituted as trustee, and R advertises the land, or so much as might be necessary to pay the debt, for sale. T then applies for and obtains an injunction, on the grounds that R was insolvent and the counsel of F, and because they refused to divide the land and sell it in parcels; alleging that there were four separate improvements on the land; and insists that the trustee shall not sell without giving security for the safety of the trust fund—**Held:**

1. **Trustee, Right to Require Security from.**—Insolvency does not disqualify a person to act as trustee; but when money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of equity ought uncountedly to require of the trustee security before he is allowed to proceed with the execution of the trust.
2. **Same.**—Although R was substituted as trustee by an order of the court, on motion of which T had notice, he is not thereby precluded from applying to a court of equity to require of him bond and security before he proceeds to execute the trusts.
3. **Trustee as Agent of Both Parties in Sale of Land.**—The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell so as to get the best price for it.

844

***4. Trustees—Sales of Land—Equity Jurisdiction.**

—If the land will bring a better price by dividing it, and selling in separate lots, and the owner desires and requests it, and the trustee refuses, the owner may invoke the intervention and assistance of a court of equity, in a proper case, to control the trustee in the exercise of his discretion.

5. **Same—Same—Same.**—The court, having possession of this case, ought, instead of dissolving the injunction, to have retained the case, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of division into different tracts, and in what way, with power to employ a surveyor to

***Trustees—Sales of Land—Equity Jurisdiction.**—The principal case is cited, and the right to invoke the assistance of a court of equity, in order that the land may be sold advantageously is affirmed in *Thomas et al. v. Farmers Nat. Bank of Salem*, 86 Va. 293.

lay it off into as many different tracts as would promote an advantageous sale. And if, upon the coming in of the report, the court is satisfied from it and the testimony that it would conduce to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to decree a sale in that way, and the order in which the tracts should be sold, until enough was sold to pay the debt, interest and expenses.

This was an appeal from a decree of the circuit court of Pittsylvania county, dissolving an injunction which had been granted at the suit of William C. Terry to restrain the sale of a tract of land which had been conveyed by said Terry and his wife in trust to secure a debt due to William R. Fitzgerald. By deed bearing date the 3d of January, 1874, William C. Terry and Sallie F., his wife, conveyed to Samuel M. Stone a tract of land of eleven hundred and seventeen acres, made up of five or six several parcels, in trust to secure a debt of \$4,160, with eight per cent. interest, payable semi-annually, and if the principal of said debt was not paid in twelve months, then the trustee, on the request of the creditor, after advertising, &c., should sell on the premises for cash the said land, or enough thereof to pay the debt and interest then due and the costs of sale.

On the 15th of February, 1875, the county court of Pittsylvania, on the motion
845 of William R. Fitzgerald, and *upon notice to Terry, substituted Robert H. Tredway as trustee in said deed, in the room of Stone, the said Stone having declined, as the order recites, to accept said trust.

By a decree in a previous suit the debt was reduced to \$4,000 and six per cent. interest. In September, 1875, Tredway, the substituted trustee, advertised for sale the land, or so much as should be necessary to pay the debt, interest and costs; and thereupon Terry applied by bill in equity for an injunction to stay the sale by the trustee, and asking that the court would direct the sale by its commissioner, and in parcels. He objected to the trustee on the ground that he was the counsel of Fitzgerald, and was insolvent; and he insisted that even if he was a proper person to act in the case, he should be required to give security for the proper application of the proceeds of the sale. And he further insisted that the tract should be divided and sold in separate parcels, there being at present four separate improvements on the land, and two more about to be made.

The trustee, Tredway, did not answer the bill; but Fitzgerald answered, insisting that Tredway was substituted as trustee upon notice to the plaintiff, and without objection by him, and that though Tredway had been his counsel, he was not his counsel in this case. As to the mode of sale, it was advertised according to the terms of the deed, and that he would be satisfied with the sale of any portion of said land, however small, that might be sufficient to pay his debt, interest and costs.

For other statements of the bill and answer, see the opinion of Judge Anderson.

The cause came on on the motion of the defendants to dissolve the injunction, upon the bill, answer and exhibits; and it was dissolved. And thereupon Terry applied to this court for an appeal; which was allowed.

846 *J. Alfred Jones and E. Bouldin, Jr., for the appellant.
Ould & Carrington, for the appellees.

ANDERSON, J., This case comes up on a motion to dissolve an injunction on bill and answer. The injunction was to enjoin the sale of a tract of eleven hundred and seventeen acres of land in the county of Pittsylvania, by a substituted trustee, under a deed of trust, to satisfy a debt of \$4,000, and the interest which had accrued on it, and five per cent. commissions to the trustee.

One of the grounds of the injunction was, that the trustee as alleged by the bill was insolvent, and otherwise unfit for the execution of such a trust, and ought at least to be required to give security before he should be allowed to proceed with the execution of the trust. Another ground is that the land is a large and valuable tract, and ought to be divided and sold in separate parcels. That there are now four settlements on it, and two others have been commenced, and that it might be divided into six convenient and valuable farms. The plaintiff alleges that he knew persons who would bid for and pay a fair price for the different parcels, if sold separately, but knew of no one who would bid against the creditor, William R. Fitzgerald, if the land was sold in one body.

He alleges that the said Fitzgerald positively refused to allow the trustee to sell in any other way than for cash and the land in one body, his object being to bid it off for himself at a great sacrifice.

He also alleges that he went to the said Fitzgerald, and desired him to sell the land in separate lots and parcels, and proposed to advertise and sell himself, notifying the purchaser to pay the purchase money to the said Fitzgerald, but he positively refused to allow him to sell at all; and he then insisted

847 that he should direct the trustee, *Tredway, to sell the land in different lots and parcels to suit purchasers; and he alleges that if it is fairly and properly sold in parcels, it will not require the sale of the whole to pay said debt, but enough can be sold to pay what is due, and leave him a comfortable home. The trustee himself represents the land as very fertile, and highly productive for all crops raised in that section. "There are," he says, "good and valuable improvements, consisting of a large dwelling house, outhouses, stables, barns, &c., &c., in fact the property is well improved, in a high state of culture, and considered one of the best farms in this whole region of country."

Insolvency does not disqualify a person to act as a trustee, though it has not been uniformly so held. Mr. Hill says: For the removal of an insolvent trustee, and the appointment of a new trustee in his place, a bill must be filed in a court of chancery;

and the insolvency would unquestionably be sufficient foundation for such an application. Hill on Trustees, top p. 832, side 534. But in 1 Perry on Trusts, 2 ed., p. 353, § 279, it is said that generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust. Yet he says that in the United States trustees are or may be required, in the great majority of cases, to give bonds or security for the safety of the trust fund. In *McCullough & al. v. Sommerville*, 8 Leigh, 415, both the trustees were wholly irresponsible individuals, owning no property of any description, and this court held that the circuit court acted with entire propriety in relieving the trustees from the execution of the trust, and in taking a control of the funds for the purpose of distribution. P. 439-40.

There were other grounds urged also in the lower court for the removal of the trustees, but this court does not appear to have sustained the removal upon them.

We think that where money of the trust fund is to pass through the hands of an insolvent trustee, upon the application
848 *of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of chancery ought, undoubtedly, to require of the trustee security before he is allowed to proceed with the execution of the trust. Whether the sale of the land by the trustee in this case would be a discharge pro tanto of the debtor's obligation to the creditor, in case the trustee fails to pay over the money to him, is a question about which there may be different opinions. It is implied, by a declaration in the answer of Fitzgerald, that he would, in that case, consider the debtor absolved. And if that declaration could be regarded as a release of the debtor from responsibility in case of a diversion and misuse of the money by the trustee, he had not the benefit of it when he filed his bill, and it could not indemnify him for any surplus the land might bring over paying the debt if used by the trustee. Suppose the land should sell for three or four thousand dollars more than the amount of the incumbrance upon it, which is not an unreasonable supposition, from the trustee's description of it, and the trustee refused to pay it over to the owner, where and to whom could he look for indemnity?

The answer does not deny the insolvency of the trustee. The trustee has not answered at all; and the creditor, in his answer, says, although the said Tredway might be utterly solvent, (which the defendant does not admit), yet such insolvency could entail no loss on the complainant, &c. On a motion to dissolve an injunction, the allegations of the bill which are not denied must be taken to be true, although they are not admitted. The allegation of insolvency, not being denied, must be taken to be true, although it is not admitted by the answer. Although the said Tredway was substituted as trustee by an order of the court, on motion of which the debtor had notice, we are of opinion that he is not thereby precluded from

applying to a court of equity to require
849 of him bond and *security before he proceeds to execute the trust. And it would be no hardship on the creditor if it devolved on him the necessity of going his security, as it seems, according to his view, it would not increase his responsibility; and for the debtor, it is but what sheer justice requires. The bill alleges, that Samuel M. Stone was appointed trustee in the deed because he was known to the grantor to be a good business man, of high character, and a man of substance, and entirely solvent, who would act impartially and fairly in the matter. It is true that he had notice of the motion that would be made by Fitzgerald to substitute Ro. H. Tredway, his counsel, in the place of Stone, who, he represented, had refused to act. As soon as he received this notice, he went to see Fitzgerald about it, and to learn from him why he proposed to appoint his counsel, Ro. H. Tredway, trustee in place of Stone, who informed him that Stone had refused to act. He says he had never had any conversation with Stone on the subject, but has no doubt, that if he refused to act it was because of unjust requirements made of him by the said Fitzgerald. He avers that he would have objected to the appointment of said Tredway, trustee, if the said Fitzgerald had not induced him to believe that there never would be any necessity for the trustee to sell the said land. If he was thereby prevented from appearing in court, and objecting to his appointment, it would have been a fraud upon him, and the order appointing him ought not to be binding on him. The answer of Fitzgerald is not directly responsive to this allegation, though he "utterly denies that he ever, at any time, gave any assurance to the complainant that he did not wish to close said deed, or that he did (not) want the principal, as well as the interest, of his money;" which is responsive to another allegation of the bill. He does not deny that Tredway was his counsel, but denies that he is or has been his counsel in this proceeding since his appointment as trustee. The
850 bill charges *"that the said Tredway is not a fit or proper person to act as trustee in the deed of trust aforesaid; that he is the counsel of the said Fitzgerald, and employed and paid by him to represent his interest entirely, and is insolvent, and ought not to be allowed to sell the land, without first giving security, even if he was a fit and proper person to act as trustee."

A trustee, who is to act as the agent of both parties, should have no bias or partiality which would disqualify him fairly to discharge his duty, and to do justice to both parties. Where the parties agree that their respective counsel may act as trustees, it may be done. But where there is but one trustee, he ought not to be the counsel of one of the parties, especially where, as in this case, he may have to decide questions which may be of vital interest to the adverse party.

The answer does not deny the allegations before recited, that the plaintiff applied to the creditor, and also to the trustee, to have the land laid off and divided into different

tracts, and sold separately, and that they both refused to comply with that request. He denies only that he ordered the trustee to advertise the whole of said tract of land for sale, or that the trustee so advertised it, but affirms that he advertised strictly in conformity with the provisions of the deed so much of said land as might be necessary to pay the debt, and refers to the advertisement, which is made an exhibit. The advertisement is that he will sell, by way of public auction, so much as may be necessary to pay the debt, &c. He and Fitzgerald both refused, as is alleged, the request of the grantor to divide the tract, laying it off into four, five or six different farms, for which it was well adapted, and selling them separately, or so many of them as was necessary to pay the debt, &c. And this allegation, not being denied on a motion to dissolve, must be taken to be true. The plaintiff had a right, therefore, to conclude that they had no

other purpose, from the advertisement, *than to offer the whole in a body, for to do so—the creditor having no competition in the bidding—it would not sell for more than enough to pay his debt, interest and costs, if that. Under that advertisement they might have offered it to the bidder who would pay the debt, &c., for the smallest quantity of the land, as in the sale of land for taxes. Or on the day of sale, they might have offered such part of it as they chose, and if insufficient, then offer another part of it, and so on until they sold enough to pay the debt. But this advertisement gives no notice to the public that it would be so offered, or how the tract would be divided, or description of the parcels that would be offered separately, so as to invite the attendance of bidders, who might wish to purchase portions of the tract.

It is true, that the deed directs the trustee to "sell the said land, or enough thereof, to pay the debt and interest then due, and the costs of sale." The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell it so as to get the best price for it. And the deed does not prescribe any particular mode of selling it. He is only limited not to sell more than enough to pay the debt, &c. It does not provide that he shall sell it in one tract, nor does it prohibit him to sell it in parcels. We hold that it was the duty of the trustee to sell it in parcels, if by that mode it would bring the best price. And although he has a discretion, it is a legal discretion which is subject to the control of a court of equity. And if the land will bring a better price by dividing it and selling it in separate lots, and the owner desires and requests it, and the trustee refuses, the owner thereby invokes the intervention and assistance of a court of equity, in a proper cause to control him in the exercise of his discretion. In *Crenshaw v. Seigfried*,

24 Gratt. Judge Moncure, speaking

852 *for the whole court, said, If the debtor desires that a particular and

designated portion of the land, fully adequate by a sale for cash to produce the amount of the debt and expenses, such desire ought to be carried into effect. In this case the debtor does not insist that only a part of the land shall be sold, or object to selling the whole if necessary for the payment of the debt and expenses, but only insists that it shall be laid off into particular and designated portions, having assurance that it will sell better, and will not require the sale of the whole to pay the debt and expenses. The principle as laid down in the cited case, we think, clearly applies to this. In that case it was further held, that "the court in the exercise of a sound discretion, had authority to substitute a commissioner of sale in lieu of the trustee named in the deed," and a fortiori a substituted trustee.

The court having possession of this case ought, instead of dissolving the injunction, to have retained it, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of division into different tracts, and in what way, with power to employ a surveyor to lay it off into as many different tracts as would promote an advantageous sale. And if upon the coming in of the report, the court was satisfied, from it and the testimony, that it would be conducive to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to direct that it should be advertised and sold in such lots or parcels, and the order in which they should be sold, until enough were sold to pay the debt, interest, and expenses. And there is nothing in the deed which is restrictive of the power of the court to so direct.

That such a mode of procedure would in this case conduce to an advantageous sale we must conclude from what is before us. The

bill so alleges, and that allegation is 853 not *contradicted by the answer; it ought, therefore, on this motion to have been taken as true. And that allegation of the bill seems to be well supported by the consideration, as is alleged, if the tract is offered as a whole for cash, Fitzgerald would have no competition in bidding for it, and would get it at any price he might choose to bid, and the land would necessarily be subjected to a great sacrifice. Whereas if it were laid off into a number of small convenient farms, the plaintiff declares that there were persons within his knowledge who were able and willing to buy and pay fair prices, and he believed that in this way the sale of a part of the tract would pay the debt and costs and leave him a comfortable home; and these allegations of the bill are not denied in the answer. And why should not this just demand of the debtor be conceded to him when it could not prejudice the rights of the creditor? It seems it is prevented by the refusal of the trustee, who has not answered the bill. The creditor, in his answer, says, "As to the allegation in regard to the parceling out said land, this defendant can only say that all he desires is the payment of his debt and interest

and costs, and would be satisfied with the sale of any portion of said land, however small that might be, sufficient for that purpose."

That was all he was entitled to require; and the grantor had a right to require the trustee to proceed, in a way to effect that object, by the sale of as little of the land as practicable. And the creditor does not now seem to object to it. Why, then, should it not be done?

The court is of opinion, therefore, that the circuit court, instead of dissolving the injunction, should have continued it, retained the cause, and had the sale made under its supervision and direction, as indicated by its own commissioner; and might have appointed the substituted trustee such commissioner, upon his giving bond, with security, conditioned for the faithful execution of the trust, if not deemed otherwise unfit and disqualified for the discharge of the trust.

854 *The court is of opinion, therefore, to reverse the decree of the circuit court dissolving the injunction, with costs, and to remand the cause to the said circuit court, to be proceeded with in conformity with the principles declared in this opinion.

STAPLES and BURKS, J's, concurred in the opinion of Anderson, J.

MONCURE, P., and CHRISTIAN, J., dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court dissolving the injunction is erroneous. It is therefore ordered and decreed that the said decree be reversed and annulled, and that the appellees pay to the appellant his costs expended in the prosecution of his appeal here. And the cause is remanded to the circuit court of Pittsylvania county, with instructions to reinstate the injunction, and for further proceedings to be had therein in conformity with the principles declared in the opinion filed in the record.

Decree reversed.

855 *Walton v. The Commonwealth.

January Term, 1879, Richmond.

I. W, indicted for larceny in the county court of F, sends in reasonable time, a subpoena for two witnesses living in an adjoining county; and the sheriff of that county makes return upon it not executed for want of fees. When the case is called W asks for a continuance, on the ground of their absence, and makes affidavit as to their materiality. The court refuses to continue the case, but sends for the witnesses, and says that they may be examined if they come before the trial is ended. One comes, but not till the trial is ended, when there is a motion for a new trial. There being nothing to indicate that W was not acting in good faith—Held:

1. Criminal Case—Continuance—Judicial Discretion.—It was error not to continue the case, upon the application of W.

*Criminal Cases—Continuance—Judicial Discretion.—As to the principles governing the

2. Same—New Trial.—It was error not to set aside the verdict and grant W a new trial.

II. **Same—Continuance.**—The principles governing the court on motions for a continuance in criminal cases as stated in *Hewitt's case*, 17 Gratt. 627, 629, approved and acted on.

At the May term, 1877, of the county court of Fauquier county, James M. Walton was indicted for the larceny, in November, 1874, of three beef cattle, of the value of \$90. On his first trial the jury found him guilty; but the court set aside the verdict. There were subsequently two trials, in which the juries could not agree and were discharged. The fourth trial came on in May, 1878, when the jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him according to the verdict. The prisoner **856** thereupon applied to the judge of the circuit court of Fauquier, in vacation, for a writ of error; which was refused; but upon application to a judge of this court, the writ of error was allowed. The case is fully stated in the opinion of the court, delivered by Moncure, P.

A. D. Payne, H. W. Thomas and E. E. Meredith, for the prisoner.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the county court of Fauquier county, convicting the plaintiff in error of the larceny of three beef cattle, of the value each of thirty dollars, amounting in the whole to ninety dollars, awarded by a judge of this court after an application by the said plaintiff for such a writ had been denied by the judge of the circuit court of said county in vacation.

The principal question presented to this court for its decision in the case is, whether the county court erred in overruling the motion of the said plaintiff in error—the defendant in the county court—for a continuance; which motion was made on the calling of the case for its final trial in the said court.

The facts on which the said motion was founded, and the action of the said court upon it, are set out in bill of exceptions No. 1, which was made a part of the record in the case on the said trial, and is in these words:

"Be it remembered, that on the calling of this case the defendant, by his counsel, moved the court to continue this case on the grounds of the absence of James R. Purcell and C. W. Hazen, whom the prisoner, on oath, declared were important and material witnesses **857** to his defence, and *that he could not safely go into trial without them; the

court on motions for a continuance, see *Keesee, etc., v. Border Grange Bank*, 77 Va. 132; *Carter v. Wharton*, 82 Va. 267; *Harman v. Howe*, 27 Gratt. 676; *Bland and Giles County Judge v. Case*, 33 Gratt. 443; *Comm. v. Mister et al.*, 79 Va. 5; *Shelton v. Comm.*, 89 Va. 450; *Clinch River Mineral Co. v. Harrison et al.*, 91 Va. 122; *Goodell's ex'ors v. Gibbons*, for etc., 91 Va. 608; *N. & W. R. R. Co. v. Shott*, 92 Va. 34.

subpœnas for said witnesses having been duly issued from the clerk's office of the county court of Fauquier to the sheriff of the county of Prince William, the county in which said witnesses reside, and said sheriff having received said subpœnas, and returned the same not executed for want of fees.

"Whereupon the court overruled said motion for a continuance, and at the same time announced that it would send for said witnesses, and that they should be examined if they made their appearance at any time before the case was given to the jury—the said witnesses having been sent for by the court, the process having been put into the hands of — Francis to deliver to the deputy sheriff of Prince William county, but said messenger has not returned, nor has there been any return on said subpœnas.

"To which action of the court, overruling said motion of continuance, the said defendant excepted, and prays that this his bill of exceptions may be signed and enrolled.

"W. H. Gaines, Judge."

The only other question presented to this court for its decision in the case is, whether the county court erred in overruling the motion of the said defendant to set aside the verdict of the jury and grant a new trial, as appears from bill of exceptions No. 2, which was also made a part of the record in the case on the said trial, and is in these words:

"Be it remembered, that upon the rendition of verdict in this cause, the prisoner, being present in court, by his counsel, moved the court to set aside the verdict and grant him a new trial, upon the grounds set forth in bill of exceptions No. 1, and for other reasons appearing upon the record, and the additional fact that J. R. Purcell, one of said witnesses, appeared in court after the

858 rendition of the *verdict, and when he could not be examined, the trial having ended; which motion of the prisoner to grant a new trial the court overruled; to which action of the court the prisoner excepts, and prays that this his bill of exceptions may be signed; which is accordingly done.

"W. H. Gaines, Judge."

1st. Did the county court err in overruling the defendant's said motion for a continuance, mentioned in his said bill of exceptions No. 1?

The rule of law on the subject of a motion for a continuance is thus laid down in the unanimous opinion of this court in Hewitt's case, 17 Gratt. 627, 629: "A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground unless such action was plainly erroneous. As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpœna for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides,

a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted. 1 Rob. Pr., old ed., p. 250. The party thus shows, prima facie, that he is not ready for trial, though he has used due diligence to be so; and in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and to continue the case, if there be reasonable ground to believe that the attendance of the witness, at the next term of the court, can be secured, especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party

859 in *moving for a continuance is to delay or evade the trial, and not to prepare for it, and in such case, of course, the motion ought to be overruled."

Was not the defendant entitled to a continuance on the grounds stated in his said bill of exceptions No. 1, when he made his motion therefor, according to the rule laid down on the subject as aforesaid?

The court is of opinion that he was. He showed, at the time of making said motion, that a subpœna for his said witnesses, James R. Purcell and C. W. Hazen, who failed to appear at the time appointed for the trial, was delivered to the proper officer of the county in which the said witnesses resided—to wit: the county of Prince William—a reasonable time before the time for the trial; which officer, instead of duly executing the same, as he doubtless might have done, improperly returned it, "not executed for want of fees." He made oath, at the time of making said motion, that the said witnesses were material to his defence, and that he could not safely go to trial without their testimony. He thus showed, prima facie, that he was not ready for trial, although he had used due diligence to be so; and, according to the rule aforesaid, in the absence of anything to show the contrary, the court ought to have given him credit for honesty of intention, and to have continued the case, if there was reasonable ground to believe that the attendance of the said witnesses, at the next term of the court, could be secured, especially if the case had not been before continued for the same cause. There was certainly reasonable ground to believe that the attendance of the said witnesses, at the next term of the court, could be secured. The attendance of one of them, James R. Purcell, was actually secured during the same term at which the case was tried, but after the trial, when of course it was too late for his examination as a witness on said trial. Certainly the case had not been before continued for the same cause; that is, the non-attendance of the said two witnesses, or either of them.

860 *It is true that, according to the said rule, "a motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment

on that ground, unless such action was plainly erroneous." "But circumstances may satisfy the court that the real purpose of the party, in moving for a continuance, is to delay or evade the trial, and not to prepare for it; and in such case, of course, the motion ought to be overruled." The circumstances of this case, in our opinion, were not such as to satisfy the court, and did not satisfy the court, that the real purpose of the party, in moving for a continuance, was to delay or evade the trial, and not to prepare for it.

The indictment in the case was found on the 28th day of May, 1877, and the case was formerly tried, or, rather, the final trial was ended, on the 27th day of May, 1878; so that the case was pending in the county court just a year. During that comparatively brief period, the case was four times tried. Twice there was a verdict against the accused; and twice the jury could not agree, and a juror was withdrawn, and the case continued. The case was several times continued generally, or on the motion of the commonwealth, but never on the motion of the defendant, though he twice moved for a continuance. A new trial was granted to the defendant when the first verdict was found against him, and was doubtless granted because the court did not consider the verdict as sustained by the evidence. If James R. Purcell was examined as a witness for the defendant on the trial in which the said verdict was rendered, as was no doubt the case, the court might have relied, in part at least, upon his evidence as a ground for setting the verdict aside. If he was not so examined, his evidence would doubtless have made the case stronger for the defendant than it was without his evidence. So

861 that, *in either view, the defendant no doubt desired, in moving for a continuance as aforesaid, not to delay or evade the trial, but to prepare for it by securing the presence of his said witnesses on that occasion.

The defendant was first required to enter into a recognizance of bail in the penalty of \$3,000, with sureties in a like or larger amount, which amounts were continued for some time during the progress of the case. But afterwards, pending the prosecution, the penalty was reduced from \$3,000 to \$500, and then to \$100, at which last very small amount it remained for some months before the decision of the case in the court below. This certainly tends to show that the court's opinion of the case became more favorable to the defendant as it progressed and as the facts were more fully developed by the successive trials which occurred in it. The defendant continued to appear according to his recognizances of bail without regard to the amount of them, whether very large or very small; and on the only occasion on which he made default, he showed such good reasons for it as induced the court to excuse him, and spare his recognizance.

On the 8th day of May, 1878, pending the last trial of the case in the court below, on motion of the attorney for the commonwealth, an attachment, returnable before the said court on the next day, was awarded against P. H. Oliver, a witness on her behalf

in the case. And on the same day, pending the said trial, on motion of the defendant, by counsel, an attachment, returnable before the said court on the next day, was awarded against Theron Newman, James R. Purcell, and C. W. Hazen, witnesses in his behalf in the case. And on the next day—to wit: the 9th day of May, 1878—before the trial was ended, the attachment issued the day before against P. H. Oliver, and absent witness for the commonwealth in the said case, was returned duly executed, and he was no doubt examined as a witness in the case.

But the attachment issued on the same **862** day *against three witnesses in behalf of the defendant as aforesaid was not returned duly executed before a verdict was rendered in the case, although the said J. R. Purcell, one of the said witnesses, appeared in court after the rendition of the verdict and before judgment was pronounced thereon. When the court overruled the defendant's motion for a continuance, as stated in his said bill of exceptions No. 1, it announced that it would send for said witnesses, and that they should be examined if they made their appearance at any time before the case was given to the jury. The said witnesses having been sent for by the court, the process having been put into the hands of — Francis to deliver to the deputy sheriff of Prince William county, but said messenger had not returned when said bill of exceptions was taken, nor had there been any return on said subpoenas. It appears, however, from bill of exceptions No. 2, that the said J. R. Purcell, one of said witnesses, appeared in court after the rendition of the verdict, and when he could not be examined, the trial having ended. But though he could not be examined on the trial which was then ended, he might have been examined on a new trial, which could then have been granted, and ought to have been under the circumstances.

In the vacation order made in the case by the learned judge of the circuit court June 17th, 1878, he says:

"In this case, prisoner was indicted at May term of county court of Fauquier. There were several continuances and three trials between that time and April court, 1878. At that time prisoner moved for continuance, on account of absence of witnesses; court overruled motion, and set case for May 8th. On that day prisoner again moved for continuance, and made affidavit as to materiality of witnesses. There is no other evidence of materiality. The prisoner, it seems, was out on bail, and had, therefore, every opportunity of preparing for trial. As to

863 second *bill of exceptions, asking new trial, J. R. Purcell, one of the witnesses, was then present, and his affidavit as to what he could prove might have been put on record, to enable court to judge of his materiality. This was not done. There is no statement of facts or evidence. I think writ of error should be refused. Roussell's case, 28 Gratt. 930.

"James Keith."

The defendant had complied with the requisition of the rule of law on the subject

of continuances, by causing a subpoena for the witness in question to be delivered to the proper officer of the county in which he resided a reasonable time before the time for the trial, and swearing that the witness was material, and that he could not safely go to trial without his testimony. If the court doubted the materiality of the witness, notwithstanding the said oath of the defendant, the court itself might and ought to have examined the witness as to what he could prove in the case. That it did not do so confirms the view that it had no doubt or difficulty on that subject. In fact, the court, in overruling the defendant's motion for a continuance on the ground of the absence of his said witnesses, announced that "it would send for them, and they should be examined, if they made their appearance at any time before the case was given to the jury." And the court actually did send for them, as aforesaid, but none of them appeared, except James R. Purcell, who appeared after the verdict was rendered, though before the case was ended. The absent witnesses all resided in the adjoining county of Prince William, and their attendance—and certainly that of James R. Purcell—might have been enforced by the mandatory process of the court, then in session, in full time for his examination on the trial, which might have been delayed a day or two for the purpose, if necessary. And that course ought certainly to have been pursued, as the court overruled the defendant's motion for a continuance to the next term of the court.

864 *As to Roussell's case, 28 Gratt.

930, cited by the judge of the circuit court in his vacation order aforesaid, it is materially unlike this case, as will plainly appear from the opinion of the court, delivered by Judge Burks, in that case, to which reference can readily be had, and there can be no occasion for repeating any of it here.

In Roussell's case, as in this, the prosecution had been pending about a year, and the accused had been admitted to bail. In other respects the cases materially differed. In that case there had been no trial during the year, and the witness on account of whose absence the continuance was asked for was not only not summoned to attend at the term at which the case was tried, but a subpoena for the witness to that term had not been placed in the hands of the sheriff of the county for execution, the only excuse of the accused for not doing so being, that it was "the habit of the clerks of other courts when a subpoena for a witness had once been ordered in a case, to continue to issue it afterwards from term to term, until trial, without further directions." This court was of opinion that this was not a valid excuse. In the present case, there had been three trials previously during the year, and the accused on a former occasion had sued out an attachment to enforce the appearance of the witness, and had placed in the hands of the sheriff of the county in which the witness resided a subpoena for him to attend the term at which he was finally tried, which the sheriff received in time to execute, but

failed to do so. There are other material differences between the two cases, but it is not necessary to repeat them here.

Besides Hewitt's case, and Roussell's case, which have a material bearing on the subject of a motion for a continuance, the following cases were cited in the argument of this case, and have also a material bearing on the same subject, viz: *Hook v. Nanny, &c.*, reported in note to 4 Hen. & Mun. p. 157;

Higginbottom, &c. v. Chamberlayne, 4 865 Munf. *547; *Deford v. Hayes*, 6 Id. 390; *Gwatkin v. Commonwealth*, 10 Leigh, 687; *Harris v. Harris*, 2 Id. 584; and *Harman v. Howe*, 27 Gratt. 676.

Upon the whole, we are of opinion, for the reasons aforesaid, that the said judgment of the said county court is erroneous and ought to be reversed and annulled, the said verdict set aside and the cause remanded to the said county court for a new trial to be had therein.

The judgment was as follows:

The court is of opinion, for reasons in writing and filed with the record, that the said county court of Fauquier county erred in overruling the motion of the said plaintiff in error, James Walton, for a continuance of this case, as mentioned in his bill of exceptions No. 1; and also in overruling the motion of the said plaintiff in error to set aside the verdict and grant him a new trial in the case as mentioned in his bill of exceptions No. 2; and that the said judgment of the said county court is therefore erroneous: therefore, it is considered, ordered and adjudged that the said judgment be reversed and annulled, that the verdict of the jury be set aside, and that the cause be remanded to the said county court of Fauquier county, for a new trial to be had therein of the said plaintiff in error, James Walton, for the said felony, on the said indictment; and for further proceedings, to be had in the said cause to a final judgment therein, in conformity with the opinion and judgment of this court aforesaid.

Which is ordered to be certified to the said county court of Fauquier county.

Judgment reversed.

866 *Robinson v. The Commonwealth.

January Term, 1879, Richmond.

I. **Indictments.**—An indictment charging the prisoner with stealing certain papers of the value of \$110, not otherwise describing the papers charged to have been stolen, is fatally defective.

II. **Discharge of Jury.**—On a trial for stealing certain bank notes, "the numbers and denomination of which are unknown to the jurors," the evidence of the commonwealth shows that the number and denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner, excludes the evidence; and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offence—*Held:*

1. **Second Indictment for Same Offence.**

—That if the jury had, on the first trial, rea-

dered a verdict in favor of the prisoner, it would not, under the statute, Code of 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offence; and therefore the discharge of the jury was no injury to the prisoner.

This was a writ of error from the judgment of the hustings court of Manchester, by which Charlotte Robinson was sentenced to three years imprisonment in the penitentiary for larceny. The case is stated by Judge Christian in his opinion.

S. M. Page, for the prisoner.

The Attorney-General, for the commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

367 *The plaintiff in error, Charlotte Robinson, was indicted for larceny in the hustings court of the city of Manchester. The indictment contained two counts. The first count charged "that the said Charlotte Robinson, on the 21st day of April, in the year 1878, at the said city, within the jurisdiction of the said hustings court of the city of Manchester, divers notes, national currency of the United States, the numbers and denomination of which said notes are to the jurors unknown, of the value of one hundred and ten dollars, the notes and property of George W. Alsop, being then and there due and unsatisfied to the said George W. Alsop, feloniously did steal, take and carry away, against the peace and dignity of the commonwealth of Virginia."

The second count charged "that the said Charlotte Robinson, on the 21st day of April, 1878, in the city and jurisdiction aforesaid, certain paper of the value of one hundred and ten dollars, of the goods and chattels of one George W. Alsop, being then and there found, feloniously did steal, take and carry away, against the peace and dignity of the commonwealth of Virginia."

Upon this indictment the prisoner was arraigned, and pleaded "not guilty." Upon this trial there was no motion to quash the indictment, or either count thereof, and the only plea tendered by the prisoner was the plea of "not guilty."

The record of the trial shows that after the commonwealth's evidence was all produced, the prisoner, by her counsel, moved the court to exclude all the evidence of the commonwealth.

And upon this motion the record discloses that, "it appearing to the court, from the evidence adduced in the case, that the notes designated in the indictment and described as unknown, were in fact known to the grand jurors, the court, for this reason, sustains the motion aforesaid; and G. B. Williams, one of the jurors, was with-

368 drawn, *and the rest of the jury from rendering their verdict were discharged."

The record further shows that the prisoner, by counsel, "objected to the discharge of the jury, and moved the court to permit this jury

to render a verdict; which motion the court overruled; and the prisoner, by counsel, except thereto."

After this proceeding, another indictment was found by the grand jury against the prisoner, both counts being in the same form except it failed to charge that the denomination of said notes were unknown to the grand jury, and described the denomination of same. In all other respects, both counts were the same as in the first indictment.

Upon this second indictment the prisoner was arranged, and she then tendered the following plea:

And the said Charlotte Robinson comes and says that no further proceedings in the premises should be had or taken against her on the said indictment, because she says that on the 15th day of July, 1878, in the hustings or corporation court of the city of Manchester, she, the said defendant, was put upon her trial upon an indictment for the identical charge contained in this, a second indictment, for the same offence, and a jury between the commonwealth and the said defendant, upon the said indictment, on the 15th day of July, 1878, was in due form of law drawn, selected, and impaneled, charged and sworn to well and truly try the said issue. And the said jury, without the consent of the said Charlotte Robinson, have been discharged and separated without having rendered any verdict therein, and without disagreeing or other special cause, there being no material necessity for the discharge of the said jury, and the said Charlotte Robinson says that she has been once in jeopardy upon and for the said charge and offence for which she now stands charged, and indicted in the present indictment to which she is now called on to plead, and cannot by the laws of the land be again tried therefor, and this she is ready to verify.

369 *To this plea the commonwealth's attorney tendered a demurrer, which was overruled by the court; and thereupon there was a replication filed by the attorney for the commonwealth, and issue joined therein by prisoner. Upon this issue thus made up a jury was sworn, and arguments of counsel being heard, returned a verdict in these words: "We the jury, on the issue joined, find for the commonwealth."

The prisoner then pleaded not guilty; and upon this issue another jury was sworn, who, after hearing the evidence and the arguments of counsel, returned a verdict, finding the prisoner guilty, and ascertaining the term of her imprisonment at three years in penitentiary.

Motions were made by the prisoner to set aside the verdict of the jury, on the special plea and the verdict of the jury on the plea of not guilty, both of which motions the court overruled. To these judgments refusing to set aside said verdicts a writ of error was awarded by one of the judges of this court.

The court is of opinion there is no error in the judgment of the hustings court refusing to set aside these two verdicts of the jury.

As to the verdict upon the plea of not guilty, it is sufficient to remark that neither the evidence nor the facts proved are certified; nor does it appear in the record that the court below was asked by the prisoner's counsel to certify either the evidence or the facts proved. In the absence of both, this court cannot, of course, determine the question whether the verdict of the jury on the issue made by the plea of not guilty was contrary to the evidence.

The only question we have to pass upon, as the record is presented here, is, whether the prisoner ought to have been discharged, at her second trial, upon her special plea of "once in jeopardy," as above set forth.

In determining this question, we
870 must treat the first indictment *as containing really but one count—the first. The second count was manifestly defective, and must be rejected as bad. It charged the prisoner with the larceny of certain paper, of the value of one hundred and ten dollars. There ought to have been some description of the paper, so as to inform the defendant of the nature of the charge she was called upon to answer. The charge of stealing certain paper was altogether too vague and indefinite. It might have been wall paper, or writing paper, or wrapping paper; paper written or printed upon; paper whose value was determined by what was written or printed thereon, or paper the value of which was intrinsic in itself. It is true bank notes, promissory notes and bonds, and other writings of value, are, in a certain sense, all paper, but their value is estimated not as paper, but according to the value of the obligation thereon written or printed. It is not sufficient, therefore, in an indictment to charge the larceny of certain paper. There must always be some description, at least to the extent to notify the defendant of the specific charge he is called upon to answer.

In this case, therefore, we must reject the second count as defective, and treat the case as under an indictment containing a single count, charging the plaintiff in error with the larceny of "divers notes, national currency of the United States, the number and denomination of which said notes are to the jurors unknown, of the value of one hundred and ten dollars, the notes and property of George W. Alsop."

Now, on the trial of the prisoner on this indictment, upon the plea of not guilty, the evidence for the commonwealth disclosed that the denomination of the notes were in fact known to the grand jurors, while the indictment charged that they were "to the jurors unknown." It would certainly, at this stage of the proceedings, have been competent for the attorney for the commonwealth to have entered a nolle prosequi under this
871 indictment, and preferred *another indictment, by the same or another grand jury, against the prisoner, leaving out the words "the denomination of which said notes are to the jurors unknown"; and certainly to the second indictment it could not be pleaded in bar that the prisoner had once

before been tried for the same offence, or, in other words, was put twice in jeopardy.

In this case, however, the prisoner, by her counsel, moved to exclude all the evidence on account of the variance between the proof and the charge in the indictment, as above indicated. The court granted her motion, and excluded the commonwealth's evidence and discharged the jury.

Now, the great complaint of the prisoner's counsel is, and that is the burthen of the elaborate argument on the authorities cited here, that the court had no right to discharge the jury without the consent of the prisoner; that the prisoner had a right to the verdict of the jury; that she objected to a discharge of the jury and insisted that the court should permit the jury to render a verdict in her case.

Without special reference to or comment upon the numerous cases cited by the counsel for the prisoner, it is sufficient to say that it is undoubtedly true, as a general rule, that in a criminal trial the court has no right, without the consent of the prisoner, to discharge the jury except in a case of manifest necessity, such, for instance, as the illness or death of a juror, or where it is plain that the jury cannot agree in a verdict.

But in the case before us, it is plain that the discharge of the jury by the court, if error, was not an error to the prejudice of the prisoner.

The evidence offered by the commonwealth, being excluded by the court, the verdict of course would have been a verdict of not guilty. That verdict would only have dis-

872 charged the prisoner from further prosecution under that *indictment. The action of the court in excluding the evidence and discharging the jury accomplished precisely the same thing. If the jury had not been discharged and rendered a verdict of not guilty, that verdict could not have been pleaded to the second indictment, because the acquittal was effected in consequence of a variance between the allegations and the proof. Whatever may have been the rule at common law, or the principles settled by the cases relied on, our statute puts that question at rest forever. For it provides that "a person acquitted of an offence on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again on a new indictment, or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal." Code 1860, ch. 199, § 16, p. 814.

It is plain, therefore, that by the express terms of this statute, if the jury had not been discharged and had rendered a verdict of not guilty, that verdict could not be pleaded in bar of the second prosecution.

We are therefore of opinion that there is no error in the judgment of the hustings court of the city of Manchester, and that the same be affirmed.

Judgment affirmed.

873 *Leath v. Commonwealth.

January Term, 1879, Richmond.

1. **Indictment Charging Several Acts.**—An indictment under the statute, Code of 1873, ch. 194, § 1, for gaming, pursues the language of the statute, except that it uses the word "and" in place of "or," thus charging the accused with exhibiting all the games mentioned in said statute. This is correct. It charges but one offence, and is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be but one fine, and one term of imprisonment.
2. **Indictment—Sufficiency.**—The indictment charges the offence to have been committed in the city of Richmond, and within the jurisdiction of the court. This allegation is sufficiently certain. It is not a case in which place enters into the offences; but it is an offence without regard to the particular house, building or other particular locality where it is committed.
3. **Same—Gaming.**—It is not necessary that the indictment should charge that the games or tables were kept or exhibited for gain. It is sufficient that it follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit, &c.
4. **Case at Bar.**—Upon the facts as certified in this case, the accused was improperly convicted, and the judgment was reversed by the appellate court.

At the December term, 1878, of the hustings court of the city of Richmond, Thomas G. Leath was indicted for gaming. The indictment contained two counts. The defendant demurred to the indictment; but the court overruled the demurrer; and he then pleaded not guilty. On the trial, the jury found him guilty, and assessed his fine at \$500. He thereupon moved for a new

874 trial, on the *ground that the verdict was contrary to the law and the evidence; but the court overruled the motion, and rendered a judgment for the fine, and added ten months imprisonment. To the refusal of the court to grant him a new trial Leath excepted, and applied to a judge of this court for a writ of error and superseas; which was allowed. The case is fully stated by Judge Burks in his opinion.

Samuel M. & Charles L. Page, for the appellant.

The Attorney-General, for the commonwealth.

BURKS, J., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Richmond.

There was a demurrer to the indictment, which was overruled, and this action of the court is assigned as the first error.

The indictment was for a violation of the provisions of the statute as contained in the first section of chapter 194, Code of 1873.

There were two counts. The first charges

***Indictment Charging Several Acts.**—See *Tiernan's Case*, 4 Gratt. 545; *Rasnick v. Comm.*, 2 Va. Cas. 356; *Angel v. Comm.*, 2 Va. Cas. 231; *Morganstern v. Comm.*, 94 Va. 790.

"that Thomas G. Leath, (the plaintiff in error), within twelve months last past, in the year one thousand eight hundred and seventy-eight, at the said city, (Richmond), and within the jurisdiction of the said hustings court of the city of Richmond, unlawfully did keep and exhibit gaming tables called A B C or E O tables, faro bank, wheel of fortune, keno table, and tables of the like kind; the said tables of the like kind being under denominations to the grand jurors aforesaid unknown; the games played on tables aforesaid being then and there played with cards, against the peace and dignity of the commonwealth of Virginia."

The second count charges that the **875** said Leath was a *partner and concerned in the keeping and exhibiting of gaming tables of the description named in the first count, concluding as in that count. Several objections are urged to the sufficiency of the first count.

The first is for alleged duplicity, in that it charges several distinct offences.

We are of the opinion that this objection is not well founded. The court pursues the language of the statute in describing the enumerated games or tables, except that it substitutes the conjunctive "and" for the disjunctive "or," and in so doing, it charges really but one offence, to wit: the keeping and exhibiting all the games or tables named, at the same time and place, and such a count is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and, on conviction, there would be but one fine and one term of imprisonment. The pleader might have inserted separate counts, charging the keeping and exhibiting of each game or table at a different time and place, and, if warranted by the proof, the defendant might have been convicted of the several offences committed on different occasions, and fined and imprisoned for each offence.

The precedents justify the mode of counting adopted in the present instance.

"If a statute," says Bishop, "makes it a crime to do this, or that, or that, mentioning several things disjunctively, the indictment may, indeed, as a general rule, embrace the whole in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain." 1 Bish. Crim. Proceed. § 334.

A statute in this state (1 R. Code, ch. 154, § 1), enacted that "if any free person shall falsely make, forge, counterfeit, or alter, or procure to be made, forged, counterfeited, or altered, or willingly act or assist in falsely making, *forging, counterfeiting, or altering, any coin, &c., such

person shall be deemed guilty of felony."

* * * An indictment, with one count, for a violation of this statute, charging that the accused certain coin did falsely make, &c., and did cause and procure to be falsely made, &c., and did willingly act, &c., was held to be not faulty for duplicity. *Rasnick v. Com.*, 2 Va. Cases, 356.

So, in numerous cases in other states, in-

dictments in like form under statutes declaring one act, or another, or another, to be an offence, have been sustained. *State v. Meyer*, 1 Spears (S. Car.), 305; *State v. Helgen*, 1 Spears, 310; *State v. Slocum*, 8 Blackf. 315; *State v. Colwell*, 3 Rhode Isl. 284; *State v. Fletcher*, 18 Mo. 425; *Hinkle v. Com.*, 4 Dana (Ky.), 518; *State v. Ringer*, 6 Blackf. 109.

The statute of this state against unlawful shooting, &c., to be found in 1 R. Code, ch. 156, §§ 1, 2, like the present statute, affixed a penalty where the act was done with intent to maim, disfigure, disable, or kill (in the disjunctive), and it was decided that the indictment should charge the intents conjunctively, and further, that although all the intents were laid, proof of either would support the indictment. *Angel v. Com.*, 2 Va. Cas., 231.

So, the statute against gaming made it unlawful to play in a public place at any game (with certain exceptions), or to bet on the sides or hands of such as did play. 1 R. Code, ch. 147, § 3; Acts 1847-8, ch. 10, § 5.

It was held by the general court, that a presentment under this statute, charging, in conjunctive form, an unlawful playing and betting, &c., ought not to be quashed for duplicity. *Tierman's case*, 2 Gratt. 545.

The case of *Wingard v. State*, 13 Geo. 396, was more like the present. The statute of Georgia enacts that "if any person shall play and bet for money, or other things of value, at any game of faro, loo, brag, bluff, three-up, poker, vintune, euchre, or any other game or games played with cards; or

877 shall play and bet for money, or *other things of value, at any E O or A B C table, or other table of like character, or shall bet at any game of nine-pins or ten-pins, or any other number of pins, such person, so offending, shall, on conviction, be fined," &c.

Certain persons were indicted for a violation of this statute, and it was charged in the indictment that they "did play and bet with cards for money, at a game of poker, whist, faro, seven-up, three-up, and other games played with cards," &c.

There was only one count in the indictment, and it was objected that the indictment was radically defective in uniting several distinct and incompatible offences in one count. The objection did not prevail; and *Lumpkin, J.*, in delivering the opinion of the court, speaking of the several games enumerated in the statute, said, "The offence is consummated by playing and betting at any one of them. But, we apprehend, that the playing and betting at the whole, at the same sitting, and between the same parties, would constitute but a single offence." * * * "But even if it were true," he continued, "that the playing and betting at each one of the games set forth in the act, or at any other game played with cards, constitutes a distinct and separate offence, still there is no rule of pleading which forbids them from being joined in the same count. By reference to the British books, they abound in similar forms." After citing *Chitty's Crim.*

Law, he then refers to the cases, already cited in this opinion, of *Rasnick v. Com.*, 2 Va. Cas. 356, and *Hinkle v. Com.*, 4 Dana, 518.

It was further objected, that the place at which the offence is charged to have been committed is not stated with requisite particularity in the indictment; that the house or buildings in which the games or tables were alleged to have been kept and exhibited, should be stated.

The place laid in the indictment is the city of Richmond, and alleged to be within the jurisdiction of the said hustings court.

This allegation is sufficiently certain.

878 *This is not a case in which place enters into the offence. It is an offence without regard to the particular house, building, or other particular locality where it is committed.

It is also objected, that the indictment does not charge that the games or tables were kept and exhibited for gain. It is a sufficient answer, that the indictment follows the language of the statute, and further charges that the accused did "unlawfully keep and exhibit," &c.

The objection that the indictment is not sufficiently certain in its description of the games or tables of "the like kind" with those particularly enumerated, need not be passed upon in this case, as the evidence points only to one of the enumerated games—to wit, the game of faro; and for the purposes of this case, so much of the indictment as relates to games of "the like kind" may be disregarded.

The demurrer to the indictment being disposed of, the only remaining question is, whether the verdict of the jury was warranted by the evidence.

From the certificate of facts proved on the trial, it appears that about the hour of 10 o'clock of the night of the 10th of November last, James R. Jeter, a policeman, under the direction of the chief of police, attended by another policeman, visited a room on Fourteenth street, in the city of Richmond, over the bar room kept by D. Delarue. On reaching the room, he knocked at the door. The plaintiff in error answered the knocking, and after two or three minutes the door was opened, and the policeman with his attendant entered the room. The only persons he found in the room were the plaintiff in error and one W. A. Puryear, both of whom he arrested, though it would seem that Puryear was probably afterwards released, as he testified in the case in behalf of the commonwealth.

The room was found to be neatly 879 carpeted and a bright *fire in it. The furniture consisted of two tables, a sideboard, and a number of chairs. Three or four chairs were in place around one of the tables. On the floor between this table and the sideboard were several ivory and bone chips, such as are used by persons in betting at the game of faro. In the sideboard were found a cloth with cards pasted on it, called "a lay-out," used for the game of faro, with a number of ivory and bone chips already described, a box called by faro-dealers

"a dealing box," containing a full pack of cards in position, a number of cards called "cue-papers," used by persons betting at the game of faro to keep an account of the games played, and other packs of playing cards; all of which implements the policeman took possession of.

It was proved that the plaintiff in error, some time back, had been canvassing for a directory for the city of Petersburg, where he claimed to live, and took his meals at Delarue's when in the city of Richmond, and that he came from Petersburg on the day preceding the night in which he was arrested.

It was further proved, that the room in which the plaintiff in error was found had been occupied since the year 1868, by one Potter, who had the reputation of being a gambler, and by one William Duke, his partner; that Potter died in September last, and Duke survived him, and died about one month before the arrest or before the trial, it is not certain which.

Delarue, as tenant, occupied the lower part of the building, and, in March last, wishing to get possession of the upper rooms also, rented the whole house, and endeavored to get Potter out of the rooms occupied, but did not succeed in doing so, Potter claiming to be a tenant from year to year, and that he had the right to hold possession until 15th November, which was five days after the day of the arrest.

It was further proved by Delarue's 880 bar-keeper that the *room in question was not kept by Delarue; that he could not account for the possession by the plaintiff in error of the key and the occupancy of the room; that he could give no account of the gambling apparatus found there, nor could he say who had ordered a fire to be kindled up there; and that the plaintiff in error was not the proprietor of the room, and could not have been the proprietor of the room without his knowledge.

It was also proved that after Potter's death his brother came to Richmond to take possession of the decedent's effects, stating that decedent had left effects in a room; which effects he intended to sell.

It further appears that administration on the estate of Potter had been granted to one Samuel McCubbin.

It was proved by Puryear (who testified, as before stated, on behalf of the commonwealth) that at the time of the arrest he had been in the room from twenty minutes to half an hour; that he had seen no gambling or gambling apparatus while he was there, and that on entering the room he asked the plaintiff in error this question: "Is there any game going on to-night?" To which the plaintiff in error replied, "I don't know; I just got over from Petersburg."

After certifying the foregoing facts, the court further certifies as follows: "That the paraphernalia, said to be that of a faro bank, as mentioned in the testimony of the witness Jeter, and taken possession of by him, was exhibited to the jury; and that the ownership of the same, or the proprietorship of the room, was not further accounted for than as

heretofore set forth in this bill of exceptions, and that the foregoing are all the facts proved upon the trial of the cause."

Upon these facts, we are of opinion that the evidence was plainly insufficient to warrant the finding of the jury. At most, it excites only a suspicion against the plaintiff in error. It falls far short of the proof

881 of guilt required by *the law to justify conviction. The room in which the plaintiff in error was found when arrested was evidently a place fitted up and used for the purpose of gaming, but it was distinctly proved that he was not the proprietor of the room; that it had been claimed by Potter under a tenancy which had not expired, and there was no circumstance connecting him with the possession or use of it, or with the ownership or use of the gaming apparatus found in the room. He was not in the possession of any of the implements found, and therefore it was not incumbent on him to give any account of them, if any such account he could give. He asserted no claim to them. No question were put to him about them, and he volunteered no statements. There was no evidence that on the night he was arrested, or at any other time, he had exhibited, the game of faro, or any other game, at the place of arrest or elsewhere. On the contrary, it was proved by Puryear, the only person besides the plaintiff in error found in the room at the time of the arrest, and who had been there from twenty minutes to half an hour, that he had seen no gambling or gambling apparatus while he was there. The only evidence that could tend to connect the plaintiff in error with the offence charged against him was his bare presence at night in a gaming house, the proprietor of which was unknown, and his presence there, if for an unlawful purpose at all, was more consistent with a purpose to bet at a game than to exhibit one.

Precedents are of little value in determining whether a verdict in a particular case is against the evidence or not, as the facts and circumstances are seldom, if ever, the same in any two cases; but the following decisions in criminal cases, prominent among those in which verdicts of juries have been set aside by this court and by the general court, because of the insufficiency of the evidence, may be referred to. Grayson's case, 6 Gratt. 712; Id. 7 Gratt. 613; Smith's case, 21 Gratt. 809; Pryor's case, 27 Gratt

882 1009; *Johnson's case, 29 Gratt. 796.

We do not think the insufficiency of the evidence was more palpable in Johnson's case than in this.

The judgment of the hustings court must be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial.

MONCURE, P., concurred in the opinion of the court, except as to one point. He thought there was proof that the offence was committed. The only question was—who committed it? There were only two persons present; one of these was proved not guilty. Who, then, could have done it but the ap-

pellant? The jury found him guilty, and he was not inclined to reverse their verdict.

The judgment was as follows:

This day came again as well the attorney-general on behalf of the commonwealth as the plaintiff in error by his counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the indictment in this case is sufficient in law, and that the said hustings court did not err in overruling the demurrer of the plaintiff in error thereto; but the court is further of opinion, for the reasons aforesaid, that the evidence was plainly insufficient to warrant the verdict of the jury on the issue joined, and that the said hustings court erred in overruling the motion of the plaintiff to set aside said verdict and grant him a new trial: it is therefore considered and ordered that the said judgment of the hustings court be reversed and annulled, the verdict of the jury set aside, and that this cause be remanded to the said hustings court for a new trial of the issue joined, and for

883 further proceedings *in order to final judgment in conformity to law and the opinion hereinbefore expressed; which is ordered to be certified to the said hustings court of the city of Richmond.

Judgment reversed.

884 *Nuckolls v. The Commonwealth.

March Term, 1879, Richmond.

1. Gaming—Draw Poker—Statute.—The game of poker, or draw poker, is not a game of the like kind with faro, keno, &c., and does not come within the meaning of statute, Code of 1873, ch. 194, § 1, p. 1212.

2. Same—Same—Liability of Proprietor of Room.—A person who does not take part in the game, but furnishes the room and gas in which poker or draw poker is played, for which he receives a moderate compensation from the persons playing, is not guilty, under the statute, of being concerned in interest in the keeping a table of the like kind with faro, keno, &c.

This is an appeal by William P. Nuckolls from the judgment of the hustings court of the city of Richmond, on an indictment against him for gaming. The questions in the cause and all the facts are set out in the opinion of President Moncure.

S. M. Page and E. C. Cabell, for the appellant.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Richmond, rendered in March, 1879, in favor of the commonwealth against the plaintiff in error Wil-

liam P. Nuckolls, convicting him of a misdemeanor.

885 *Such conviction was upon an indictment containing two counts. In the first it was charged, that within twelve months next preceding the indictment, at the said city, and within the jurisdiction of the said hustings court, he unlawfully did keep and exhibit gaming tables commonly called A B C and E O tables, faro bank, wheel of fortune, keno table, and tables of the like kind, being under denominations to the grand jurors unknown; the games then and there played on the tables aforesaid being games played with cards. In the second count it was charged, that within the period, and at the place aforesaid, he unlawfully was a partner and concerned in interest in the keeping and exhibiting of gaming tables as aforesaid.

The said indictment was founded on the Code, page 1212, ch. 194, § 1, which is in these words: "A person who shall keep or exhibit a gaming table, commonly called A B C or E O table, or faro bank, or keno table, or table of the like kind, under any denomination, whether the game or table be played with cards, dice or otherwise, or who shall be a partner or concerned in interest in the keeping or exhibiting such tables or bank, shall be confined in jail not less than two nor more than twelve months, and be fined not less than one hundred, nor more than one thousand dollars. Any such table or faro bank, and all the money, stakes or exhibits to allure persons to bet at such table, may be seized by order of a court, or under the warrant of a justice; and the money so seized, after deducting therefrom one-half for the person making the seizure, shall be forfeited," &c., "and the table and faro bank shall be burnt."

The plaintiff in error was convicted on the said indictment on the 17th day of December, 1878, but the judgment was afterwards reversed, and a new trial was awarded by this court; on which new trial he was again convicted by the said hustings court, which overruled his motion for a new trial, and rendered judgment against him

886 according *to the verdict in March, 1879, to which this court awarded a writ of error as aforesaid; and that is the case which this court has now to dispose of. The questions arising in the case are presented by five bills of exceptions, which were made parts of the record in the progress of the trial, and will now be considered and disposed of in the order in which they were taken and are numbered.

I. It is stated in the first bill of exceptions that during the trial of the case, after the attorney for the commonwealth had made his opening statement, and the attorney for the accused had done the same, the prisoner, by his counsel, moved the court to require the prosecuting attorney to furnish him a statement or bill of particulars showing when, how and where the offence of which he is accused was committed, the same not being sufficiently specified in the indictment; which motion the court overruled on the ground

*Gaming.—See 14 Am. & Eng. Enc. of Law (2d Ed.) 681, 705.

that the indictment had been passed upon by this court, and that this was a motion unheard of in a criminal case, as far as the court is advised; to which ruling of the court the prisoner excepts.

Without assigning any other reason than that assigned by the hustings court, which is deemed sufficient for its action in this respect, this court is of opinion that there is no error in such action.

II. It is stated in the second bill of exceptions that on the trial of the cause the commonwealth introduced as the first witness one J. P. Jeter; whereupon the prisoner, by his counsel, moved the court to permit him to take down the evidence in the cause in writing; but there having been at the time of such motion no exception taken to any portion of the testimony, and the court having stated to the counsel that as soon as any exception was taken which would require the statement of the evidence to be set forth in writing, it would, according to its custom, stop the trial, and in the presence of the wit-

887 nesses have the bill or bills *of exceptions, with the evidence, prepared, &c., the court overruled said motion; to which ruling of the court the prisoner excepted.

This ruling of the court was plainly right.

III. It is stated in the third bill of exceptions that on the trial of the cause the commonwealth introduced a witness—M. J. Griffin—and asked him to explain to the jury, if he could, how the game of "keno" was played; thereupon the attorney for the prisoner asked the witness if he was an expert at the game of keno; to which the witness answered no, but that he had played it twice, and seen it played two or three times. The attorney for the commonwealth then asked the witness if he knew how the game was played; to which the witness answered that he did; and then the said attorney asked the witness to explain to the jury what he knew of the game; and thereupon the prisoner objected to the witness stating to the jury what he knew of the game, on the ground that the witness was not an expert; but the court overruled the objection, and allowed the witness to state what he knew of the game; to which ruling of the court the prisoner excepted.

The evidence objected to was certainly admissible. The weight of it was of course a subject for the consideration of the jury. The evidence of an expert, if there can be an expert in such a matter, and the witness was not in fact such an expert, still his evidence, to the extent of his knowledge on the subject which he explained, was admissible, and it was uncontradicted by the evidence of any expert introduced as a witness by the prisoner. There was, therefore, no error in the action of the court in overruling the said objection.

IV. In the fourth bill of exceptions precisely the same question is presented in regard to the game of faro as in the third bill of exceptions is presented in regard to the game of keno, and the facts in regard to the two games in this case are the same, or similar.

888 For the reason already *assigned in regard to the third bill of exceptions, there is, therefore, no error in the action of

the court below in regard to the fourth bill of exceptions.

V. In the fifth and last bill of exceptions is presented the only difficulty arising in the case, which, however, is certainly a very serious difficulty, and the question we now have to solve is, whether such difficulty be not in fact insurmountable.

It is stated in that bill of exceptions that on the trial of the cause, after the jury had returned their verdict into court—"we, the jury, find the prisoner guilty"—the prisoner, by his counsel, moved the court to set the said verdict aside, because the same was contrary to law and the evidence, and grant him a new trial; which motion the court overruled; and the prisoner excepted. On his motion, the court certified the facts proven on the trial; which, so far as it seems to be material to state them here, are in substance as follows:

"The commonwealth first introduced one J. P. Jeter, who proved that as sergeant of police, by direction of chief of police of the city of Richmond, on Saturday night, 10th day of November, 1878, at about 10 o'clock at night, he, in company with two other policemen, went to house No. 20, located on Fourteenth street in said city, the lower part being occupied by one John Pitt as a tailor's shop; that he went up stairs and knocked at the door; he heard some one say, 'here come our oysters'; that he was dressed in citizens, clothes at the time. The door was opened by the prisoner, who asked him to come in. He went in saying to the other policemen, 'Come on, boys'; that on entering the room he saw two round tables, a sideboard, a stove and some chairs, and nine or ten men; that the room was nicely carpeted, and divided from the front part of the house by a partition extending from the floor to near the ceiling, with an open door in it; around one of the tables five men were seated playing cards, he thought the game of poker

889 *or draw-bluff; that one of these men made two plays after he entered the room and had taken hold of the bone or ivory chips he found on the table with which they were playing the game, but he could not say that this man knew him; that the prisoner was not playing, or had anything to do with the game that he knew of; that he found in the drawer of a sideboard a quantity of chips like those the men were playing with, on a small tray, and about nine dollars in money; that as he was about to open this drawer to search it, the prisoner said to him, there is nothing in there; after he found the tray and money he asked for the owner of it, or the proprietor of the house, not certain which, to come up and see it counted, but no one claimed to be either; that in the front room he found a bed and two trunks, one of which the prisoner claimed as his own and promptly opened it, that it might be searched; but the other he said belonged to a man who had gone down the street; that he did not know his name; that Black was not present in either room; that he asked prisoner for the key to open the other trunk, saying if not opened he would have to break it open; when prisoner loaned him a bunch of keys,

but none of them would fit; that one of the policemen tried his keys, but they would not open the trunk; some one of them called the name of Black, and he said to Wm. P. Nuckolls, the prisoner, if this is Black's trunk, tell me, I know where to find him, and I will go and get the keys from him; if you do not tell me I shall have to break the trunk open; prisoner then said, 'yes, it is Black's trunk'; that he went to hunt for Black, could not find him, and returned to the station house and picked the lock of the trunk; found in the trunk, which was afterwards claimed by Thomas G. Black, a cloth called a faro layout cloth; that this cloth was folded up and crosses remained in the cloth where the folds were; that he found Black next morning in the same room and arrested him.

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"It was also proved by one D. W. Rider, that he was playing in the game at the time of the arrest; they were playing a friendly game of draw poker; that he had played this game at the same place one time before the arrest; that he saw both Thomas G. Black and William P. Nuckolls there each time; that neither of them was his associate, though he knew them both, and had known Nuckolls for some time; that he went to this room to play because he was invited to go there, and understood he could play a game there; but before he began to play he obtained a stack of 20 chips from Black, that he purchased a second stack from Black; he paid one dollar for first stack, but returned Black the other without paying anything for it; that no one had any advantage over him as a player in this game; but whenever threes, or a better hand than threes, were held by any player, and his hand was called, one chip was laid aside by the winner for the keeper of the room; that the game was played by the deal passing around to the left from one to the other of the players, the dealer always dealing out to the others one card at a time until each player held five cards; that the player sitting to the left of the dealer then put upon the middle of the table one chip, and the player sitting to his left could then put up one or more chips, or decline to bet if he wished, each player in his turn doing the same thing until all had exercised this privilege; after this, each player beginning at left of dealer, would say how many cards he wished to draw from the pack, discarding that number from one up to five from those held in his hand; when each player had been furnished, the betting began again, beginning at the left of the dealer, each player again having the right to bet or retire from that deal by discarding his cards; that when the betting was ended, the winner was he who held the highest hand, though sometimes a winner would succeed in scaring or bluffing off the other players by outbetting them; that the highest hand at this game

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was, first the *highest card when neither held a pair; next highest hand was the highest pair when neither player held two pair; the next highest hand was two pair over one pair; the next highest hand was the highest two pair when each held two pair; the next highest hand was threes

of one kind; the next highest hand was a flush, and this was when five cards of one suit was held, say five hearts or five diamonds; the next highest hand was a full, that is, three of one number and a pair of another; the next highest hand to this, and the highest in the game, was fours, and this was when fours of one kind was held, say four kings or four aces; and that in this game it was agreed between the players, before they began to play, that when threes or a better hand was called, one chip was to be laid aside for the keeper of the room; that this agreement was generally made by the players before they commenced a game, and was a voluntary contribution to pay for use of gas, fuel, and room; that he did not suppose they could play in this room without giving something, as no one could provide a room for nothing; that on the night in question they had been playing from three to four hours, and had laid by, he supposed, from ten to fifteen chips, and that the chips were valued at five cents each; that neither Black nor the prisoner had been playing in the game, or had anything to do with it, so far as he knew, except that the chips had been purchased from Black, who for convenience was to furnish the chips and keep the money until the close of the game, paying for them the same he received for them, except that he was not required to pay for or redeem those laid aside for the keeper of the room during the game; that sometimes one of the players was selected to do this for convenience; that in this game there were none playing but friends, and no one could come into the game without their consent, and none but a friend or some one personally known to one of the players would have been permitted to come into the game:

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that *during their play at times both Black and prisoner were out of the room at the same time; that a part of the money found in the drawer was his, and balance belonged to his friends who were playing in the game, except so much as might be due for chips laid aside for the keeper of the room; the money was same paid to Black for the chips they were playing with; that he heard the officer ask for the owner of the money or proprietor of the house to come up and see the money counted, but said nothing; and that if the game was played long enough, the keeper of the room, under this arrangement, was compelled to get nearly all of the money; that he could, by no possibility, lose anything in the game, and must, under the arrangement, get a chip whenever 'threes or a better hand'—i. e., 'threes,' a 'flush,' a 'full,' or 'fours'—were held by any player and that player was 'called'; and that it was simply a question of time for him to get all, or nearly all, of the money around the table.

"The commonwealth then introduced one M. J. Griffin as a witness, who proved that he had seen the games of 'keno' and 'faro' played on other occasions and gave an account of those games, but as neither of those games was played by the prisoner or others on the occasion to which this pros-

ecution applies, and as the game which was played on that occasion was not a game or table of the like kind with faro bank or keno table, or any of the games or tables specified in the section on which this prosecution is founded, it is unnecessary to insert here the facts proved by this witness, which seem to be irrelevant to this case.

"The commonwealth also proved by a witness, one B. W. Hancock, that he was playing in the game at the time of the arrest on the night named; that when he went into the room he found four men playing, and he said to Nuckolls, I should like to get into that game, when Nuckolls said to him the game is made up, I believe, I don't

893 know *whether you can get into it or not, but I will ask them; that Nuckolls then asked the players if they had any objection to his (Hancock's) coming into the game; and they signified their assent, when he paid Nuckolls a dollar and got from him a stock of chips and commenced playing; that he had seen the game played often, and that it was a rule of the game as played at such places, and had always seen something taken out for the use of the keeper of the room whenever threes or a better hand was held and called; that they generally took out twice as much as the chip was worth for the room whenever threes or a better hand was held and called; that on this occasion they were setting aside ten cents whenever threes or a better hand was called and shown; that sometimes, when neither bettor held a pair, the player having the highest card would win, and then nothing was set aside; the next highest hand to the highest card was when a single pair was held, when the man holding the highest pair would win, and then nothing was laid aside for the room; that the next highest hand was when two pair beat one pair, and then nothing was laid aside for the house; that sometimes a player would win without showing the cards he held, by simply betting enough to scare off his opponent, and then nothing was laid aside for the house; that the next highest hand above two pair was when a player held three of one kind, and then if a winning was made by a call and showing the threes, the chip was taken from the winner and laid aside for the room; that the next highest hand above threes was a flush, and if a winning was made by showing the flush the chip was laid aside for the room; that the next highest hand was a full, and the next highest hand above a full was when fours were held, and in each of these cases a chip was laid aside for the room, but that fours were very seldom held. He also proved that part of the money found in the drawer was his.

894 "The commonwealth also proved by a witness, one *Thomas G. Black, that he was the renter of the room in question, and the owner of all the furniture, and also of the faro lay-out, but that had not been used for two years; that he did not know who was the owner of the chips found there with which the game was played; that he and William P. Nucholls, the prisoner, were

jointly interested in the game; that he had been tried and acquitted for the same offence, and that Nuckolls had told him that he (witness) could clear him (the prisoner) by coming into court and swearing that he was not interested in the game; which he refused to do; that Nuckolls got one-half of what was made on the game, and he (witness) got the other half.

"For the defence it was proved by one witness, John Pitt, that he rented out premises in question—rented it to Thomas G. Black; that Black paid both the rent and gas bill, and that he never knew Nucholls in the transaction, or that he had anything to do with it; that he rented the rooms to Black for a sleeping apartment and never knew that any gaming was carried on in there."

The game proved to have been played in this case was certainly not one of the games specified in the statute, Code, p. 1212, ch. 194, § 1. It was not a keeping or exhibition of "a gaming table, commonly called A B C or E O table, or faro bank, or keno table." And if the case comes within the terms, intent or meaning of the statute, it can only be because the game proved to have been played in this case was the keeping or exhibition of a table of the like kind with those specified in the said statute.

Was it a case of the like kind as aforesaid? In what does the likeness consist? The record does not show. Can the accused be said to have been a keeper or exhibitor of a gaming table in the meaning of the statute? He may have owned or had an interest in the tables on which the game was played. He took no part in playing the game, was not always present while it was played,

895 and had no *interest in it except that he had a chance to receive a portion of the winnings, under an agreement with the parties to the game to compensate him for the use of the house and the tables which were used in carrying on the game. The amount received under this agreement does not appear, so far as it is disclosed by the record, to have been an extravagant compensation for such use; but whether so or not, does not seem to affect the question we are now considering. The game played in this case was poker, or draw poker.

In regard to what is a table of the like kind with those specified in the statute, according to its true intent and meaning, there are two decisions of this court which seem to settle the matter beyond all controversy. They are, *The Commonwealth v. Wyatt*, 6 Rand. 694, decided in 1828; and *Huff's case*, 14 Gratt. 648, decided in 1858.

In *Wyatt's case*, supra, it was unanimously held by the late general court, in an opinion delivered by Daniel, J., that "the distinctive feature in the character of the games called A B C and E O and faro bank, is that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games or tables. If other games resemble those standard games in that distinctive feature, they come within the terms of the 17th section of the gaming act, (corresponding with

the 1st section of the present gaming act), being 'gaming tables of the same or like kind,' and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice, or in any other manner."

In Huff's case, supra, it was unanimously held by this court, in an opinion delivered by Allen, P., that "an indictment for gaming under the 1st section of chapter 198 of the Code, (corresponding with the 1st section of the gaming act in the present Code),
896 must charge the playing *of one of the games specified; or it must show by averment that the gaming charged is of the like kind as those specified—that is, that the chances of the game are unequal, all other things being equal."

These two cases clearly show that the game proved to have been played in this case was not a game of the like kind with any of those specified in the statute, as it was clearly not one of the games so specified. The accused was not an exhibitor of a gaming table such as seems plainly to be contemplated by the statute—a gaming table against which the betters at the game risk their money. He had no interest in the game, except as a means of compensation for the house, the tables and the gas, which were used in carrying on the game. It does not appear that such compensation derived in that way exceeded what might reasonably have been charged directly for the same consideration. At all events, it is not perceived how that mode of receiving such compensation can convert what would otherwise be a lawful act into one which would be highly penal. If it be deemed reasonable and proper that the owner of a house, receiving compensation in that way for the use of his house and his tables for gaming purposes, should be punished as an exhibitor of a gaming table under section 1 of chapter 194 of the Code, page 1212, it ought to be plainly so declared by statute, instead of being left as a matter of such forced and violent inference.

In the argument of this case before this court the Arkansas Code and reports were referred to, which seem to have an important bearing upon the case. In the said Code of 1858, page 369, chap. 51, art. 111, § 1, it is declared, in language very similar to that of our Code, that every person who shall set up, keep or exhibit any gaming table, &c., commonly called A B C, E O, &c., or any faro bank or other gaming table, &c., of the like or similar kind, &c., shall be deemed guilty of a misdemeanor, and *be
897 fined not less than \$100 and imprisoned not less than thirty days nor more than one year. The subsequent sections of the same article embrace the residue of the statute against gaming.

In *Stith v. State*, 13 Ark. R. 680, it was held by the supreme court of that state that the owner or occupant of a house, &c., cannot be indicted under the fourth section of the gaming act for permitting poker or any of the small games of cards mentioned in the 8th section of the act to be played in his

house, &c., but only for suffering some of the games, tables, cards, &c., embraced in the previous sections to be played, &c., therein. The Chief Justice, in delivering the opinion of the court in that case, uses this strong and appropriate language: "An attentive perusal of the statute makes the conclusion almost irresistible that the first seven sections are intended to relate exclusively to the banking games, whether called by the names specified or by any new name or device. They are usually exhibited by persons whose occupation it is to prey upon the community, and who are therefore peculiarly obnoxious to the laws, which besign also to punish with equal severity those who allow them to be exhibited in their houses." Id. 682.

See also *Barkman v. The State*, Id. pp. 703 and 705, and *The State v. Hawkins*, 15 Id. 259.

The court is therefore of opinion that the said hustings court erred in overruling the motion of the prisoner to set aside the verdict because the same was contrary to law and the evidence and grant him a new trial, as mentioned in his said fifth bill of exceptions. And for that cause the said judgment is reversed, the said verdict set aside, and the cause remanded to the said hustings court for a new trial to be had therein, in conformity with the foregoing opinion.

898 *The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in any of the rulings of the said hustings court excepted to by the first, second, third and fourth bills of exceptions, made parts of the record of this cause.

But the count is further of opinion, for reasons stated as aforesaid, that there is error in the ruling of the said court excepted to by the fifth of the said bills of exceptions, made part of the said record, and that the said court erred in overruling the motion of the plaintiff in error to set aside the verdict of the jury because the same was contrary to law and the evidence and grant him a new trial; this court, being of opinion that according to the facts certified in the said fifth bill of exceptions to have been proved on the trial of the said cause in the hustings court, the accused, the said plaintiff in error, was not guilty of the offence with which he was charged, and of which he was convicted on the said trial.

Therefore, it is considered, ordered and adjudged that the said judgment of the said hustings court be reversed and annulled, the said verdict be set aside, and the cause remanded to the said hustings court for a new trial to be had therein, in conformity with the foregoing opinion.

Which is ordered to be certified to the said hustings court of the city of Richmond.

Judgment reversed.

899 **Shinn v. The Commonwealth.*

March Term, 1879, Richmond.

1. *Grand Jury*.—Although one of the forty-eight persons directed by the judge to be summoned to

serve as grand jurors for the ensuing twelve months, may be incompetent to serve as a grand juror, a grand jury of sixteen selected from this list, all of whom are competent, is a legal and duly qualified grand jury.

2. Special Grand Jury.—Where one of the grand jury finding an indictment was incompetent, and for that reason the grand jury is dismissed and the indictment quashed, the court may direct a special grand jury of eight to be summoned and impaneled at the same term; and an indictment found by this grand jury is valid.

3. Larceny—Corporate Records as Evidence against Officer.—Upon an indictment against S, the secretary of a building fund association, for the larceny of a check, the property of said association, the records of the association whilst he was in office, and oral evidence relating to the organization, objects and business of the building association, the appointment and duties of S as secretary, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the larceny of which he was indicted, are competent evidence against him.

4. Same—Indictment against Corporate Officer—Corporate Existence—Collateral Attack.—In such a case whether the building fund association was organized strictly in conformity with the requirements of the statute, is not a proper subject of enquiry, S having, as secretary of the association, received and wilfully appropriated its funds or property, cannot be heard, upon a criminal prosecution therefor to contradict its legal existence.

5. Same—Embezzlement—Criminal Intent—Question for Jury.—The check having been given to S, the secretary, in payment of a debt due to the association, was the property of the association, and though payable to S, as secretary, it was also payable to bearer, and it was the duty of S to turn it over to the treasurer. If S had accounted

900 for the money, that fact would, of course, show that he had no intention to appropriate the check. Not having done so, it was a question for the jury, whether he intended to embezzle the check. And to convict him, it was necessary that the jury should be satisfied that this intention existed before, or at the time the check passed into the possession of the bank.

6. Same—Same—Controlling Statute.—Though the building association was organized under the act of 1852, even if that act applied to a prosecution for the embezzlement of a check by an officer of the association, the act of February 24th, 1874, p. 81, § 11, being subsequent in date, must control the case.

7. Same—Same—Criminal Intent.—If S

***Corporate Existence—Collateral Attack.**—The existence of a corporation *de facto* cannot be inquired into collaterally, but must be attacked directly by a proceeding instituted in the name of the state. *Pixley v. Roanoke, etc., Co.*, 75 Va. 320; *Crump v. United States Mining Co.*, 7 Gratt. 352. See also extensive note, 11 Am. & Eng. Corp. Cas., N. S., 398 *et seq.*; 8 Am. & Eng. Enc. of Law (2nd Ed.), 754 *et seq.*

Larceny and Embezzlement.—The principal case is cited in support of the proposition that proof of embezzlement will support an indictment for larceny in *Pitsnogle's Case*, 91 Va. 811. See also *Dowdy's Case*, 9 Gratt. 727; *Leftwich's Case*, 20 Gratt. 716; *Price's Case*, 21 Gratt. 846; *Fay's Case*, 28 Gratt. 912; *Dull's Case*, 25 Gratt. 965.

drew the money on the Avery check with the intention of using the same for his own purposes, and not for the liquidation of the Avery debt, though probably with the intention to return the same at some future day, to the building association, he is guilty of the embezzlement of the check.

8. Competency of Jurors.—Where there is ground to believe that jurors named had not formed such decided opinions as disqualified them from giving the prisoner a fair trial, the verdict will not be set aside on the ground that they were incompetent jurors.

At the December term, 1878, of the corporation court of Alexandria, a grand jury of eight members indicted George R. Shinn for the larceny of a check which was in the following words and figures:

Alexandria, Va., August 18th, 1874.

The Citizens Bank of Alexandria:

Pay to Geo. R. Shinn, sec'y, or bearer, six hundred and fifty-three dollars 50-100.

Wesley Avery.

\$653.50.

The indictment contained two counts—the first stating that the check was the property of the Alexandria Co-operative Building Association of Alexandria, Va., and the second that it was the property of Wesley Avery.

The defendant filed two special pleas; to which the attorney for the commonwealth demurred; and the court sustained the demurrer.

901 *The first special plea stated that of the list of forty-eight persons directed by the judge to be summoned to be grand jurors for twelve months thereafter, one of them—Herbert Bryant—had been adjudged by the court to be the owner of a mill and disqualified to act as a grand juror; and that the grand jury which found the indictment in this case was summoned from said list, and not summoned to fill vacancies in a grand jury; and so the said list so furnished as aforesaid was not a list of forty-eight persons suitable in all respects to serve as grand jurors, as required by law.

The second special plea, after setting out the fact that Herbert Bryant, one of the grand jury of sixteen impaneled and sworn at said December term of the court, had been adjudged by the court incompetent, and the grand jury discharged, states that the court directed the clerk to issue a venire facias for a special grand jury of eight, returnable the

†Competency of Jurors.—In the following cases it was held that the opinions formed by jurors were not such decided opinions as to disqualify them from serving: *Clore's Case*, 8 Gratt. 606; *McCune v. Comm.*, 2 Rob. 771; *Heath v. Comm.*, 1 Rob. 735; *Williams v. Comm.*, 85 Va. 607; *Hendrick v. Comm.*, 5 Leigh, 707; *Hall v. Comm.*, 89 Va. 171; *Maile v. Comm.*, 9 Leigh, 661; *Page v. Comm.*, 27 Gratt. 954; *Little v. Comm.*, 25 Gratt. 921; *Brown v. Comm.*, 2 Leigh, 769; *Smith v. Comm.*, 6 Gratt. 696, 697; *Sprouce v. Comm.*, 2 Va. Cas. 375. For cases holding jurors disqualified because of opinions formed by them, see *Lithgow v. Comm.*, 2 Va. Cas. 297; *Armistead v. Comm.*, 11 Leigh, 657; *Dejarnette v. Comm.*, 75 Va. 867; *Washington v. Comm.*, 86 Va. 405.

next day; that said special grand jury were summoned from the said list furnished as aforesaid; that said eight persons so impaneled and sworn, the said Herbert Bryant not being one, presented the paper purporting to be an indictment, which is the paper upon which the defendant is about to be tried. And he says that the said December term, 1878, was a regular grand jury term, at which there should have been a regular grand jury of not less than sixteen qualified jurors; that the sixteen persons sworn as aforesaid did not constitute a regular grand jury at the December term, 1878, and the summoning the said special grand jury at said December term, 1878, was illegal, and that the paper presented by said special grand jury at said term, purporting to be an indictment against the defendant, and on which he now stands charged, is of no effect, null and void.

The defendant then moved the court to quash the indictment, but the court overruled the motion. He then demurred to the indictment and each count thereof; which being overruled, he pleaded not guilty.

902 *On the trial the jury found the prisoner guilty on the first count in the indictment, and fixed the term of his confinement in the penitentiary at three years.

In the course of the proceedings the prisoner took seven bills of exceptions to rulings of the court, which will be best understood by a brief statement of facts.

The Alexandria Co-operative Building Association of Alexandria, Va., was incorporated in 1870, and was organized on the 8th of September of that year; though it was one of the questions made in the cause whether its organization had been regular. Of this association Edward S. Leadbetter was president, the prisoner was the secretary, and continued as such until the 10th of October, 1876. A. H. Smyth was treasurer until after September, 1875, when he resigned, and J. H. Reid was elected his successor. The meetings of the association were held on the 1st and 3d Tuesday evenings of each month, and at these meetings the stockholders paid the subscription on their stock and the borrowers paid the premiums on their loans. The secretary was on the left and the treasurer on the right of the president at said meetings, and the stockholder would hand the book with the money owed by him to the president, who would generally count it and say it was correct; then the secretary would receipt it in the pass book of said stockholder and enter it on the secretary's book to the credit of the stockholder, and the president would credit to said stockholder the amount so paid on the check sheet, and the money would be handed to the treasurer.

The secretary kept the books of the association, and frequently, during the intervals between the meetings, he received money of stockholders, and settled the loans and received payments of such loans, and, as a rule, the money or checks were reported and accounted for by him at the next succeeding meeting, and entered on his secretary's book

to the credit of such stockholders or borrowers. The president would also credit it on the check sheet as of that *meeting, and the same was receipted for by the treasurer to the secretary. Borrowers were permitted to settle their loans with the secretary at any time, and he was the only person to settle with them; and the secretary received payments thereof in currency or checks as money, and turned over to the treasurer what he so received.

In August, 1874, Wesley Avery was a member of the association, and was indebted to it for money borrowed. On the 18th of August, 1874, he called upon the prisoner at his place of business, in the city of Alexandria, to settle with him, as secretary of the said association, his indebtedness to it. The prisoner informed him that the amount of his said indebtedness was \$653.50, and drew up a check, payable to himself as George R. Shinn, secretary, or bearer, for that amount, and handed it to Avery, who signed it and returned it to Shinn, not giving to Shinn any directions as to the use of it, but intending it as a payment of his indebtedness to the association. This check was paid by the bank to Shinn, but was not returned or accounted for at the meetings of the association, nor was it known to the association that Avery had paid his debt until after Shinn left Alexandria in October, 1876, when, on application to Avery for payment, he produced the check; and upon examination of the books of the association and application to the persons who appeared to be debtors, there appeared to be other instances in which Shinn had received payments of debts without accounting for the money. For other facts bearing on the different exceptions, see the opinion of the court, delivered by Staples, J.

It appears that eight indictments had been found against Shinn—one for forgery, and the other for embezzlement and larceny—of which the present is numbered 7. On three of these indictments he had been tried and acquitted by the jury; and on two others—one of which seems to have been an indictment for the embezzlement and larceny of the same check of Avery—the jury could not agree upon a verdict, and was discharged.

904 *The first bill of exceptions relates to the refusal of the court to send to another county or corporation for a jury, on the ground that an impartial jury could not be obtained in the city of Alexandria. The second relates to the refusal of the court to exclude from the jury as evidence the articles of association of the Alexandria Co-operative Building Association of Alexandria, Va. The third was to the admission as evidence of the annual statement of the secretary in the prisoner's handwriting, rendered to the first meeting in September, 1874. It had been proved that the constitution of the association required the secretary and treasurer to make quarterly reports on the first meeting in December, March and June of each fiscal year, and a statement annually on the first meeting in September,

the end of each fiscal year; which annual statement of the secretary was required to show the standing of each member, or stock and loan account, and the condition of the association, its assets and liabilities.

The fourth bill of exceptions was to the refusal of the court to exclude from the jury all the evidence offered on behalf of the commonwealth and set out in this and the second and third bills of exceptions.

After all the evidence, both for the commonwealth and the prisoner, had been introduced, and the case had been argued, the prisoner moved the court to give to the jury nine instructions. Of these the court gave the 4th, 5th, and 6th and 7th, but refused to give the rest, and of its own motion gave the following:

1st. If the jury believed from the evidence, beyond reasonable doubt, that the Alexandria Co-operative Building Association was a body corporate duly incorporated by the laws of this commonwealth; that the check described in the said indictment was delivered to the prisoner by Wesley Avery, the said check (or proceeds thereof) to be paid over to the said association in payment of an indebtedness from the said Avery to the said association; that the prisoner
905 *received the said check for the said association; that the said check was the property of the said association; that the prisoner presented the said check to the bank upon which it was drawn, and obtained the money therefor; that he has not paid the said money to the said association in payment of said indebtedness, but has used the same for his own purpose, without the permission or authority of the said association; then if the jury shall further believe that the prisoner, whilst the check was in his possession, and before it had passed from his possession to the possession of the bank, conceived the purpose of obtaining the money on said check, not for the payment of the said indebtedness, but using the same for his own purpose, without obtaining the permission or authority of the said association—then the jury may find the prisoner guilty under the first count.

2d. If the jury believe from the evidence, beyond reasonable doubt, that the check described in the indictment was delivered to the prisoner by Wesley Avery, the check itself (or the proceeds thereof) to be paid by the prisoner to the Alexandria Co-operative Building Association in payment of an indebtedness of the said Avery to the said association; that the said association was a body corporate, duly incorporated under the laws of this commonwealth; that the prisoner presented the said check to the bank upon which it was drawn, and obtained the money therefor, and had not paid the said money either to the said association in payment of the said indebtedness, or to the said Avery, but had used the same for his own purposes, without the permission or authority of the said Avery; that said check was the property of the said Avery; then if the jury shall further believe from the evidence,

beyond reasonable doubt, that the prisoner, whilst the check was in his possession, and before it had passed to the possession of the bank, conceived the purpose of obtaining the money on said check, and using the same, not for the payment of the said
906 *indebtedness or of paying the same to the said Avery, but to use the same for his own purposes, without obtaining the permission or authority of the said Avery—the jury may find the prisoner guilty under the second count.

3d. To justify the jury in finding the prisoner guilty under the first count, they must believe from the evidence, beyond reasonable doubt, all the facts as stated in the first instruction. To find the prisoner guilty under the second count, they must believe all the facts as stated in the second instruction. If they do not believe all the facts as stated in one or the other of said instructions, beyond reasonable doubt, they will find the prisoner not guilty.

To the refusal of the court to give said instructions as asked, and to the action of the court in giving the 1st, 2d and 3d instructions, the defendant excepted, and prays that this his fifth bill of exceptions may be signed, sealed and enrolled; which is accordingly done.

The sixth exception is to the answer of the court to an enquiry of the jury. And the seventh is to the refusal of the court to set aside the verdict and grant the prisoner a new trial; which was asked on the grounds that the verdict was contrary to the evidence, and law, and other grounds; and among them, that three of the jurors named were not competent jurors on account of prejudice and bias against the accused.

The court having sentenced the prisoner in accordance with the verdict, he applied to this court for a writ of error; which was awarded.

Chas. E. Stuart, for the prisoner.

Attorney-General and Samuel G. Brent, for the commonwealth.

STAPLES, J., delivered the opinion of the court.

907 *The court is of opinion that the defendant's first plea in abatement does not present any proper matter of defence to the indictment. The design of the statute in requiring the judges of the several county and corporation courts to select from the qualified voters forty-eight persons, who shall be grand jurors for the next twelve months thereafter, was merely to secure a sufficient number of qualified grand jurors, during that period. When a qualified grand jury is obtained from those thus selected it is no valid objection to it, that others on the list of forty-eight may perchance be disqualified. The proposition asserted in the plea is, that any one of the forty-eight is incompetent to serve, that of itself will vitiate an indictment found by a grand jury, each one of which possesses every necessary qualifica-

tion. To state the proposition is to give the refutation. See acts 1877-8, p. 330.

With respect to the matter of the second plea in abatement it is sufficient to say that the first grand jury impaneled at the December term, 1878, was a regular grand jury within the true intent and meaning of the statute, although one of the persons serving thereon may have been disqualified, and for that cause the indictment pronounced defective. Upon the discharge of that grand jury it was competent for the court, if the public interests required it, to proceed at once to impanel a special grand jury, consisting of eight persons, as was done in the present case.

The court is therefore of opinion, the corporation court did not err in sustaining the demurrer to the two pleas in abatement.

The court is further of opinion the corporation court did not err in overruling defendant's motion to summon a jury from another county or corporation. Whatever prejudice may have prevailed against the defendant, if such there was, growing out of the alleged commission of other offences involved in previous trials, none was shown

908 *to exist in the present case. There was not the slightest reason for supposing the defendant could not obtain a fair trial by a jury of the vicinage. Indeed, the motion of the defendant was not made until after fourteen qualified jurors had been obtained, and the entire number was in a short time procured without the slightest difficulty.

The court is further of the opinion, the corporation court did not err in admitting the evidence, oral and documentary, set out in the defendant's second, third and fourth bills of exception. That evidence related to the organization, objects and business of the "building association," of which defendant was a member, his appointment and duties as secretary of the association, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the larceny of which he was then on trial. Whether the association was organized strictly in conformity with the requirements of the statute was not a proper subject of enquiry. The defendant having, as secretary of the association, received and willfully appropriated its funds or property, could not be heard, upon a criminal prosecution against him therefor, to contradict its legal existence. This is not the case of a suit brought by the corporation to enforce its rights, when, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence. Nor is it the case of a quo warranto, where the government calls upon the company to establish its legal corporate powers and organization. The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. *United States v. Amedy*, 11 Wheat. R. 392.

The court is further of opinion, that the

corporation court having certified the evidence adduced on the trial, and not the facts proved, it is not the province of this
909 *court to review the finding of the jury, unless it is manifest the testimony is plainly insufficient to warrant the verdict. The defendant is charged with the larceny and embezzlement of a check, the property of the association. It is insisted that he cannot be convicted of the offence, because the check was payable to him or his order, and it was his right as well as his duty to collect the money; and if the defendant was guilty of any offence, it was the larceny of the money, and not of the check. In the first place, the check was not the property of the defendant, but of the association. It was payable to him as secretary, and was received by him as such in payment of a debt due the association. It was also made payable to bearer, the object being not only to identify the check as trust property, but to enable any proper officer of the association to collect the money thereon. It was plainly the defendant's duty not to collect, but to turn over the check to the treasurer. Had the defendant duly accounted for the money, that fact would of course establish the fact that he had no intention to appropriate the check. Not having done so, it was a question for the jury whether he intended to embezzle the check. The corporation court very properly instructed the jury they must be satisfied this intention existed before or at the time the check passed into possession of the bank. The jury were satisfied, from all the circumstances, that such was the fact, and we find nothing in the case to warrant this court in interfering with the verdict.

The act of 24th February, 1874, would seem directly to apply to the case. The first section provides "that if any person shall wrongfully and fraudulently use, dispose of, conceal, and embezzle, any money, bill, note, check, order, bond, draft, receipt, bill of lading, or any other property, which he shall have received for another, or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which

910 shall have been entrusted *or delivered to him by another, or by any court, corporation, or company, he shall be deemed guilty of the larceny thereof." It has been argued that by the act of 1852, under which this association was organized, the offence with which the defendant is charged is a mere misdemeanor. The penalties prescribed by the act of 1852 relate to acts done without felonious intent, and not to the crime of embezzlement or larceny. If this were not so, if the act of 1852 could be construed as applying to a prosecution like the present, still the act of 1874, already cited, being subsequent in date, must control the case. See Acts of 1874, p. 81, § 11.

The court is further of opinion, that the corporation court did not err in refusing to give defendant's second, third, fourth, fifth, seventh and ninth instructions.

The matter of all these instructions, except the last, has been disposed of in considering the evidence. If the defendant could

be legally convicted of embezzling the check under the facts and circumstances already mentioned, these instructions were properly refused by the court. With reference to the ninth instruction, it is only necessary to say that the mere fact the defendant became civilly liable to the association by appropriating its money, did not at all affect the question of his criminal responsibility if he acted with a felonious intent.

The court is further of opinion, that the corporation court committed no error in the answer it gave to the enquiry of the jury set out in the sixth bill of exceptions. The jury, after retiring to consult of their verdict, returned into court and propounded the following question: "The jury wish to know if the prisoner drew the money on the Avery check, with the intention of using the same for his own purposes, and not for the liquidation of the Avery indebtedness, but probably with the intention to return the same at some future day to the building association, can they find him not guilty?" To which the judge replied, "I answer the question in the negative."

911 *Now, it is to be observed, the only matter as to which the jury desired information was whether, if the defendant took the money, the proceeds of the check, intending probably to return it at some future day, they would be justified, on that ground, in finding him not guilty. Very properly the court answered the question in the negative. The court might have gone on to explain the matter more fully to the jury, if it deemed any further explanation necessary; it had, however, already given a number of instructions applying to the case, in its various aspects, and it is obvious the jury only desired information upon the point to which their enquiry was addressed. The court, therefore, very properly contented itself with a direct and simple response to that enquiry.

The court is further of opinion, the corporation court did not err in overruling the defendant's motion for a new trial upon the ground that the verdict was contrary to the evidence. This has already been disposed of in effect in considering another branch of the case, and nothing further need be added on the subject. The motion for a new trial was, however, based upon the further ground that certain members of the jury, having made up and expressed decided opinions with respect to the guilt of the defendant, were not qualified to give him a fair trial.

Upon that point, all that is necessary to be said is that the affidavits, statements, and examinations of the several jurors and witnesses showed that the remarks attributed to the objectionable jurors had been misunderstood by the hearers. At all events, there was good ground to believe that neither of them had formed such decided opinions as disqualified them from giving the defendant a fair trial.

For these reasons we are of opinion that there is no error in the judgment of the corporation court, and the said judgment must be affirmed.

Judgment affirmed.

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*Dean v. The Commonwealth.

July Term, 1879, Wytheville.

Absent, Moncure, P., and Anderson, J.

1. Criminal Case—Refusal to Set Aside Verdict—Appeal—Review.—Where, in a criminal case, a bill of exception taken to the refusal of the court to set aside the verdict on the ground that it is not warranted by the evidence sets out the evidence and not the facts proved, the appellate court can only consider the evidence introduced by the commonwealth, and will not reverse the judgment unless upon that evidence, taken to be true, the decision of the court below appears to be erroneous. *Read's case*, 22 Gratt. 924.

2. Murder—Circumstantial Evidence.†—Circumstantial evidence must always be handled with great caution, and can never justify a verdict

***Evidence—Appeal—Review.**—The principal case is cited, and the rule under which the exceptor's evidence is rejected, and only that of the other side considered, is followed in *Proctor v. Spatley*, 78 Va. 264; *Taylor v. Comm.*, 77 Va. 692; *Pruner & Clark v. Comm.*, 82 Va. 116; *Daingerfield v. Thompson*, 33 Gratt. 141; *Hanriot v. Sherwood*, 82 Va. 3; *Moses v. Old Dominion, etc., Co.*, 82 Va. 21; *State v. Baker*, 33 W. Va. 337. See also 4 Min. Inst. (2nd Ed.) 827 *et seq.* And see *Finchim v. Comm.*, 83 Va. 690, where the principal case is also cited.

Same—Same—Same—Qualification of Rule where Evidence Certified.—In *Muse v. Stern*, 82 Va. 36, the court, referring to the above stated rule, said: "By a line of decisions beginning with *Carrington v. Bennett*, 1 Leigh, 340, decided as early as 1829, it was quickly established, as a qualification of the rule, that if the bill of exceptions contains a certificate of the oral testimony given on the trial, the appellate court would review and reverse the judgment, if, after rejecting all the oral testimony of the excepting party, and giving full force and credit to the evidence of the adverse party, judgment still appears to be wrong. *Rohr v. Davis*, 9 Leigh, 30; *Pasley v. English*, 5 Gratt. 141; *Carrington v. Goddin*, 13 Gratt. 587; *Gimmi v. Cullen*, 20 Gratt. 439; *Read's Case*, 22 Gratt. 924; *Danville Bank v. Waddill*, 31 Gratt. 469; *Dean's Case*, 32 Gratt. 912; *Creekmur v. Creekmur*, 75 Va. 432; *Taylor's Case*, 77 Va. 692. This qualification, while it restricts the operation of the rule laid down in *Bennett v. Hardaway*, does not contravene the principle of that case."

†Criminal Cases—Circumstantial Evidence.—The principal case is cited, and its holding that circumstantial evidence can never justify a verdict of guilty, especially of murder in the first degree, unless the circumstances are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt, is affirmed in *Cluverius v. Comm.*, 81 Va. 882; *Moses v. Old Dominion, etc., Co.*, 81 Va. 22; *Payne v. Grant*, 81 Va. 164; *Anderson v. Comm.*, 83 Va. 320; *Brown v. Comm.*, 87 Va. 220; *Nicholas' Case*, 91 Va. 750; *State v. Musgrave*, 43 W. Va. 696; *Baker's Case*, 33 W. Va. 371. In *Cluverius v. Comm.*, *supra*, it was held that the circumstantial evidence justified a verdict of murder in the first degree.

In *State v. Morgan*, 35 W. Va. 268, it is said: "Dean's Case, 32 Gratt. 912, by no means asserts that, to warrant a conviction upon circumstantial evidence, time, place, motive, means, and conduct must each and all concur in pointing out the prisoner as

of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt.

3. Same—Same—Sufficiency of Evidence.*

—On a trial for murder, the evidence connecting the accused with the killing is wholly circumstantial; but as to time, place, motive, means and conduct, it concurs in pointing out the accused as the perpetrator of the crime—**HOLD:** Accused was properly convicted of murder in the first degree.

At the July term, 1877, of the county court of Scott county, Daniel Dean was indicted for the murder of Henry E. Fugate. There were two trials of the case, in which the jury could not agree. The third trial took place at the May term, 1878, before a jury which had been brought from the county of Washington, and the prisoner was found guilty of murder in the first degree, and the court sentenced him to be hung.

913 *Upon the trial the prisoner took several exceptions to the rulings of the court admitting evidence offered by the commonwealth; but they seem to be of little importance. He also excepted to the opinion of the court overruling his motion for a new trial, on the ground that the verdict was not warranted by the evidence. This exception contains all the evidence introduced before the jury, and gives the testimony of many witnesses examined by the commonwealth and by the prisoner, and except as to the fact that Fugate was shot, is wholly circumstantial.

The prisoner obtained a writ of error to the circuit court of the county, where the judgment was affirmed; and he then obtained a writ of error and supersedeas to this court.

Patrick Hagan, for the prisoner.

The Attorney-General, for the commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

Daniel Dean was indicted in the county court of Scott county for the murder of Henry E. Fugate. He was found guilty of murder in the first degree, and sentenced to

the guilty agent, and that, if one of those elements be wanting, there can be no conviction. It only says that, when all these elements do concur, a strong case is made against him."

***New Trial—Sufficiency of Evidence.**—In *Russell v. Comm.*, 78 Va. 404, the court, in affirming the principal case, said: "The law relating to the granting of the new trials is well settled and familiar. When some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances or presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury. And this restriction applies *a fortiori* to an appellate court. *Grayson's Case*, 6 Gratt. 712; *Dean's Case*, 32 Id. 912."

be hanged. His case was carried, by writ of error, to the circuit court of said county, and that court affirmed the judgment of the county court. To this judgment of the circuit court a writ of error was awarded by this court.

It appears from the record before us that between the hours of eight and nine o'clock on the morning of Monday, the 25th June, 1877, Henry E. Fugate, while plowing in his field, was shot in the back by an unseen assassin, concealed in the brush on the edge of the field. This field was between two hundred and fifty and three hundred yards from the home of the deceased. His wife was in the garden watering her plants, when

914 she heard a gun fired *in the direction of the field, and immediately heard her husband's cries, and looking in the direction from which the sound of the gun and the cries proceeded, saw the horse with which her husband had been plowing running through the field. She hastened at once to the spot, and found her husband lying on the ground, supporting himself on his arm, with his legs stretched out. When she reached him, she enquired what was the matter. His reply was, "I am shot. Some one has shot me from the brush." So far as the record shows, these were the only words spoken by the deceased. He was taken to his home by some of his neighbors; physicians were sent for, who administered to the wounded man as best they could, but the wound proved fatal, and he died on the following Wednesday.

Daniel Dean (the plaintiff in error) was arrested and indicted in the county court of Scott county, for the murder of Fugate. There were two mistrials, the jury failing to agree in each. At the third trial, a jury brought from another county found a verdict of murder in the first degree.

Numerous witnesses were examined. The evidence is all certified. It is altogether circumstantial. There is no direct evidence as to the person who fired the fatal shot.

Now, in the very outset in this case two things must be borne in mind—first, that circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt. But secondly, it must also be remembered that there are some crimes committed with such secrecy that to require the production of a witness who saw the act committed would be to defeat public justice, to deny all protection to society, to let the greatest offenders go free, and the most heinous crimes go unpunished.

915 *No direct evidence can ever be produced in a case like this, where the assassination is secret, and where no human eye, not even that of the unhappy victim, could see the hidden foe.

Of necessity, and from the very nature of

the case, such a fact can only be proved by circumstantial evidence.

Keeping these two considerations constantly in view, let us now examine the case before us with that careful and patient deliberation which the grave and solemn issues of life and death demand at our hands.

And first, it is a subject of remark that during the long trial in the county court no objection is made (as is frequently the case), as to the misconduct of the jury, as to any outside influence, as to a separation of the jury, as to any influence of the force of popular excitement, as to any charge of prejudice and partiality.

No exception is taken by the astute and learned counsel for the prisoner to the conduct of the jury during the trial. The jury is brought from a distant county. They are free from local prejudice, or the influence of local excitement, produced by so shocking a crime. They have no acquaintance either with the accused or with the deceased. There is not a word in the record to impeach, in the slightest degree, the integrity and impartiality of the jury. Whatever else may be uncertain, it is certain that the prisoner had a fair trial before a fair and impartial jury.

The verdict of this jury was approved by the judge who presided at the trial, and who saw and heard the witnesses, and his judgment, refusing to set aside the verdict and grant a new trial, was affirmed by the judge of the circuit court.

The grounds of error assigned, and relied upon here by the learned counsel for the prisoner, are as follows:

1st. Because the verdict is contrary to the evidence.

2d. Because the evidence is plainly insufficient to warrant the finding of the jury.

916 3d. Because certain evidence (set forth in the previous bills of exception), offered by the commonwealth and admitted by the court, was inadmissible.

Before we proceed to consider, in their proper order, these assignments of error, it is well to advert to certain rules of universal application, laid down by this court, in reference to the manner in which an appellate court must consider a motion for a new trial, upon the grounds set forth in the first two assignments of error.

And first it is to be observed that the facts proved are not certified by the court below; but that the bills of exception contain a certificate of the evidence only.

In such a case, as has been repeatedly declared by this court, the appellate court can only consider the evidence introduced by the commonwealth, and will not reverse the judgment unless, after rejecting all the parol evidence for the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court below still appears to be wrong. *Reed's case*, 22 Gratt. 924, and cases there cited, *Gimmie v. Cullen*, 20 Gratt. and 439, and cases there cited. In other words, the appellate court in considering the case must discard all the evidence introduced by the prisoner, and admitting the truth of the commonwealth's evidence, the enquiry al-

ways is, Is the verdict contrary to that evidence. Is that evidence (admitted to be true) insufficient to warrant the verdict of the jury. And if the case be one entirely of circumstantial evidence, the further enquiry is, are the circumstances given in evidence of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt?

There are other rules clearly and distinctly laid down by this court, in respect to new trials, which must govern the case before us, and may be succinctly stated as follows: A new trial will be granted—

1. Where the verdict is against law. 917 This occurs when *the issue involves both law and fact, and the verdict is against the law of the case on the facts proved.

2. Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the facts proved required a different verdict from that found by the jury.

3. Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue, where some evidence has been given which tends to prove the facts in issue; or where the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases the evidence should be plainly insufficient to warrant the finding of the jury. This restriction applies a fortiori to an appellate court. For in the appellate court there is super-added to the weight which must be given to the verdict of a jury fairly rendered, that of the opinion of the judge who presided at the trial, which is always entitled to peculiar respect upon the question of a new trial.

4. A new trial asked on the ground that the verdict is contrary to the evidence ought to be granted only in a case of plain deviation from right and justice. And this court will set aside a verdict on such a motion only in a case where the jury have plainly decided against the evidence, or without evidence. *Blosser v. Harshbarger*, 21 Gratt. 214, and cases there cited.

Let us now apply these rules, established by repeated decisions of this court, and which must guide and govern us in our determination, to the case at bar; and say whether the jury in this case have plainly decided against the evidence, or without evidence to support their verdict. For this we must say, before we can interfere with that verdict.

The corpus delicti, the starting point in the case, is distinctly proved by direct testimony.

918 *It is certain that on the morning of the 25th of June, 1877, Henry Fugate, who but one hour before had left home, to pursue his daily labor, was cruelly murdered, without warning, by a secret foe, while plowing in his field—shot from behind by some cowardly assassin concealed in the

brush. This happened in the hearing and almost in the presence of his family. When his wife, who heard the report of the gun and the cries of her husband, and saw his horse running, hastened to the fatal spot, she found him stretched wounded upon the ground, and he exclaimed, "I am shot. Some one has shot me from the brush." That he came to his death by the hands of another, and the manner of his death are thus distinctly proved.

Now, when so heinous and startling a crime is committed, the very first enquiry, in order to detect its foul perpetrator, always is, Who was the enemy of the murdered man? Who had the motive to do the dreadful deed?

It was the pursuit of this enquiry that first led to the arrest of the prisoner. It is proved in the record before us that some months before the murder—to wit: at the January term of the county court of Scott county—the grand jury of said county found two indictments for perjury against Daniel Dean. These indictments were found upon the testimony of Henry Fugate and Francis Fugate, his father. At the April term the defendant (Dean, the plaintiff in error,) appeared by his attorney and demurred to the indictments. The demurrers were overruled, and the cases continued.

It was further proved that Dean had repeatedly made threats against the Fugates in reference to the prosecution which they had instituted against him for perjury. A witness (Barker) proves that he attended the county court of Scott at the April term. He went to where prisoner was feeding his horses. Witness said to prisoner that he

noticed an indictment or two against him on the docket, *and said to prisoner, "How is this, Daniel?" To which prisoner replied, "Them fellows done it." Witness asked, "Who?" Prisoner replied, "Henry and Francis Fugate, and they have done it through spite." Witness then said to prisoner, "I reckon you will get out of it pretty easily." Prisoner replied, "I reckon so; but I will make some of them pay dear for it." And witness stated that when prisoner made this remark "he had the illest and most spiteful appearance that witness ever saw on any one's countenance."

Another witness (Marion Fletcher) proves he met prisoner in the road carrying a gun, which he was taking to Cleek's shop to have repaired. He commenced talking about the indictments for perjury, and about the Fugates. Witness said to him, "The Fugates will out you on it, won't they?" To which prisoner replied that the Fugates could be fixed so that they could not give evidence. Witness understood him to mean, he could set their evidence aside, and replied to him, "You cannot set their evidence aside, can you?" To which the prisoner answered, "A witness can be fixed so he can't tell what he knows;" or, "when the work is done, they can't tell what they know;" or something of that sort; witness cannot remember which form of expression was used. Witness then understood him, and said,

"You wouldn't do that, would you?" Prisoner replied, "I will defend myself." Witness then said, "You had better bend that old gun barrel, or sell her to me." Prisoner replied, "I will sell her to you for twelve dollars;" and then rode away.

It was proved by another witness (Reynolds) that at the April term of the county court, 1877, when the court had adjourned for dinner, witness was passing near where Daniel Dean was standing talking with some persons, and heard him say, "Henry Fugate will never be at this trial."

Another witness (Renfro) proves that he was going *home from the April county court, and fell in with prisoner, and they rode together. Witness, referring to the indictments for perjury, asked prisoner if he and Fugate had had their trial. Prisoner said they had not. Witness said, "It was a pity, as the Fugates were ready, and you say you were ready, and all the witnesses were up;" and prisoner replied, "Yes, for the witnesses were nearer all up than they would ever be again;" or, "might ever be again;" witness not remembering which form of expression was used.

There are other witnesses who testify as to feelings of hostility expressed by prisoner against Henry Fugate and his father. But the testimony above referred to is sufficient for our purpose.

Here, then, we find in the prisoner a declared enemy of the murdered man, having a motive to take his life. Indeed, he had a double motive—one of revenge, the other to prevent a prosecution against him for a criminal offence, for which, if found guilty, he would have been severely punished. The motive of revenge is indicated by the threats so often made. Doubtless he knew, also—or, if he did not, no doubt his counsel had informed him—that in a prosecution for perjury, two witnesses were necessary to a conviction. If he could get rid of one of them, he would be safe. This was a powerful motive, superadded to the spirit of revenge, which he manifested, to take the life of Henry Fugate.

The motive, then, being proved which influenced the prisoner, the next question is, Did he have the opportunity to do the deed? It is proved that the prisoner lived about half a mile from the field where the deceased was shot. He knew that Fugate was plowing in that field, for the Saturday evening before he had commenced plowing in that field, and the prisoner was seen coming from that direction with bark and a gun on his shoulder. He knew, too, that there was a thicket of brushes surrounding that

*field, from which an assassin could mark his victim unseen. Here, then, we have the motive, the proximity, and the opportunity, all concentrating on the prisoner.

The next question is, Did he have or make preparation for the weapon with which to commit the deed? Let us see. It is proved by the witness Fletcher, whose evidence is quoted above, that on the occasion when prisoner, talking about the indictments for

perjury, said "a witness could be fixed so as he couldn't tell what he knew," he then, having a gun in his hands, was on his way to Cleek's shop to have the gun repaired. We find him afterwards with Cleek, the gunsmith. Cleek testifies that at the June term of Scott county court, (which met in the early part of June), prisoner left his gun at witness' house, and asked him if he could fix it. It was a flint-lock gun, and he wanted it changed to a percussion lock. Witness told prisoner he could not fix the gun before the July court next following. Prisoner said he needed his gun, and wanted it sooner than that; and asked witness if he would pay him part of the money down, would he fix it sooner. Witness told him he would not; but that he would fix it as soon as he could, any way; that prisoner took out his pocket-book, and paid witness two dollars in money, in part payment for fixing the gun, and gave him one dollar additional to buy a new lock with. The charge for fixing the gun was five dollars. He further proved that on the Saturday before Fugate was shot, Harris came by witness' shop, and said that prisoner had told him to get his gun, if it was done; but the gun had not then been fixed. Harris proves that on Saturday morning prisoner sent his little boy over to his house, with the request, if he was going to Estillville, to stop at Cleek's shop, and get his gun; that he did stop for that purpose, and was informed that the gun had not been fixed; that prisoner was at witness' house about 10 o'clock next morning, Sunday, (the day before Fugate was shot), spent the day with him, 922 and *went to an evening meeting at Pleasant Grove church. While there, asked what Cleek had said about his gun.

Now, while he did not procure this gun, after showing this great anxiety to get it into his possession, he is found in the possession of another gun, just before the fatal day, borrowed by one of his sons from Francisco; which is referred to in the record as the Francisco gun. This gun plays an important part in the bloody drama. It is a gun of peculiar construction, and peculiar bore. It carried a ball of unusual size. It had a square barrel, and while originally it was full stocked—i. e., the stock extending to the end of the barrel—it was now in a half stock, and on the barrel, which was a square rifle-barrel, about three or four inches from the muzzle, there was a loop or staple, being a square piece of iron with a hole in it. Upon search being made around the fence enclosing the field where the deceased was shot, and between which and the field was thick underbrush, there was found an impression upon the ground where the assassin had evidently been seated, and where there was a slight opening through which the deceased, at the point where he was shot, could be seen. On the top of a rail at this spot was a distinct impression, as if made by a square rifle barrel, and a peculiar notch made on the edge of the rail. By actual experiment, made by some of the witnesses, the Francisco gun, when laid upon the same rail and drawn back, left a similar square impression and a

similar notch, made by the small piece of iron which was fastened to the barrel near the muzzle. There were other circumstances strongly tending to show that the Francisco gun, found in the possession of the prisoner, was the gun used in the assassination of Fugate. The ball extracted from his body was weighed, by the physician who extracted it, with a ball taken from the mould of the Francisco gun. They were almost exactly the same weight; the difference being, in the opinion of the physician, only 923 in the loss of weight occasioned by the *flattening of the ball in penetrating the body of the deceased. Again, it was proved that upon the examination of a large number of guns, within a radius of eight miles of the scene of the murder, none were found of the same bore, or which would carry precisely the same ball. Two or three only, out of a large number examined, were found which were nearly the same bore and might have carried the same ball as the Francisco gun. But these two or three were accounted for, and proved to be where it was impossible the murderer of Fugate could have used them. When this gun was sent for, the prisoner delivered it up, saying it would not shoot; it would not stand cocked. It was proved it had been shot the day before, and that the prisoner knew it.

There was evidence also tending to show that the lock had been tampered with.

From all this evidence a jury, I think, might fairly infer that the Francisco gun was the weapon used in the murder of Fugate.

Now, then, we have in the chain of circumstantial evidence distinctly proved—1st, the motive; 2d, the proximity; 3d, the opportunity; 4th, the weapon with which the murder was committed, traced to the possession of the accused.

The next thing to be considered is, the conduct of the accused. Was his conduct, after the murder, consistent with that of an innocent man?

In all cases of circumstantial evidence the conduct of the accused is always an important factor in the estimate of the weight of circumstances which point to his guilt. As is said by Mr. Starkie—"The connection between a man's conduct and his motives is also one of a moral nature pointed out by experience. It is by their experience of such connections that juries are enabled to infer a man's motives from his acts, and also to infer what his conduct was from the motive by which he was known to be influenced."

This is especially the case where the 924 corpus delicti *has been established by evidence aliunde, as in this case. See 1 Starkie, 491. Where all the circumstances of time, place, motive, means, opportunity and conduct, concur in pointing out the accused as the perpetrator of the crime, it must produce a moral, if not absolute, certainty of his guilt. See Id. 494.

With this statement of the law of circumstantial evidence, let up now examine the conduct of the accused after the crime was

known. And the first striking fact we have to notice, is this. There was naturally, in a quiet country community of farmers, great excitement produced by this secret, unusual, and dreadful crime, when one of their number is shot dead from behind, while plowing in his field, by a hidden foe. Neighbors and persons, far and near, as the startling news was spread, flocked to the spot, and to the home of the deceased, to aid in the detection of the murderer, or offer sympathy to the stricken family. The prisoner alone, of all the neighbors, did not go either to the scene of the murder, or the home of the deceased. Although he lived within half a mile, near enough to see the commotion and hear the cries of the afflicted family, and certainly saw the aged father and mother on one horse, hurriedly going to the scene of the murder, yet he neither went himself nor sent any one to enquire what was the matter.

When informed on Tuesday that Fugate was shot, and that he was suspected, he made no remark; he did not then go to the place, or express any surprise or concern in the matter. When the gun was sent for, he brought out the gun, saying, "she won't shoot. She won't stand cocked," and when asked for the moulds, he said "I had nothing to do with the gun, nor the moulds either; if the boys know where the moulds are they can get them." And yet it is proved that when Francisco delivered the gun to the prisoner's son it was in good shooting order; that it was shot by his sons on Saturday 925 day and early Monday morning, *the day of the murder; and that the prisoner knew it. When arrested by the party having the warrant of arrest issued by a justice, who said, "Daniel, I am after you," his reply was, "what is up?" Witness said, "Henry Fugate is dead, and you are suspected of being the man that killed him, and I have a warrant for your arrest." Prisoner's reply was, "I don't want to go across the ridge there," meaning the house of Fugate where his corpse lay. Witness asked him if it would suit him to go to another place near by; prisoner said it would, and he was taken there and a guard placed over him.

While there under guard he made his escape at night, fleeing to the mountains without coat or vest or hat or pants, and leaving, besides his garments, twenty dollars in money. He was pursued and re-arrested, and tried before a justice. At this trial he then made no defence and was committed to jail. At the trial on indictment for murder before the county court, he for the first time offered proof of an alibi; and this was his whole defence. Now the failure unexplained to assert the defence of an alibi when it could first be made, and if true, would be conclusive, is always regarded by the best writers on circumstantial evidence as a most suspicious circumstance.

The credibility of an alibi is always strengthened, if it be set up at the moment when the accusation is first made and be consistently maintained throughout the subsequent proceedings.

Wherever pertinent and material evidence by which an alibi might, if true, have been supported, is withheld, or is the result of afterthought or contrivance, the attempt to set it up recoils with fatal effect upon the party who asserts it. Wells, 168-170.

Now, in this case the defence of an alibi was not offered till the trial at the county court. It was then attempted to be proved by his two sons. It was manifestly an afterthought. If it had been true, how 926 natural that it would *have been asserted at the moment of the first charge and arrest and trial before the justice. If he had informed his counsel then, it is inconceivable that such a fact should have been withheld and the prisoner have been permitted to be sent to jail without defence.

But waiving all these considerations, the question of whether an alibi was proved was a question of fact for the jury. It is manifest the jury did not believe the evidence of the two boys, the sons of the prisoner. It was for the jury, not this court, to judge of their credibility.

Here, then, we have a case of circumstantial evidence, where time, place, motive, means and conduct concur in pointing out the accused as the perpetrator of the crime. When these concur, says Mr. Starkie, the evidence is powerfully strengthened by the total absence of any trace or vestige of any other agent. 1 Stark. 494.

In the case before us, this is a pregnant and powerful fact. Here is an humble man, living in the country, with no large number of acquaintances, his daily life limited to comparatively a narrow circle. No human being is suggested as being his enemy. No one is found as having a motive to commit the deed. There is no trace or vestige of any other agent save Daniel Dean. In him we have all the facts and circumstances concurring and concentrating as the guilty agent. They all point to him, and to no one else. They all declare that he is the murderer.

There are other circumstances, not alluded to in this opinion, which of themselves are unimportant, but which all point to the prisoner as the guilty agent. It would protract this opinion to too great length to notice them all. It is sufficient to say they all point in one direction.

It is hard to conceive of any case of circumstantial evidence more completely made out. We cannot say the evidence is insufficient to warrant the verdict of the jury. It is sufficient to produce on the mind of every impartial tribunal the moral conviction of the guilt of the prisoner beyond all reasonable doubt.

927 *We are painfully aware that this is a case of purely circumstantial evidence; and we have therefore given to it the most careful and anxious consideration. And looking with the closest scrutiny to all the facts and circumstances proved, we find them, when combined, utterly inconsistent with the innocence of the accused, but con-

sistent with no other reasonable hypothesis but that of his guilt.

When these things concur, the force of circumstantial evidence becomes as potent as that of direct evidence.

"The effect of a body of circumstantial evidence (says Mr. Wills) is sometimes compared to that of a chain," but the metaphor is obviously inaccurate, since the weakest part of a chain is of necessity the strongest. Such evidence is more aptly compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose.

So, in the case before us, there are circumstances which, taken alone, would not bear the weight of conviction, but when taken together, and considered in their relation to each other, must produce upon the mind a moral certainty of the guilt of the accused beyond all reasonable doubt.

As to the only remaining question, the 3rd assignment of error, as to the inadmissibility of the evidence in relation to the examination of a number of guns in the neighborhood to ascertain whether any of them carried a ball of the same size as that found in the body of the deceased, I think the county court did not err in admitting the evidence. Its weight was a question for the jury. It was admissible as tending to show that the gun in the possession of the prisoner, known in the record as the Francisco gun, was the weapon used in the murder of Fugate.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, affirming the judgment of the county court of Scott county, refusing to set aside the verdict of the jury.

928 *That verdict was fairly rendered, and is supported by the evidence.

This court will not set aside that verdict. The plaintiff in error must pay the penalty of his dreadful crime. That penalty is death, and the judgment must be affirmed.

STAPLES and BURKS, J's, concurred.
Judgment affirmed.

929 *Willis v. The Commonwealth.

November Term, 1879, Richmond.

1. Homicide—Presumptions—Burden of Proof.—All homicide is presumed to be murder in the second degree. In order to elevate the offence to murder in the first degree, the burden is

***Murder—Malice.**—In *Lewis v. Comm.*, 78 Va. 733, the court held that on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused, citing *Hill's Case*, 2 Gratt. 599; *Willis' Case*, 32 Gratt. 932; *Wright's Case*, 75 Va. Rep. 914; *Roscoe's Crim. Ev.* 707, top. 5th Amer. Ed.; *Russell on Crimes*, 483; 9th *Metcalf*, 93; 3 *Gray*, 463; *Penn. v. Bell*, 1 Am. Dec. 298; *Davis' Crim. Law*, 99. See also *Harrison v. Comm.*, 79 Va. 374; *Murphy v. Comm.*, 23 Gratt. 960.

on the commonwealth: and to reduce it to manslaughter, the burden is on the prisoner.

2. Same—Evidence—Intoxication.†—Whilst voluntary intoxication is no defence to the fact of guilt, yet where the question of intent, or premeditation is involved, evidence of it is admissible for the purpose of determining the precise degree of the crime. And in all cases where the question is between murder in the first and second degree, the fact of the prisoner's drunkenness may be proved to shed light on mental status, and thereby enable the jury to determine whether the killing was from a premeditated purpose or from passion excited by inadequate provocation. But caution is necessary in the application of this doctrine as there may be many cases of premeditated murder, in which the prisoner previously nerves himself for the deed by liquor. In such cases as these, drunkenness is entitled to no consideration in favor of the prisoner in determining the degree of his crime, but, on the contrary, tends to elevate the offence to murder in the first degree.

3. Same—Intoxication—Degree of Murder—Sufficiency of Evidence—Appeal—Review.—Circumstances, which reduce a homicide committed by a drunken man, from murder in the first degree, to murder in the second degree, and in which the court of appeals so held, notwithstanding the verdict of a jury, convicting the prisoner of murder in the first degree, which verdict was sanctioned and approved by the trying court, and notwithstanding the further fact that the prisoner had some time previous to the homicide, when drunk, made threats against the life of the deceased, their relations being apparently friendly till a very short time before the homicide was committed.

930 *The grand jury of the county court of Lee county indicted John D. Willis for the murder of James H. Reasor, and when he was set to the bar he elected to be tried in the circuit court. On his trial, the jury found him guilty of murder in the first degree, and the court sentenced him to be hung. And he applied to a judge of this court for a writ of error and supersedeas; which was awarded.

In the progress of the trial the prisoner took several exceptions to rulings of the court. The first and second exceptions relate to questions of evidence, and were not noticed by this court. The third referred to instructions asked for by the prisoner and the commonwealth, and one given by the

†**Same—Intoxication.**—In *Honesty v. Comm.*, 81 Va. 301, the court, in delivering the opinion, said: "And so, Anderson, J., in *Willis' Case*, 32 Gratt. 929, says: 'Drunkenness is only entitled to weight when and so far as it tends to show that the offender did not act in a frame of mind to act with that determination and premeditation which is necessary to constitute murder in the first degree. Great caution is required in applying this doctrine because there are few cases of premeditated violent homicide in which the defendant does not nerve himself to the encounter by liquor.' In *Desty's Am. Cr. Law*, section 27b, it is said: 'If the accused determined upon the act when he was sober, and fortified himself with liquor for its perpetration, or did the act deliberately, his intoxication furnishes no extenuation.'" See also *Baccigalupo's Case*, 33 Gratt. 817. And *State v. Welch*, 36 W. Va. 703, citing the principal case.

court on its motion. This last instruction is as follows:

"Voluntary drunkenness does not excuse crime. Every crime committed by one in a state of intoxication, however great, is punished just as if he were sober. Drunkenness, therefore, can never be relied on as an excuse for murder. It matters not how drunk one is, if he purposely slay another, without other excuse, palliation or justification than that of his drunkenness, he is just as guilty of murder as if he had been sober. There are certain grades of crime, however, which a drunk man may not be capable of committing. When a man has become so greatly intoxicated as not to be able to deliberate and premeditate, he cannot commit murder of the first degree, or that class of murder under our statute denominated a wilful, deliberate and premeditated killing. But so long as he retains the faculty of willing, deliberating and premeditating, though drunk, he is capable of committing murder in the first degree; and if a drunk man is guilty of a wilful, deliberate and premeditated killing, he is guilty of murder in the first degree. If a moral wound be given with a deadly weapon in the previous possession of the slayer, without any or on very slight provocation, but at the time of inflicting the wound the slayer's condition from

931 intoxication *is such as to render him incapable of doing a wilful, deliberate and premeditated act, he is then guilty of murder in the second degree."

And as the court read to the jury that part of the instruction which declares that drunkenness is no excuse for murder, the court explained orally to the jury that upon the question as to whether the murder was murder in the first or second degree, it was proper to consider the intoxication of the slayer and its effect upon his mind, so far as it bore upon the question of deliberation and premeditation.

And the court further orally explained to the jury, in connection with that part of the instruction which asserts that if a drunk man is guilty of a wilful, deliberate and premeditated killing he is guilty of murder in the first degree, that though this is the law, yet, when the question is, whether the killing was wilful, deliberate and premeditated, and drunkenness of the slayer and its effect upon his mind, and any peculiar excitability of disposition to which he might be subject, must be taken into consideration.

The fourth exception was to the refusal of the court to grant the prisoner a new trial on the ground that the evidence did not authorize the verdict of the jury. In this exception all the evidence of the witnesses is set out. The view taken of it by this court will be seen in the opinion of Judge Anderson.

Patrick Hagen, for the prisoner.

The Attorney-General, for the commonwealth.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that the homicide

committed by the prisoner, as shown by the evidence in the record, is murder. The only question is one of degree—whether
932 *it is murder in the first or second degree. All murders are presumed in law to be murder in the second degree; and in order to elevate the offence to murder in the first degree, the burden of proof is on the commonwealth. And to reduce the offence to manslaughter, the burden of proof is on the prisoner. That the offence proved is greater than manslaughter, the prisoner's counsel does not deny; but contends that it is not murder in the first degree, but only murder in the second degree.

The evidence shows that on the 14th of February, 1878, about one o'clock afternoon, the prisoner was on his way to Leech's shop, in Lee county, and said to Dilda Olinger, a witness, that he was going there to get a dram. He had been drinking then so much that witness told him she thought he had enough. At Leech's shop he met the deceased and T. S. Coldiron, another witness, who testifies that both the prisoner and deceased were drinking, and were tolerably drunk; deceased had a bottle of liquor. They, together with Coldiron, went from the shop to Dr. Edmonds' store, where they still had the bottle and continued to drink. After remaining there a while, all three left together on their way home, and stopped at John Brown's for supper. While they were there the difficulty occurred which resulted in the death of the deceased a few days after from paralysis, caused by a blow which he received from the prisoner on his head with an axe.

The only provocation which the prisoner received from the deceased was given in conversation whilst they were sitting together at the supper table. They had spent the greater part of the day jovially together, and on terms of familiarity and friendship, and it was upon the invitation of the prisoner that the deceased stopped with him on their way home at the house of John Brown for supper. Prisoner ordered the supper, and when it was prepared he sat down and invited deceased to sit with him at the table. Whilst they were partaking of the food which

933 had been *prepared for them, Mr. Coldiron engaged in conversation with Mrs. Brown, and the prisoner and deceased engaged in conversation together, which seems to have been commenced by the prisoner, in a friendly way, by reminding deceased that he had not come to eat supper with him on the occasion of his son James' infair. The deceased seems to have explained the reason why he was not there in a friendly way, but then said something about the acts of the prisoner to his other children—that he had made distinctions between them. The witness does not say what acts he referred to, or whether he specified anything. But his remarks, whatever they were, appeared to have been, if not a reproach, an expression of the deceased's disapproval of the prisoner's treatment of his other children; to which, however, the prisoner does not seem to have taken serious umbrage at the time, as he replied, that "he would do as much for his

son Henry." But the deceased then said something about prisoner's wife, who was then an inmate of the lunatic asylum. What the remark was is not disclosed by the testimony. But the prisoner became at once greatly excited, and said when his wife's or children's names were mentioned he felt like cutting his throat, pushed back his plate, and took the knife with which he was eating and drew or jerked it across his throat and quit eating. The witness Brown does not remember what the remark was, and Coldiron being engaged in conversation, did not understand what it was. But neither the deceased nor other persons at the table seemed to have attached any importance to it, or to have been disturbed by it; for they finished their dinner, and then seated themselves around the fire, the deceased playing with a little girl, and tarried awhile after prisoner and Coldiron had passed out and invited Mr. Brown and his family to visit him and his family. But the prisoner, very much excited, left the table and went out, and in a short time returned, showing great excitement and violent passion, demanding to know *of deceased what he was saying about him; when deceased replied he had said nothing about him, responding that "he was a God damned liar." All present said deceased had said nothing about him. He repeated, "It is a damned lie"; and said to Coldiron, "Let's go." The prisoner's deportment was that of a drunken man, whose epithets of abuse and vituperation are not thought worthy of notice, and seemed to have been so regarded by the deceased, who did not resent them or further notice them. Prisoner left and Coldiron followed, and deceased, soon after he came out after Coldiron, received the fatal blow. From all that appears by the evidence he had no adequate motive or provocation for the horrible deed he perpetrated.

934 manding to know *of deceased what he was saying about him; when deceased replied he had said nothing about him, responding that "he was a God damned liar." All present said deceased had said nothing about him. He repeated, "It is a damned lie"; and said to Coldiron, "Let's go." The prisoner's deportment was that of a drunken man, whose epithets of abuse and vituperation are not thought worthy of notice, and seemed to have been so regarded by the deceased, who did not resent them or further notice them. Prisoner left and Coldiron followed, and deceased, soon after he came out after Coldiron, received the fatal blow. From all that appears by the evidence he had no adequate motive or provocation for the horrible deed he perpetrated.

But whatever motive or provocation he had, it was sudden and unexpected. All the witnesses who testify as to the character of the prisoner, represent him to be a very quiet and peaceable man when sober, but when in liquor he was wild and excitable, rough and anxious to destroy. But for the free indulgence in the intoxicating draught that day, it is evident that this terrible misfortune would not have befallen these men—this dreadful crime would not have been committed—both of them might be alive this day, and free from restraint, discharging towards each other the offices and courtesies of neighbors and friends. It was whiskey which brought upon them this sudden, irremediable ruin.

But voluntary intoxication is no excuse for the commission of crime. Lord Hale says "the third sort of madness is dementia affectata—namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." And so Parke, B., says, "if a man makes himself voluntarily drunk, it is no

excuse for any crime he may commit whilst he is so; he *takes the consequences of his own voluntary act, or most crimes would go unpunished." Cited by 1 Wharton on Criminal Law, § 39. And this writer says, In harmony with this is the whole current of English authority. An that "in this country the same position has been taken with marked uniformity; it being invariably held that voluntary drunkenness is no defence to the factum of guilt." Id. § 40.

But while intoxication per se is no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is admissible for the purpose of determining the precise degree. Id. § 41. In all cases where the question is between murder in the first degree and murder in the second degree, the fact of drunkenness may be proved, to shed light on the mental status of the offender, and thereby to enable the jury to determine whether the killingsprung from a premeditated purpose, or from passion, excited by inadequate provocation.

By our statute, murder by poison and lying in wait, imprisonment, starving, or any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree. (Code of 1873, p. 1188, c. 187, § 1.) To convict of murder in the first degree by wilful, malicious, deliberate and premeditated killing, the jury must ascertain as a matter of fact, that such was the state of mind of the accused when the act was done. Any state of drunkenness being proved, said the court in *Haile v. State*. 11 Hump. 154, is a legitimate subject of enquiry as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passions excited, and rashly perpetrate a criminal act. It is unphilosophical to assume that he should be chargeable with

936 the same degree of premeditation *and deliberation that would be ascribed to a sober man perpetrating the same act upon a like provocation. Hence the rule has been laid down by the courts, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. 1 Whart. Cr. Law, in note to § 41. Great caution is necessary in the application of this doctrine, for there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself to the encounter by liquor. When that is so, drunkenness is entitled to no consideration in favor of the offender in determining whether the offence is murder in the first or second degree. On the contrary, it tends strongly to elevate the crime to murder in the first degree. Voluntary

immediate drunkenness is not admissible to disprove malice, or to reduce the offence to manslaughter. But where, by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offence to murder in the first degree, it is properly ranked as murder in the second degree; as the courts have repeatedly decided. *Com. v. Jones*, 1 Leigh, 598; *Pirtle v. State*, 9 Humph. 663; *Swan v. State*, 4 Humph. 136; *Boswell v. Commonwealth*, 20 Gratt. 860.

In *Pirtle v. The State*, supra, Judge Turley, in delivering the opinion of the court, said, where the question is whether the killing was the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, or whether it has been the result of premeditation and deliberation, whatever is able to cast light upon the mental status of the offender is legitimate proof, and among others the fact that he was at the time drunk; not that this will excuse and mitigate the offence,

937 if it were *done wilfully, deliberately, maliciously and premeditatedly, (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the point of taking life, without premeditation and deliberation. Here the court explicitly laws down the rule to be, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose or from passion, excited by inadequate provocation. Cited by 1 Wharton Cr. Law, in note to § 41. The court, we think, very properly held that drunkenness will not mitigate the offence, if it were done wilfully, deliberately, maliciously and premeditatedly. It is only entitled to weight when and so far as it tends to show that the offender did not act and was not in a frame of mind to act with that deliberation and premeditation which is necessary to constitute murder in the first degree.

From the evidence in this case, the prisoner was greatly under the influence of liquor when he inflicted the death wound upon the deceased. About one o'clock that day he told one of the witnesses—Dilder Olinger—that he was going to Leech's shop to get a dram. This was before he met with deceased. He had then been drinking; and witness thought he had enough, and told him so. He met with deceased at Leech's shop; and T. S. Coldiron testifies that both prisoner and deceased were pretty drunk; deceased had a bottle of whiskey, and they drank together at the shop—how often does not appear; the probability is several times. They came on together to Dr. Edmonds' store, and were still drinking there, and still had the bottle. And Brown testifies that after they got to

938 his *house, where they stopped for supper, they were all drinking some. There is not the slightest evidence that the prisoner, through all the jovial hours he spent this day with the deceased, meditated an assault upon him to take his life, or that he drank to nerve himself to the encounter. The evidence absolutely repels such an idea, and shows that he commenced drinking before he saw the deceased, and when, most probably, he had no thought of seeing him that day. And when he met him at the shop, where he went to get another dram, he drank with him, and they continued together and drank together the balance of the day, on terms of familiarity and friendship, until prisoner suddenly took umbrage at some remark which deceased made at the table, became greatly excited, left the table without finishing his dinner, went out of doors, and in a short time returned, exhibiting the most violent passion. Excited and inflamed by the fumes of liquor in his brain, he gave him the blow with an axe, which resulted in his death. There can be no doubt, we think, that the giving the fatal blow by the prisoner was the result of sudden passion, engendered and influenced by the liquor which he had been pouring into him during the day, and which caused him to take offence where none was intended, and which disqualified him for deliberation, and repels the idea that the deed was premeditated, there being nothing in the case to create even a suspicion that he imbibed the intoxicating draught to nerve him to the commission of a crime which he had premeditated.

Whilst we hold that intoxication is no excuse for crime, and whilst murder in the first degree may undoubtedly be committed by one who is intoxicated at the time, yet a murder committed, as in this case, by a drunken man, from sudden passion, which imagines a provocation when there was none, or any adequate provocation, and by reason of intoxication the offender was not in a frame of mind to deliberate and premeditate, the crime, we think, under

939 the *statute, could not be elevated to the crime of murder in the first degree, which requires that it shall be wilful, deliberate and premeditated. But as an intoxication is no excuse for crime, and cannot be relied on to disprove malice, we are of opinion that the prisoner in the case at bar was guilty of murder in the second degree.

We attach no importance to the declarations which the prisoner is proved to have made, ten or twelve years before, when he was drunk, expressive of hostility to the deceased and threatening to kill him; or of the more recent threat, which was nine months prior to the commission of the offence for which he is now prosecuted—such threat also having been made when he was very drunk—and the evidence showing that they were very friendly, and there being no evidence that their relations were at all unfriendly when the last threat was made in a fit of drunkenness. We say we can attach no importance to the testimony of that character, especially when the evidence in this case clearly

shows that the prisoner, in inflicting the fatal blow, was actuated alone by a supposed recent provocation, though it was inadequate, but which he, under the influence of liquor, magnified into a most grievous and aggravated provocation; and which, if he had been sober, would not have regarded as a provocation at all, and it would not have given him offence.

It is often difficult to apply the principles which distinguish between murder in the first and second degree. We do not think that the instructions given by the court to the jury are erroneous. We think the jury either misunderstood them, or misapplied the law to the facts, as it was laid down by the court. We are clearly of opinion, upon the law and the facts, that the offence proved is murder; and as all murders are presumed in law to be murder in the second degree, and to elevate the crime to murder in the first degree, the burden rests upon the commonwealth; and we think she has

940 failed to show that it is murder in *the first degree, we are of opinion that it must be ranked as murder in the second degree. We are of opinion, therefore, that the verdict of the jury of murder in the first degree is not warranted by the law and the facts of the case, and that the circuit court erred in overruling the motion to set aside the verdict and to grant the prisoner a new trial.

We are of opinion, therefore, to reverse the judgment of the circuit court, to set aside the verdict, and to remand the cause for a new trial, to be had therein, in conformity with the principles herein declared.

The judgment was as follows:

The court being of opinion, for reasons stated in writing and filed with the record, that whilst the evidence certified proved the prisoner guilty of murder in the second degree, it did not warrant the finding of the jury of murder in the first degree, and that the court erred in overruling prisoner's motion to set aside the verdict and to grant him a new trial. It is therefore considered that the judgment of the circuit court be reversed and annulled, that the verdict be set aside, and the cause remanded to said circuit court for a new trial, to be had therein, in conformity with the principles declared in the opinion filed with the record.

Judgment reversed.

941 *Wright v. The Commonwealth.

November Term, 1879, Richmond.

1. **Competency of Jurors—Opinions.**—On the examination of his *voir dire*, a juror answered, "that he had read newspaper accounts of the offence with which the prisoner was charged, and had heard rumors of the same; that upon what he had read and heard he had made up and expressed an opinion in the case; that the opinion so made up and expressed was still upon his mind; that he did not think he could do the prisoner justice; but in answer to a question from the court, should the evidence before the jury be different from that he had heard, he said his opinion would be changed; that he could come to the trial with an unbiased and unprejudiced mind, and give the accused a fair

and impartial trial"—HELD: He was not a competent juror.

2. **Same—Same.**—If a juror has made up and expressed a *decided* opinion as to the guilt or innocence of the accused, he is incompetent, whether the opinion be founded on conversation with the witnesses or upon mere hearsay or rumor. It is sufficient if the opinion is decided and has been expressed.
3. **Same—Same.**—When the opinion is founded on common rumor, the presumption is that it is merely hypothetical, and it will be so considered in the absence of proof to the contrary.
4. **Same—Same.**—Whether the opinion be hypothetical or decided, whether founded upon rumor or upon evidence heard at the trial, the juror must be free from prejudice against the accused. Upon this point nothing should be left to inference, or in doubt.

At the July term, 1879, of the county court of Bedford, Peter Wright was indicted for the murder of Robert Maupin. At the same term of the court he was tried, convicted of murder in the first degree, and sentenced to be hung.

942 *The prisoner took two bills of exceptions to rulings of the court—the first to the admission of a juror, and the second to the refusal of the court to grant him a new trial on the ground that the verdict was contrary to the evidence. Only the first exception was considered by this court; and the case is stated in the opinion of Judge Staples. Upon application by the prisoner to the judge of the circuit court of Bedford for a writ of error and superseas, it was refused; but upon application to this court, it was allowed.

Whitehead & Claytor, for the prisoner.

The Attorney-General, for the commonwealth.

STAPLES, J., delivered the opinion of the court.

The prisoner was convicted in the county court of Bedford of murder in the first degree, and sentenced to be hanged. When the venire was called, and the jurors sworn to answer questions, the prisoner objected to two of them as incompetent. One of the persons thus objected to—Charles W. Hardy—stated, that he had read newspaper accounts of the offence with which prisoner was charged, and had heard rumors of the same; that upon what he had read and heard he had made up and expressed an opinion in the case; that the opinion so made up and expressed was still upon his mind; that he did not think he could do the prisoner justice; but in answer to a question from the

***Jurors—Prejudice.**—The leading case is cited, and its holding that, in determining whether a juror is free from prejudice, nothing should be left to inference, or in doubt, is approved in *Dejarnette v. Comm.*, 75 Va. 871; *Washington v. Comm.*, 86 Va. 405. In the last case the juror was held incompetent because he stated he had formed and expressed an opinion as to the guilt of the accused, based on rumor and newspaper accounts, which was "right positive" and evidence would be required to remove it; although he claimed that he could give defendant a fair trial.

judge, should the evidence before the jury be different from that he had heard, he said his opinion would be changed; that he could come to the trial with an unbiased and an unprejudiced mind, and give the accused a fair and impartial trial.

Upon this statement, the court overruled the objection of the prisoner, and permitted the juror to be sworn; and

943 *thereupon the prisoner excepted.

The question we are to determine is, whether there is error in this ruling. The law bearing upon this subject has been so often and so fully considered in the numerous cases before the general court and before this court, that any further discussion of the subject must now be regarded as unnecessary and out of place. A citation of these cases will be found in the opinion of the president of this court in *Jackson v. Commonwealth*, 23 Gratt. 928. Whatever may be the conflict in this opinion upon other points, they are generally agreed that if the juror has made up and expressed a decided opinion as to the guilt or innocence of the accused, he is incompetent; and it does not matter whether the opinion be founded on conversations with the witnesses or upon mere hearsay or rumor. It is sufficient that the opinion is decided, and has been expressed. When, however, the opinion is founded on common rumor, the presumption is that it is merely hypothetical, and it will be so considered in the absence of proof to the contrary. *Jackson's case*, 23 Gratt. 919, 928. But whether the opinion be hypothetical or decided, whether founded on rumor or upon evidence heard at a trial, the juror must be free from prejudice against the accused. He must be able to give him a fair and impartial trial. Upon this point nothing should be left to inference or doubt. All the tests applied by the courts, all the enquiries made into the state of the juror's mind, are merely to ascertain whether he comes to the trial free from partiality and prejudice.

If there be a reasonable doubt whether the juror possesses these qualifications, that doubt is sufficient to insure his exclusion. For, as has been well said, it is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible.

Now, in the case before us, the juror had heard of the homicide, and he had read **944** the newspaper accounts of the *occurrence; and upon these he had made up and expressed an opinion, which he then entertained; and such was the state of his mind, "he did not think he could do the prisoner justice." It is true he subsequently stated, in answer to a question propounded by the court, that he could come to the trial with an unbiased and unprejudiced mind, and give to the accused a fair and impartial trial. But how was the court to decide which of these statements was true and which was false? How was it to say that the second statement more correctly and truly represented the juror's feelings than the first? His first avowal showed alone he was not a fit person to sit

upon the trial of the accused; his ready disavowal of all prejudice under the interrogation of the court furnished no satisfactory evidence of his impartiality or incompetency. A man who could assert in one breath that he had prejudiced the accused, and could not do him justice, and in the next assert that his mind was free from all prejudice, is not to be trusted with the grave and responsible duty of passing upon the guilt or innocence of a fellow being. Such a man may persuade himself that he is impartial, but the law does not so regard him. Unconsciously to himself, it may be, his prejudices will follow him into the jury-box, and influence and control his judgment there. We are, therefore, of opinion that this juror was incompetent, and the county court erred in permitting him to be sworn as such. Indeed, the attorney-general did not hesitate to concede that the error was such as to require a new trial of the case.

We do not deem it necessary to express any opinion upon the question as to the competency of the other juror, *Marion DeWitt*, as the judgment must be reversed upon the ground already stated. For the same reason, we deem it unnecessary, and indeed, improper, to pass upon the petitioner's motion for a new trial, based upon the alleged insufficiency of the evidence to sustain the verdict. Upon the grounds already stated, the judgment and verdict must be set aside, and a new trial awarded.

945 *The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the venireman, *Charles W. Hardy*, was not a competent juror for the trial of the plaintiff in error, and the county court erred in overruling his objection to said *Charles W. Hardy*, based upon said incompetency. It is therefore considered by the court that the said judgment of the county court aforesaid be reversed and annulled, the verdict of the jury be set aside, and a new trial awarded the plaintiff in error. Which is ordered to be certified to the county court of Bedford.

Judgment reversed.

946 **Hey v. The Commonwealth.*

November Term, 1879, Richmond.

1. Criminal Case—Separation of Witnesses—Failure to Object.—On a trial of a prisoner for receiving goods knowing them to be stolen, on the motion of the attorney for the commonwealth, without objection by the prisoner's counsel, the court directs the witnesses to leave the court room; and they all leave but one, who was in the prisoner's

**Separation of Witnesses.*—In *State v. Morgan*, 35 W. Va. 264, it is said:—"The cases are numerous which hold that a witness remaining in court in violation of an order of separation may nevertheless be examined, his conduct bearing only on his credit, and subjecting him to proceedings for contempt. *Hopper v. Comm.*, 6 Gratt. 684; *Hey's Case*, 32 Gratt. 946, and citations; *Greggs' Case*, 3 W. Va. 705." See also 8 Enc. of Pl. & Pr. 92.

box in the court room, held on a requisition from the governor of North Carolina upon the charge of the larceny of the same goods. In the progress of the trial the attorney for the commonwealth offers this man as a witness, and he is objected to by the prisoner, on the ground alone of his remaining in the court room, after the order of the court. He is a competent witness.

2. Receiving Stolen Goods—Elements of Crime—Statute.—To sustain the prosecution under the statute four things must be proved. 1st. That the goods or other things were previously stolen by some other person. 2. That the accused bought or received them from another person, or aided in concealing them. 3. That at the time he so bought or received, or aided in concealing them, he knew they had been stolen. 4. That he so bought or received them, or aided in concealing them *malò animo*, or with a dishonest purpose.

3. Same—Evidence—Character of Accused.† —Upon the question whether the accused bought the goods knowing them to have been stolen, the evidence being circumstantial, evidence of the good character of the accused is competent; and in this case held upon the whole evidence that it was not proved that the accused knew the goods had been stolen.

At the July term, 1879, of the hustings court of the city of Richmond, Henry W. Hey was indicted for feloniously buying, or receiving, one double set of harness, of the value of \$300, knowing them to have been stolen. On *the trial the jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him accordingly. An he thereupon applied for a writ of error, which was allowed.

In the progress of the trial the prisoner took two bills of exception to rulings of the court. The first was to the admission of a witness by the commonwealth; and the second was to the refusal of the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to the evidence. The case upon both points is fully set out by Judge Burks, in his opinion.

Samuel M. and Charles L. Page, for the prisoner.

The Attorney-General, for the commonwealth.

BURKS, J., delivered the opinion of the court.

When Henry W. Hey (the plaintiff in error here) was on trial in the court below, before any evidence had been introduced, the attorney for the commonwealth asked that all of the witnesses should be sent from the court room, and no objection being made by the prisoner, this was ordered by the court, and all of the witnesses then sworn for the commonwealth, and the witnesses for the prisoner, were sent out, except Police Justice White, who, by consent of

counsel on both sides, was allowed to remain. Afterwards, when evidence had been introduced tending to show that the prisoner obtained the goods mentioned in the indictment from one Augustus Byers, who had been arrested, as stated in the bill of exceptions, for the larceny of said goods, and was then in the prisoner's box in the court room, held on a requisition from the governor of North Carolina, the attorney for the commonwealth called said Byers, and asked that he be sworn as a witness for the commonwealth, but the counsel for the prisoner objected
948 *on the ground, (and for no other cause), that Byers had remained in the court room, and had not been sent out with the other witnesses. The objection was overruled and the prisoner by counsel excepted. This action of the court is assigned as error.

In the trial of causes, both civil and criminal, it is a rule of practice devised for the discovery of truth and the detection and exposure of falsehood, and well adapted to the ends designed, for the presiding judge, on the motion of either party, to direct that the witnesses shall be examined out of the hearing of each other. Such an order upon the motion or suggestion of either party, it is said, is rarely withheld; but that, by the weight of authority, the party does no seem entitled to it as a matter of right. 1 Greenleaf Ev. § 432. To the effect this object, generally, the respective parties are required to disclose the names of the witnesses intended to be examined, and then the witnesses are simply ordered to withdraw from the court room and warned not to return until called, or, as is sometimes the case, they are placed under the charge of an officer of the court, to be by him kept out of hearing in the jury room or some other convenient place, and brought into court when and as they may be severally needed for examination. If a witness or the officer in charge wilfully disobeys or violates such order, he is liable to be punished for his contempt, and at one time, according to the English practice, it was considered that the judge, in the exercise of his discretion, might even exclude the testimony of such a witness. But now, it seems to be the practice to allow the witness to be examined, subject to observation as to his conduct in disobeying the order. 2 Taylor on Ev. (7th ed.), §§ 1400, 1401, 1402; 3 Wharton's Crim. Law (17th ed) § 3009 (a), note, and cases cited by these authors.

In *Cobbett v. Hudson*, 72 Eng. C. L. 11 (decided by queen's bench in 1852),
949 Lord Campbell, C. J., observed, *that with respect to ordering witnesses out of court, although this is clearly within the power of the judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness. Citing *Cook v. Nethercote*, 6 C. & P. 471 (25 Eng. C. L.); *Rex v. Colley*, 1 Mood & Mal. 329 (22 Eng. C. L.); *Thomas v.*

†**Criminal Proceedings—Character of Defendant.**—The holding that evidence as to the good character of the accused was admissible is sustained in *Parrish v. Comm.*, 81 Va. 1. See also *Briggs v. Comm.* 82 Va. 554; *State v. Donahoo*, 22 W. Va. 761, 5 Am. & Eng. Enc. of Law 866.

David, 7 C. & P. 350 (32 Eng. C. L.). And in *Chandler v. Horne*, 2 Moody & Robinson's Nisi Prius Cas. 423, Erskine, J., said, "It used to be formerly supposed that it was in the discretion of the judge whether the witness should be examined. It is now settled and acted upon by all the judges that the judge has no right to exclude the witness; he may commit him for contempt, but he must be examined; and it is then a matter of remark as to the value of his testimony, that he has wilfully disobeyed the order. See also *Nelson v. State*, 2 Swan's R. 237.

The rule as stated seems to have been applied to cases in which the witness had wilfully disobeyed the order of the court. Cases may arise in which a party to the suit has been guilty of such gross misconduct as to amount to a fraud upon the court and the adverse party. Suppose a case in which the court has directed an examination of the witnesses out of the hearing of each other, and has required the parties respectively to produce their witnesses before the court in order that they may be warned by the judge and ordered to withdraw, and one of the parties wilfully and fraudulently withholds the name of a witness, and purposely suffers him to remain and hear the examination of the witnesses on the other side, would he be permitted, under such circumstances, to examine that witness? The question need not be answered, as the case here is not the case supposed. In the present case, the motion for the separation of the witnesses was made by the worthy attorney for the commonwealth.

950 The witnesses on both sides *were sworn and sent out of the court room. The witness Augustus Byers was present, but he was not then sworn and sent out, as were the other witnesses. He was in legal custody, and of course could not absent himself. But he might have been sent out in charge of an officer. This should have been done, if it was intended to examine him, for, of all the witnesses, it was most important to the prisoner that this witness, then in custody under a charge of larceny of the goods in question, should not have been permitted to hear the statements of the other witnesses, who were examined before he testified. His name appears at the foot of the indictment as one of the witnesses sworn and sent by the court to the grand jury to give evidence. It may be, that the attorney for the commonwealth was not aware of the presence of Byers in the court room while the other witnesses were under examination, or perhaps at the time he made the motion to send the witnesses out it was then his purpose not to examine him as a witness, and he may have considered it necessary to examine him after hearing the testimony of the other witnesses. Under the circumstances, we do not think the court erred in refusing to exclude this witness, his presence during the previous examination of the other witnesses being open to observation, and a matter to be weighed in determining the value of his testimony.

The only remaining assignment of error is the overruling of the prisoner's motion to set aside the verdict of the jury and

grant him a new trial, on the ground that the verdict was contrary to the law and the evidence.

The prisoner was prosecuted under the statute (Code of 1873, ch. 188, § 19), by which it is enacted that if any person buy or receive from another person, or aid in concealing any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.

951 *To convict an offender against this statute four things must be proved.

1. That "the goods or other things" were previously stolen by some other person. 2. That the accused bought or received them from another person, or aided in concealing them. 3. That at the time he so bought or received them, or aided in concealing them, he knew they had been stolen. 4. That he so bought or received them, or aided in concealing them, *malo animo* or with a dishonest intent.

The first two ingredients of the offence were clearly proved in the present case. The harness mentioned in the indictment was stolen from the owner, Frank Coxe, at Charlotte, in the state of North Carolina, some time between the 3d and 6th day of May last, and came into the possession of the prisoner, who was a junk dealer, at his storehouse in the city of Richmond, on the 12th or 13th of the same month. If, when he received it, he knew it had been stolen, his intent, under the circumstances, must have been a dishonest one. So that the only question is, whether, when he received the harness, he knew it was stolen property. Did he have such knowledge? Certainly, there is no direct evidence that he had; that is not pretended. If guilty knowledge was established, it must have been by the circumstances proved in the case. The enquiry, then, must be into the sufficiency of these circumstances.

The prisoner received the harness from the negro, Augustus Byers, who testified in behalf of the commonwealth, and the evidence tends strongly to show that if this witness was not the original thief, he was probably his agent in disposing of the property. The harness was sent in a box, by the Richmond and Danville railroad, to Richmond, consigned to "M. H. Hays," and billed as "1 box clothing." It does not appear at what point it was put on the railroad, or who was the consignor, or that the box had any directions upon it or

952 marks indicating its contents, nor *was it shown on what day it reached the Richmond depot. But on the 9th day of May the freight agent of the railroad company at Richmond sent out a notice, as was the custom when goods arrived at the depot, addressed to "M. H. Hays," advising him that there was in the depot, subject to his order and ready for delivery, "1 box of clothing"—"freight, 75 cents." Appended to this notice was an order to the agent of the company directing the delivery of the article described in the notice, intended to be signed by the consignee, and a memo-

random on the margin in these words: "No goods delivered until freight is paid and this notice signed and returned."

On the 11th or 12th of May (it must have been the latter day, as the 11th was Sunday), Byers appeared at the depot with the notice before described, paid the freight to the proper agent, and then presented the notice to A. T. Sumwalt, a clerk of the railroad company, for the delivery of the box. Sumwalt, seeing from the face of the paper that the freight had been paid, told Byers to take the notice back and get the receipt at the bottom of it signed. Byers then said the box was his, that he was H. Hayes, and asked Sumwalt to sign the receipt for him, which Sumwalt did by writing the name "H. Hayes," Byers making his mark. The box was then delivered to him, and he took it to the storehouse of the prisoner, where it was opened by him the next day and the harness taken out. It was distinctly proved that he then offered to sell the harness to the prisoner, representing that it belonged to his brother, living somewhere on the railroad, who had been keeping a livery stable and hacks, had broken up business, and had sent the harness to him to sell. That this representation was untrue, the whole record proves; that it was wilfully false, is shown by his own testimony; for he says that the harness was sent to Richmond from North Carolina by one Lee Foster, a colored man, and that all he did was for Foster. He does not say that he

953 *gave this information to the prisoner, nor is there any evidence to that effect. He does say that he got a letter from Foster, addressed to Hey, enclosed in an enveloped addressed to him, and that he delivered that letter to Hey. He does not state, however, at what time he received the letter, or when it was delivered, whether before or after the box reached Richmond, or what were the contents of the letter, if he knew. The notice issued by the railroad company, before referred to, and upon the production of which, and the representation that he was "H. Hayes," the box was delivered to him, he says he got from the prisoner. How such a notice could have come to the possession of the prisoner is not explained by the evidence. It was not addressed to him, but to "M. H. Hayes."

It was proved by the freight agent that it was the custom of the company when goods arrived at their depot to send out such a paper or notice to the consignee or person to whom the goods were sent; that these notices were first given to a messenger to deliver, when, if the messenger could not find the party, the notice was enclosed in an envelope addressed to the party and dropped in the postoffice; that in this case he could not say whether the messenger delivered the notice, or who received it; that the notices were generally sent out by a boy named Kidwell; that Kidwell was out of the city, being on leave of absence. He was therefore not examined as a witness.

Again, it is singular that if the prisoner delivered this notice to Byers he did not

sign the order at the foot giving Byers authority to receive the box. He must have known such signature to be necessary. But suppose he did receive the notice, the information conveyed by it was not inconsistent with the representation made to him by Byers when the box was opened, that the harness it contained was the property of his brother, who lived somewhere on the railroad, and was for sale on his account: for if it is to

be borne in mind that Byers did not 954 then, or at any *other time, as far as the evidence discloses, inform the prisoner that he was acting for Lee Foster.

A circumstance much relied on by the attorney-general as showing guilty knowledge on the part of the prisoner, was the sale of the harness by him at a price grossly inadequate, as alleged. It is true that Mr. Cox, the owner of the harness, testified that he bought it in Philadelphia in June, 1878, and gave \$269 for it, together with the breast chains and lines, which, it seems, were not stolen, or at least never came to the possession of the prisoner; that he had used the harness from six to nine months, and the remainder of the time he had put it away, and that he would give \$250 for it at the time of the trial.

This estimate can hardly be regarded as the fair market value of the harness. The prisoner sold it at \$25 to John Kelly, a junk dealer in Richmond. He had offered to sell it to various persons at thirty-five dollars, but was unable to obtain that price. Kelly says he bought it to sell again, and did not consider it a bargain at thirty-five dollars, nor any great bargain at twenty-five dollars, as such stock was likely to lay on hand a long time before a sale could be made at a profit. He asked forty dollars for it, but would have taken less; that he had offered it for sale to several persons, among others to Mr. J. C. Smith, who was a junk dealer, as well as a dealer in ice, and bought and used a great deal of second-hand harness. Smith offered thirty dollars for it, but he would not take less than thirty-five dollars, which Smith refused to give.

We do not think, under these circumstances, that the sale of the harness by the prisoner at the price obtained raises the presumption of guilty knowledge.

But besides the circumstances, which have been noticed as the most unfavorable to the prisoner, there are others, which seem to repel the presumption of guilty knowledge.

The man Byers, from whom the 955 prisoner received the *harness had been engaged in driving a wagon on the streets of Richmond for a year or two and was known to the prisoner, to whom he had sold some second-hand harness of his own the year before the trial. Byers himself says in his testimony that the prisoner knew nothing wrong about him, nothing to cause him to doubt his honesty, nor did any one else in Richmond know but that he was honest; and when the prisoner sold the harness to Kelly, he said he would vouch for the man from whom he got it; that he knew him and he was all right. The box was

taken from the depot by Byers along the public streets in the day time to the prisoner's storehouse or shop, and there deposited. It was opened and the harness taken out in the shop in the day time, publicly and in the presence of witnesses, who testified to what was then said and done. The prisoner being unwilling to purchase the harness at a greater price than he offered, it was left with him by Byers for sale. He kept it for at least a month before a sale was effected. In the meantime, it was never concealed or attempted to be concealed, but was exposed all the time to public view and repeatedly offered for sale to divers persons.

The circumstances adverted to, and especially this open conduct of the prisoner, do not seem to be reconcilable with the idea of guilty of knowledge.

Besides, this is a case of circumstantial evidence, in which the good character of the accused deserves consideration in determining the question of guilt or innocence.

It was proved by Joseph J. White, the police justice of the city of Richmond, that he had known the prisoner since 1868; that he had always borne a good character for probity and fair dealings, very good indeed for one engaged in the hazardous business he was engaged in; by Thomas B. White, a captain of the city police, that he had known him well for four or five years, and that he had never heard anything to

956 cause him to doubt his honesty; *by James V. Reddy, that he had known him quite intimately since 1868, and that his character for honesty had been as good as any man's; and by James M. Gregory, that he had known him quite intimately for twelve or fourteen years, and his character for honesty had always been good, as good as any man's, and that he had never heard it questioned by any one. No evidence as to character was offered by the commonwealth.

After a careful examination of this case, whether the second bill of exceptions be regarded as containing a certificate of the evidence only, or partly of facts and partly of the evidence, (for it cannot be regarded as containing a certificate only of facts, the statements of some of the witnesses as to material matters being in conflict), we are of opinion that the evidence was insufficient to warrant the verdict of the jury, and, therefore, that the judgment of the court below must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

STAPLES, J., concurred in the opinion of the court on the first point, as to the admission of the witness; but did not concur in granting a new trial.

The judgment was as follows:

This day came as well the plaintiff in error, by his counsel, as the attorney-general on behalf of the commonwealth, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said hustings court of the city of Richmond erred in overruling the motion of the plaintiff in error to set aside the verdict of the jury and grant him a new trial on the ground that the said verdict was contrary to the law and the evidence; therefore, it is considered 957 and ordered that, for the error aforesaid, the said judgment be reversed and annulled, the verdict of the jury set aside, and this cause be remanded to the said hustings court for a new trial to be had therein, and for further proceedings, in order to final judgment; which is ordered to be certified to the said hustings court of the city of Richmond.

Judgment reversed.

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*ACTIONS.

1. An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under our statute (Code 1873, ch. 126, § 19), in a case where no special damages are alleged and proved. In such a case, the maxim, *actio personalis moritur cum persona* applies.

Grubbs' adm'r v. Sult, 203

2. Quære: Can such an action be maintained against the personal representative of the promisor where special damages are alleged and proved? *Idem*, 203

3. G and R, his wife, in consideration of \$1,000, sold and conveyed to A all their interest in and claim to any property, real and personal, of which C, the father of R, may die possessed. This deed is duly recorded, and the wife privily examined. After the death of C, in the lifetime of G, A is put in possession of R's share of her father's estate, real and personal; but upon the death of G, R files her bill to recover the property, on the ground that the deed is a nullity as to her. In 1878 there is a decree in her favor; and then A brings assumpsit against G's adm'r to recover back the \$1,000 he had paid for the property—Held:

1. Assumpsit by A will lie to recover the purchase money. And as A's cause of action did not arise until the decrees setting aside the deed in favor of R, and he sued immediately after that decree, the statute of limitations is no bar to the action.

Garber's adm'r v. Armentrout, 235

4. When an action for a malicious prosecution cannot be sustained.

See Malicious Prosecution, No 1, and

Womack v. Circle, 324

ADVERSARY POSSESSION.

1. B, owning a large tract of land, in 1830 conveyed twenty-five thousand acres of it to W, and three years afterwards conveyed twelve thousand acres of this tract to S. T holds under W, and S, Jr., holds under S. There is an interlock of three thousand five hundred acres, all of which is in forest except about fifteen acres. In 1842, Simpkins took possession of this clearing without any claim of title, and whilst in possession S, by a verbal agreement, agreed that Simpkins should continue in possession, and have what he could make on the land in consideration that he would salt the cattle of S, which he every spring sent to range on his land. In 1851 C, the grantor of T, finding Simpkins in possession, and not knowing anything of the agreement between him and S, leased the small clearing to him; and Simpkins remained

there until 1860, when he either voluntarily left or was driven from the possession. In an action of ejectment by S, Jr., against T—Held: The ground upon which an adversary title is established is the supposed laches of the true owner. The possession of the adverse claimant must not only be with claim of title, but must be visible, and of such notoriety that the true owner may be presumed to know it; and Simpkins not having taken possession under claim of title either in himself or S, and S never having exercised any notorious acts of possession over the land in controversy, either through Simpkins, as his tenant, or in any other way, S, Jr., his grantee, is not *entitled to recover in this action as adversary claimant.

Turpin v. Saunders, 27

2. Wild and uncultivated lands cannot be the subject of adversary possession whilst they remain completely in a state of nature. A change in their condition, to some extent, is essential; without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this may prove an adversary claim but cannot establish an adversary possession. The only improvement on the land in controversy being the small clearing made by Simpkins, this did not constitute and adversary possession, under the circumstances of this case, in any just and legal sense of the term; the residue of the tract being in a state of nature, could not be the subject of adversary possession, and the mere fact that herds of cattle were permitted to wander over it at will did not amount to a claim of ownership of the property. *Idem*, 27

3. Quære: While it is well settled that a tenant cannot dispute the title of the person by whom he was let in possession, nor be permitted to deny that the possession so received was the possession of his landlord, does this rule apply to the possession of Simpkins to estop him from controverting the title of S, or from showing that T was the true owner? *Idem*, 27

4. Quære: Even conceding that S had adversary possession of a part of the interlock, would that possession be co-extensive with the bounds of his deed, or be confined to his mere enclosure, the senior grantee, C, having settled on his tract, but outside of the interlock? The case of Cline's heirs v. Catron, 22 Gratt. 378, was not intended to decide this question, and explain on this point.

Idem, 27

APPELLATE COURT.

1. Upon a bill by a creditor of a mining company to subject certain minerals to satisfy his debt, there are parties claiming the minerals adversely to the mining company,

and they all plead the statute of limitations. The court below decrees in favor of the plaintiffs, and only the advance claimants appeal—Held: That a party appealing must show some error in the decree affecting himself; and as the mining company and its members have acquiesced in the decree, the adverse claimant cannot rely upon the statute in the appellate court.

Clayton & Tyson v. Henley, 65

2. How an objection for want of proper parties should be made, and how such an objection for the first time made in the appellate court will be treated, see the opinion of Staples, J. Idem, 65

3. One defendant, F, files an exception to the commissioner's report; which is relied on by R, another defendant; but, at the hearing in the court below, this exception is waived. The exception having been waived, R cannot rely upon it in the appellate court.

Robertson v. Trigg's adm'r & als., 76

4. S moved the court below to quash an execution issued against his effects on a judgment recovered against him by C, on the ground that he had paid it. The court allowed a credit on the execution to the amount of \$420; and from this judgment C obtained an appeal to this court. On the motion of S to dismiss the appeal on the ground that the matter in controversy was not as much as \$500—Held: That the appeal being by C, it is not the amount of the execution, but the amount of the credit which is the matter in controversy, and this court does not have jurisdiction of the case, and the appeal is dismissed.

Campbell v. Smith, 288

5. In an action of covenant upon a lost instrument, there is a verdict and judgment for the plaintiff. On a motion by the defendant to set aside the verdict and grant him a new trial, which is overruled, the exception sets out all the evidence. If the evidence of the plaintiff is believed, the verdict is correct. If the evidence of the defendant is believed, it is erroneous. An appellate court cannot reverse the judgment.

Great Falls Man'g Co. v. Henry's adm'r, 467

961 *6. A railroad company gives notice to S that they will move for a judgment against him for two assessments of \$150 each upon five shares of the stock for which the company alleges S was a subscriber. S denies that he was a subscriber to the stock, and resists the demand on that ground. Though the judgment against S was but \$300; in fact the subject in controversy was the validity of the subscription for the five shares, which was \$500, and the court of appeals has jurisdiction to hear the case on appeal.

Stuart v. Valley R. R. Co., 146

7. The general rule, that where improper evidence was admitted in the court below, the appellate court will set aside the verdict, because it is impossible to say what effect

such evidence may have had on the mind of the jury, does not apply in cases where all the facts are certified, and the appellate court can clearly see that the prevailing party is entitled to the verdict independently of such evidence.

Gerst v. Jones & Co., 518

8. The plaintiff in an attachment in equity is a non-resident of the state, and in the progress of the cause is required to give security for the costs within sixty days. He does not give it, but the court proceeds to decree in his favor. On appeal the decree is reversed; but in remanding the cause the appellate court will not direct the suit to be dismissed, but will direct that he be allowed a reasonable time to comply with the order.

Anderson v. Johnson & als., 558

9. The certificate of a justice of another state of oath before him of delivery to the defendant in an attachment suit of a copy of the summons and attachment, not objected to in the court below, cannot be objected to in the appellate court. Idem, 558

10. When error of the court in refusing to allow a demurrer to one count in a declaration will not be ground for reversing the judgment.

See Practice at Common Law, No. 5, and

Binns v. Waddill, 568

11. If the court gives two instructions to the jury; the first of which is correct, and the jury find their verdict expressly under that instruction, even if the second instruction is erroneous, it is not ground for reversing the judgment. Idem, 558

12. An affidavit is filed with a petition for rehearing the cause, and no objection is made in the court below: it cannot be objected to in the appellate court.

Purdie & Wife v. Jones & als., 827

ATTACHMENTS.

1. In a suit in equity against an absent defendant to attach his property for the satisfaction of a debt, if it appears from the bill that the court has jurisdiction of the case, it is not necessary that the affidavit should state that the defendant has property in the county where the suit is brought, but it is sufficient if it states that he has property and effects in any county of the state.

Anderson v. Johnson & als., 558

2. If in such case the affidavit is defective, the remedy is by motion to quash the attachment. Idem, 558

3. If it appears that a copy of the attachment was served on the defendant sixty days before a decree for the sale of the land attached, the decree for the sale may be made without requiring the bond provided for in the statute. Code of 1873, ch. 148, § 24, p. 1015. Idem, 558

4. The certificate of M, describing himself as a justice of the peace of the county of B, in the state of Ohio, that P, a deputy sheriff of said county and state, had made oath

before him, the said M, of a delivery to the defendant of a copy of the summons and attachment, not objected to in the court below, can not be objected to in the appellate court. *Idem*, 558

5. Under the statute, Code 1873, ch. 148, § 27, a defendant in a foreign attachment suit may appear at any time pending the suit, and having the cause reheard, tendering security for the costs. And the proviso to the statute, which excepts from the operation of the act a case in which the defendant was served with a copy of the attachment

962 *or with process in the suit, issued more than sixty days before the date of the decree, only refers to such a service in the proceedings in the suit, and not to a service out of the suit and out of the state; and a service out of the suit and out of the state can have no greater effect than, if so great as, an order of publication duly posted and published. *Idem*, 558

6. Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury impaneled for the purpose, as provided by the statute, Code of 1873, ch. 148, § 25; and it is error for the court to pass upon the claim without the intervention of a jury. *Idem*, 558

7. Where, on the motion of the defendant in an attachment case, the plaintiff, who is a non-resident of the state, is ordered to give security for the costs of the suit within sixty days, and fails to do so, his bill should be dismissed; and it is error to proceed to hear and decide the cause. *Idem*, 558

8. On reversing the decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the failure of the plaintiff to give security for costs, but will direct that he be allowed a reasonable time to comply with the order. *Idem*, 558

BONDS.

1. A case in which it was held under the circumstances, that a bond executed in July, 1862, for a loan of Confederate money, should not be scaled; but should be applied as of its date, as a payment of a debt due the borrower.

Robertson v. Trigg's adm'r & als., 76

2. The mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same.

Brown v. Taylor's Committee, 135

3. Though a judgment upon a note rendered by a court not having jurisdiction of the case is void, the note is still a valid security.

Linn & als. trustees v. Carson's adm'r & als., 170

4. A bond is signed by the principal obligor and a number of sureties, and there are several scrolls below the names of the sureties who sign it. In other respects the bond is complete and perfect on its face; but

the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional sureties to execute it, before he delivers it to the obligor; but he violates the condition, and delivers it to the obligee, without obtaining additional sureties—Held: The bond is binding on the sureties, unless the obligee had notice of the condition on which they executed it; and the fact that there were other scrolls to the instrument, to which no name was signed, was not sufficient to put the obligee upon enquiry as to the authority of the obligor to deliver the bond to him.

Nash v. Fugate & als., 595

5. A bond, signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Idem*, 595

CHURCHES AND CHURCH PROPERTY.

1. The act, ch. 76, §§ 12, 13, Code of 1873, does not prohibit the sale of church property for the payment of debts incurred in the purchase thereof or building thereon, or to reimburse a party who has advanced money, or made himself liable for any such debts at the instance of the trustees of the church, and the discipline of the church authorizing parties so advancing money on account of such property to raise said sums of money by mortgage or sale, a court of equity will, at the suit of a party so 963 liable *or so advancing money, subject the lot and buildings to sale for the purpose of satisfying such claim.

Linn & als. trustees v. Carson's adm'r & als., 170.

2. The Baltimore conference of the Methodist Episcopal Church having, in its meeting in 1845, declared its adherence to the Methodist Episcopal Church, could not afterwards, in 1861, secede from that church so as to entitle it to the benefit of the plan of division adopted in the general conference of the church in 1844; though in 1866 it united with the Methodist Episcopal Church South.

Hoskinson & als. v. Pusey & als., 428

White & als. v. King & als., 428

3. Except as to the border circuits of the church, the division of the churches of which is provided for by the plan of 1844, the property in the churches, &c., of the congregations within the bounds of the Baltimore conference properly belongs to the churches in connection with the Baltimore conference, composed of those members of that conference who refused to concur in the action of the conference in 1862, and continued to adhere to the Methodist church.

Idem, 428

4. The Harmony church, in Loudoun county, was not a border church, and the

plan of division of 1844 did not apply to it, and though a majority of the members of that church decided to go with the Baltimore conference south, the other party, remaining in connection with the Baltimore conference, are entitled to the possession of the church property. *Idem*, 428

CONFEDERATE MONEY.

1. See Executors and Administrators, No. 3 and
Siron v. Ruleman's ex'or & als., 215
2. When executors held justified in investing funds in Confederate bonds.
See Executors and Administrators, No. 6, and
Lingle & als. v. Cook's adm'rs, 262

CORPORATIONS.

1. Whilst a corporation may, by its agents, transact business anywhere, unless prohibited by its charter, or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter.
Cowardin & als. v. Universal Life Ins. Co., 445
2. See Railroad Companies, No. 1, 2, and
Balt. & Ohio R. R. Co. v. Noell's adm'r, 394

COUNTY JUDGES.

1. Under the constitution of Virginia it is provided that the terms of the judges of the county courts shall commence on the 1st of January, and they shall hold their office for six years, and until a successor is elected and qualified. The term of a judge having ended on the 31st of December, 1879, his successor was elected on the 12th of January, 1880—Held: His term commenced on the 1st of January, 1880; and he is the judge of the county from the time of his qualification, and authorized at once to exercise the authority and discharge the duties of the office.
In re Walsh, 779

COVENANTS.

I. A, being the owner of a cotton factory, enters into a covenant under seal with T, which is duly admitted to record, which, reciting a previous deed of trust by A to secure advancements made, or to be made by T to A, witnesses that in consideration of the premises and of the advances already made and to be thereafter made by T for the purchase of cotton or for other expenditures connected with the manufacture of cotton goods at A's factory, the said A covenants to deliver to the said T each yard of cotton goods manufactured by him at the said factory. And T covenants that he will, from time to time, advance such sums of money as may be required for the purchase of cotton 964 manufactured in said factory, and *that he will advance further sums of money as may be required to pay hands and necessary expenses incurred in running the machinery in said factory, &c. And it

was further agreed between the parties that the said A shall sell no goods manufactured in the said factory, unless upon receipt of a written authority from T to that effect, specifying the amounts of goods to be sold, the price and terms of sale, and approving the credit of the purchaser; and T shall receive five per cent. for commissions and guarantees on the entire product of said factory, whether sold by T or A, by the authority of T as aforesaid. And T is to have the same security under the said deed of trust as if this covenant had been executed at the same time as the deed—Held:

1. That the covenant by A is valid in equity to secure to T the cotton and goods thereafter purchased and made at the said factory for the repayment to him of all money advanced or paid by him for cotton to be manufactured at said factory and the expenses incurred in running the said machinery, whether said advances were made before the date of said covenant or afterwards.

First National Bank of Alexandria v. Turnbull & Co., 695

2. That the covenant having been duly recorded, it is notice to all parties claim under A. *Idem*, 695

3. That the right of T to the raw cotton, cotton yarn and cotton cloth on hand is preferable to the right of an execution creditor of A on an execution issued since the covenant was executed. *Idem*, 692

4. A creditor of A, having levied his execution on the said raw cotton, cotton yarn and cotton cloth, T may interplead and set up his title to the property under the covenant. *Idem*, 695

CREDITOR AND DEBTOR.

1. What arrangement between a creditor with his principal debtor, who is also administrator of the surety, will release the surety. See Principal and Surety, No. 1,

2, 3, 4, 5, 6, 7, 8, and
Callaway's ex'or v. Price's adm'r & als., 1

CRIMINAL JURISDICTION AND PROCEEDING.

1. W, indicted for larceny in the county court of F, sends in reasonable time, a subpoena for two witnesses living in an adjoining county; and the sheriff of that county makes return upon it not executed for want of fees. When the case is called W asks for a continuance, on the ground of their absence, and makes affidavit as to their materiality. The court refuses to continue the case, but sends for the witnesses, and says that they may be examined if they come before the trial is ended. One comes, but not till the trial is ended, when there is a motion for a new trial. There being nothing to indicate that W was not acting in good faith—Held:

1. It was error not to continue the case, upon the application of W.
Walton's case, 853

2. It was error not to set aside the verdict and grant W a new trial. *Idem*, 855
2. The principles governing the court on motions for a continuance in criminal cases as stated in Hewitt's case, 17 Gratt. 627, 629, approved and acted on. *Idem*, 855
- 3 On a trial for stealing certain bank notes, "the number and denomination of which are unknown to the jurors," the evidence of the commonwealth shows that the number and denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner, excludes the evidence; and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offence—*Heid*:
1. That if the jury had, on the first trial, rendered a verdict in favor of the prisoner, it would not, *under the statute, Code of 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offence; and therefore the discharge of the jury was no injury to the prisoner.
- Robinson's case, 866
4. An indictment under the statute, Code of 1873, ch. 194, § 1, for gaming, pursues the language of the statute, except that it uses the word "and" in place of "or," thus charging the accused with exhibiting all the games mentioned in said statute. This is correct. It charges but one offence, and is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be but one fine, and one term of imprisonment.
- Leath's case, 873
5. The indictment charges the offence to have been committed in the city of Richmond, and within the jurisdiction of the court. This allegation is sufficiently certain. It is not a case in which place enters into the offences; but it is an offence without regard to the particular house, building or other particular locality where it is committed. *Idem*, 873
6. It is not necessary that the indictment should charge that the games or tables were kept or exhibited for gain. It is sufficient that it follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit, &c. *Idem*, 873
7. Although one of the forty-eight persons directed by the judge to be summoned to serve as grand jurors for the ensuing twelve months, may be incompetent to serve as a grand juror, a grand jury of sixteen selected from this list, all of whom are competent, is a legal and duly qualified grand jury.
- Shian's case, 899
8. Where one of the grand jury finding an indictment was incompetent, and for that reason the grand jury is dismissed and the indictment quashed, the court may direct a special grand jury of eight to be summoned and impaneled at the same term; and an indictment found by this grand jury is valid. *Idem*, 899
9. Upon an indictment against S, the secretary of a building fund association, for the larceny of a check, the property of said association, the records of the association whilst he was in office, and oral evidence relating to the organization, objects and business of the building association, the appointment and duties of S as secretary, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the larceny of which he was indicted, are competent evidence against him. *Idem*, 899
10. In such a case whether the building fund association was organized strictly in conformity with the requirements of the statute, is not a proper subject of enquiry. S having, as secretary of the association, received and wilfully appropriated its funds or property, cannot be heard, upon a criminal prosecution therefor to contradict its legal existence. *Idem*, 899
11. The check having been given to S, the secretary, in payment of a debt due to the association, was the property of the association, and though payable to S, as secretary, it was also payable to bearer, and it was the duty of S to turn it over to the treasurer. If S had accounted for the money, that fact would, of course, show that he had no intention to appropriate the check. Not having done so, it was a question for the jury, whether he intended to embezzle the check. And to convict him, it was necessary that the jury should be satisfied that this intention existed before, or at the time the check passed into the possession of the bank. *Idem*, 899
12. Thought the building association was organized under the act of 1852, even if that act applied to a prosecution for the embezzlement of a check by an officer of the association, the act of February 24th, 1874, p. 81, § 11, being subsequent in date, must control the case. *Idem*, 899
13. If S drew the money on the Avery check with the intention of using *the same for his own purposes, and not for the liquidation of the Avery debt, though probably with the intention to return the same at some future day, to the building association, he is guilty of the embezzlement of the check. *Idem*, 899
14. On the examination on his voir dire, a juror answered, "that he had read newspaper accounts of the offence with which the prisoner was charged, and had heard rumors of the same; that upon what he had read and heard he had made up and expressed an opinion in the case; that the opinion so made up and expressed was still upon his mind; that he did not think he could do the prisoner justice; but in answer to a question from the court, should the evidence before the jury be different from that he had heard, he said his opinion would be changed; that he could come to the trial with an unbiased

and an unprejudiced mind, and give the accused a fair and impartial trial"—Held: He was not a competent juror.

Wright's case, 941

15. If a juror has made up and expressed a decided opinion as to the guilt or innocence of the accused, he is incompetent, whether the opinion be founded on conversation with the witnesses or upon mere hearsay or rumor. It is sufficient if the opinion is decided and has been expressed. *Idem*, 941

16. When the opinion is founded on common rumor, the presumption is that it is merely hypothetical, and it will be so considered in the absence of proof to the contrary. *Idem*, 941

17. Whether the opinion be hypothetical or decided, whether founded on rumor or upon evidence heard at the trial, the juror must be free from prejudice against the accused. Upon this point nothing should be left to inference, or in doubt. *Idem*, 941

18. To sustain a prosecution, under the statute, from receiving goods knowing them to be stolen, four things must be proved—1st. That the goods or other things were previously stolen by some other person. 2. That the accused bought or received them from another person, or aided in concealing them. 3. That at the time he so bought or received, or aided in concealing them, he knew they had been stolen. 4. That he so bought or received them, or aided in concealing them *malo animo*, or with a dishonest purpose.

Hey's case, 946

DECREES.

1. When a decree in a previous suit is a conclusive bar to a second suit.

See Estoppel, No. 1, 2, and
Tilson v. Davis' adm'r & als., 92
McComb v. Lobdell & als., 185

2. For what is an interlocutory decree.

See Heirs, No. 2, 3, and
Ryan's adm'r v. McLeod & als., 367

3. A decree cannot be in part final and in part interlocutory in the same cause, for or against the same parties who remain in court. *Idem*, 367

4. Whenever a particular relief is contemplated, if anything remains to be done by the court to make the relief effectual, the decree is interlocutory. Where no further action is required the decree is final. *Idem*, 367

DEVICES AND BEQUESTS.

1. R. died in 1854, leaving a widow and seven children—four sons and three daughters. By his will, after providing for his widow, he gave to his daughter H and each of his four sons a specific parcel of land, to Henry one-half of a tract called Bull Pasture; and he provided that each of his sons should pay a sum named towards paying testator's debts. The charge on Henry's land was \$1,000, payable in two and five years. He then said, after his debts were paid his daughters P and S to have an equal portion with the balance. The whole of the

Bull Pasture tract was under a deed of trust to secure a debt due by the testator to B. and the one-half not given to Henry was sold to pay that debt. Henry paid to 967 the executor *two small sums, amounting to \$298.20 and sold the land to J. who sold it to Siron—they having notice of the charge; and Siron paid to the executor \$722.50 in 1863, in Confederate treasury notes and bank notes, it being understood that if the parties entitled would not receive the notes they were to be returned; but they were not returned, though the executor stated the parties refused to receive them. Upon a bill by the executor to subject the land to pay the charge of \$1,000, minus the two items amounting to \$298.20—Held:

1. It was the intention of the testator, in the disposition of his property, to observe the principle of equality among his children.

Siron v. Ruleman's ex'or & als., 215

2. It was his intention to provide for his daughters P and S portions which, in his opinion, would be equal to those given to his own children. *Idem*, 215

3. If the testator intended that the sums charged upon the lands devised to the sons should be applied to the payment of his debts, including that due to B. and that the half of the Bull Pasture farm and the personal property not specifically bequeathed, so far as it was not needed for debts, should go to his daughters P and S, or be applied for their benefit, this property, having been applied to the payment of the debts, which the charges against the devisees were intended to pay, P and S will be turned over to the charges against the said land.

Idem, 215

4. If the intention was to raise by these charges, a fund for the payment of the legacies to P and S, as well as the debts, they are, of course, entitled to whatever remains of the fund after the payment of debts; and as the debts are all paid, they are entitled to the aggregate amount.

Idem, 215

5. The charges on the land were not made simply for the payment of debts, nor were they in any sense contingent, but are absolute in their nature, and constitute an unconditional testamentary provision made by the father for his daughters.

Idem, 215

6. It was competent for the executor of R and his duty to file his bill against Henry and his alienees to enforce the charge upon the land, in default of the payment of said money in whole or in part, to collect the same and dispose of it according to the provisions of the testator's will.

Idem, 215

7. It was the duty of the executor as soon as he received the said Confederate and bank notes, to apply to the legatees and ascertain from them whether they would accept the said notes; and if they refused to receive them, he should have returned

them to Siron; and not having returned them, he is liable to Siron for their value as of the date at which he received them, or a reasonable time thereafter. And Siron should be allowed a credit for such value. *Idem*, 215

8. In 1867 P and S and their husbands filed their bill in the circuit court of Pendleton against R's executor and his devisees and legatees to enforce the payment of their legacies. The executor answered, and in 1872, the suit was dismissed agreed. No decrees subjecting the land devised to Henry to the charge should be made until P and S were made parties in this cause, and enquiry made as to the adjustment made between them and the executor. *Idem*, 215

2. C, owning several tracts of land and personal estate, by his will says: 3. I give to my wife Theresa, during her natural life or widowhood, all my estate, real and personal, except as hereinafter excepted. But if she should marry again, then she is to have the same portion of my estate as if I died intestate. He directs his executors to sell his lands and personal property; and then says the Home place is for my wife to live on as long as she may remain my widow, and then it is to be sold. He then says: I wish the proceeds of the sales of my real and personal estate, and the debts due me after paying my debts, to be put at interest by my executor, 968 *and my wife to receive the interest.

But so long as she remains my widow, she is at liberty to receive from my executors or from my estate such part of it as she may choose and to appropriate it as she believes to be just and right. And he then directs that all such part of his estate as she does not thus appropriate, and all the rest of his estate, shall be given and paid over to the Missionary Society of the Methodist Episcopal Church, incorporated by an act of the legislature of the state of New York, passed April 9, 1839. All so paid to the said Missionary Society shall be paid to the India mission by that society—Held:

1. That under the provision that his wife Theresa is to be at liberty to receive from his executors such part of it as she may choose, and appropriate it as she believes to be just and right, all the estate directed to be sold and invested by his executors, passed absolutely to his wife.

Missionary Society of the M. E.

Church v. Calvert's adm'r & al., 357

2. The Home place, which was to be sold after the death or marriage of his wife, did not pass absolutely to the wife, but the proceeds of the sale thereof passed to the said Missionary Society. *Idem*, 357

3. The testator directing the Home place to be sold by his executors, the bequest to the Missionary Society though a foreign corporation is valid; they taking the proceeds of the sale. *Idem*, 357

4. The direction that the Missionary Society shall expend it on the India mis-

sion does not avoid the bequest for uncertainty. *Idem*, 357

3. M, by his will, made in December, 1864, after directing the payment of his debts, gives to his wife all the property of every kind which belonged to her at the time of their marriage, and in addition thereto he gives to her for her natural life the house in which he lives, with the yard and garden attached, and his servant girl A, and any increase she may have; and he gives her in absolute right one-half of his personal property. He gives to his nieces E and S, certain articles and Confederate bonds, and also A, at the death of his wife. The residuary clause of the will is as follows:

5th. All the rest and residue of my estate is to be divided into two equal shares, and I give one-half to my sons J and A, and the other half to my nieces above named; but if from any cause either alienage or confiscation, either of my said sons cannot take or hold the share hereby given to him, then in that event I give the share of such one to my two nieces above named—Held: The house and lot given to the wife for her life passes under the residuary clause of the will to the sons and nieces in equal shares; and this though there is some evidences of conversations between M and his wife of an intention that his sons should have the house and lot.

Markells v. Markells,

544

4. Testator, after directing the payment of his debts, says: I direct that all the property I have, or in which I have an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of the sale to be divided into four parts, namely: my brothers J, W and L to have each a fourth part, and the other fourth part to be divided among my brother W's children, each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from my brother W, I give to him—Held: The bequests to the children of W did not vest at the death of the testator, but only as and when each child arrived at the age of twenty-one; and, therefore, the children dying before attaining that age took nothing under the will.

Major's ex'or & als. v. Major's adm'r,

819

DOWER.

1. Where, in a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien 969 debts, and an *assignment of dower to his widow, the dower cannot be assigned in kind, and it is necessary to sell the whole real estate, and to satisfy the claim of dower out of the proceeds, the court cannot, without the consent of all the parties, satisfy said claim by the payment of a gross sum out of said proceeds, but must securely invest one-third of said proceeds, and direct the interest on such investment to be paid to the widow during her life, in satisfaction of her claim of dower.

Harrison's ex'or v. Payne & als., 387

2. A widow remains in the mansion house, having with her her two infant children, who she supports, and no assignment of dower is made to her. She pays a balance of the purchase money due for the property, and secured by the vendor's lien, and she pays the taxes due upon the property. As against judgment creditors of her late husband—Held:

1. She is entitled to be paid the amount of the taxes she has paid, and they are the prior lien upon the property.

Simmons v. Lyles, adm'r & als., 752

2. She is to be paid for so much of the purchase money paid by her as was properly payable by the heirs; and this is also a prior lien on the property as against the creditors. *Idem*, 752

3. Having held the mansion house, and the heirs being infants unable to assign dower, she must be considered as holding as to one-third of the house as dowress, and liable to pay one-third of the interest of the said purchase money during her life. *Idem*, 752

4. It being necessary to sell the property, and therefore to fix the present amount chargeable to her on account of said interest, the annual interest is to be treated as an annuity, to be computed for so many years as she may be supposed to live, regard being had to the state of her health; and the sum so ascertained, in gross, is to be deducted from the amount of the purchase money paid by her. *Idem*, 752

5. There being accounts to be taken in the cause, so that the property cannot be sold at once, the court should appoint two or more discreet persons to fix a rent upon the house; and if the widow will take it at the rent so fixed—she to pay two-thirds thereof—it should be rented to her; and as the court has funds of hers under its control sufficient to pay the rent, no security should be required of her. *Idem*, 752

EJECTMENT.

1. In an action of ejectment, brought against the person in possession, the landlord of such person may come in and be allowed to defend the action under § 5, ch. 131, Code of 1873, whether the actual relation of lessor and lessee exists between them or not; and this will be permitted even where the plaintiff and defendant in possession have submitted the matters between them to arbitration, an award made in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him.

Hanks, &c., v. Price, &c., 107

2. In general, the law will imply a tenancy whenever there is an ownership of land on the one hand and an occupation by possession on the other. *Idem* 170

EQUITY JURISDICTION AND RELIEF.

1. Upon a bill filed by a creditor of the M. Mining Co. and the persons constituting

that company, in the circuit court of C county, to subject to the payment of his debt the land of one of them lying in C county, and the minerals conveyed in a deed by T to S lying in F county, one of the members resides in C county, and the others are nonresidents of the state—Held: The court has jurisdiction of the cause, both on the ground that a part of the subject sought to be subjected lay in the county of C, and that one of the defendants resided in that county.

Clayton & Tyson v. Henley, 65

*2. In such suit the parties claiming under subsequent deeds made by T and by commissioners under decrees, claiming adversely to the title of the M Co. and its members, said parties thus claiming adversely to M Co. and its members cannot set up the statute of limitations as a bar to the plaintiff's claim, the M Co. and its members not relying upon the statute. *Idem*, 65

3. But if all the defendants pleaded the statute, and the circuit court decided the case in favor of the plaintiff, and only the said parties claiming adversely take an appeal—Held: That a party appealing must show some error in the decree affecting himself; and as the M Co. and its members have acquiesced in the decree, the adverse claimants can not rely upon the statute in the appellate court. *Idem*, 65

4. When a party may go into equity to recover the amount of an insurance policy. See *Insurance and Insurance Companies, No. 11*, and

Portsmouth Ins. Co. v. Reynold's adm'r & als., 613

5. A court of probate is a court of equity, and though its powers over the subject confided to it are limited, it may on a proper bill review and correct errors in its proceedings after final decree in the cause.

Connolly v. Connolly & als., 657

ESTOPPEL.

1. There is a creditor's bill against the estate of D who was the administrator of G. In this suit T, the widow of G, was a party by petition claiming an interest in the estate of one of her sons, which is paid to her. She held the bond of D, but did not present a claim for that, and there was a final decree in the cause directing the receiver to distribute the funds ratably among the debts reported. Before the whole fund is paid out by the receiver, T files her bill to subject the fund still in the hands of the receiver to satisfy the bond of D which she held—Held: That T having made herself a party in said creditor's suit without setting up this claim, she is concluded by the final decree in said suit, and cannot set up a claim to the fund in the hands of the receiver.

Tilson v. Davis' adm'r & als., 92

2. Upon a bill by L against M and others setting up a contract of partnership between them, it appears that in a previous suit the matters alleged in that bill were sufficient to put in issue the fact of such contract as is

alleged in this case, and in that case it was held that the contract was not valid—Held: The decree in the first suit is a conclusive bar to the second.

McComb v. Lobdell & als., 185

EXECUTORS AND ADMINISTRATORS.

1. What arrangement between a creditor and his principal debtor, who is also administrator of his surety, will amount to a devastavit on the part of the administrator.

See Principal and Surety, No. 6, 8, and

Calloway's ex'or v. Price's adm'r & als., 1

2. G died early in 1849, leaving a widow, T, and three infant children, and in March, 1849, D qualified as his administrator. In March, 1851, D settled his account, and had for distribution \$5,090.63; and having qualified as guardian of the children, he retained in his possession two-thirds of this sum as their guardian. He had in 1850 executed his bond for the balance due to T, as widow. There is some uncertainty as to the provisions of the bond, whether given to her as payment of the third due to her as widow, or as a mere acknowledgment of what was due to her; and whether it provided only for the payment to her of the interest during her life, and then of the principal to her children. In April, 1875, T instituted a suit in equity against the administrator and sureties of D, to recover the amount of her interest in the estate of her husband G, and the sureties answered, insisting that T had accepted the bond of D in satisfaction of her claim, and

971 *pleading the statute of limitations—Held:

1. If the bond was so given that T was only entitled to the interest during her life, and then it was to go to the children, it was a novation of the debt due by D as administrator, and his sureties were not bound for the claim.

Tilson v. Davis' adm'r & als., 92

2. That D having settled his administration accounts finally in 1851, and given the bond to T, if it was intended merely as an acknowledgment that that much was due to her, it was a settlement to the amount of the bond, and from the moment of its execution and delivery to T, right of action accrued thereon, and more than ten years having elapsed before she brought her suit, his sureties are discharged from their liabilities by the statute of limitations. Code of 1873, ch. 146, §§ 8, 9.

Idem, 92

3. An executor receives Confederate money in payment of legacies charged upon land with the understanding that if the legatees refuse to receive it, he is to return it to the party paying it. He does not return it, though he says they refused to receive it. He is responsible for its value as of the date at which he received it; and the party paying the charge should be allowed a credit for such value.

Siron v. Ruleman's ex'or & als., 215

4. C died in 1860, without wife or children, leaving a large estate, which, by his will, he gave to his brothers and sisters, and the children of such as were dead. The legatees were about forty in number, and were scattered, some in Virginia and further south and others in the western states. At the July term, 1860, of the county court of R, the will was admitted to probate, and his nephew R was appointed and qualified as administrator c. t. a., and executed his bond with sureties. At the same term the court set aside the order appointing R administrator, and appointed R, C and A, who qualified and executed their bond with other sureties. In August, 1860, on their motion, the administrators were ordered to give a new bond, with other sureties; which was done. Upon a bill filed by some of the legatees against the administrators and the sureties in the several bonds and others for an account of their administration, &c.—Held:

1. During the same term of a court the orders of the court remain in its breast, and may be revoked, annulled or amended at its pleasure, if the act be not done or obtained by fraudulent means. The court, therefore, had the power to rescind the order appointing R the administrator of C, and the office then being vacant, to appoint R, C and A administrators. And the sureties of R in the first bond are not responsible for the devastavit of the administrators.

Lingle & als. v. Cook's adm'rs, 262

2. The new bond executed in August, 1860, by the administrators, by the express provisions of the statute, relates back to the time of the qualification of the said administrators, and binds the obligors therein for the faithful discharge of the duties of the office of said administrators from that time as effectually as if the said new bond had then been executed.

Idem, 262

3. By the execution of the new bond of August, 1860, the sureties in the former bond and their representatives were, by the said statute, forthwith discharged, except as to any matter for which suit was then depending on the former bond against any such sureties or their representatives; in which case such suit might be prosecuted to judgment or decree. Idem, 262

4. As to every such matter, the new bond, without any express provisions therein to that effect, will bind the obligors therein to indemnify the sureties in the former bond against all loss or damage in consequence of executing the former bond. Code of 1849, ch. 132, § 12; Code of 1873, ch. 128, § 19. Idem, 272

5. During the war the administrators sold to H \$20,000 of the bonds *and notes of the estate for Confederate treasury notes, at the rate of two dollars of the latter for one of the former—Held:

1. If payment of the debts of the testator or legacies given by his will required a sale of the bonds or notes due to him, then such

a sale, fairly made on reasonable terms, would not have been a breach of trust by the personal representative, but would have been a due execution of such trust; for which, of course, neither they nor a purchaser from them would be made responsible. *Idem*, 262

2. If such payment did not require such a sale, but the purchaser was wholly ignorant and had no reason to believe that it did not, and in fact believed that it did, then certainly the purchaser, being, in such case a bona fide purchaser for value without notice, could not be made responsible, even though the personal representatives should be responsible by reason of their guilty knowledge, or other breach of trust in the transaction. *Idem*, 262

3. If a personal representative acts fairly and honestly within the scope of his powers, then he is not responsible for the consequences of his act, even though it result unexpectedly to the loss of the trust subject, or any part of it. *Idem*, 262

4. Though such personal representative act unfairly and dishonestly in making a sale, which, fairly and honestly made, would be within the scope of his power and duty, a bona fide purchaser for value from him would have a perfect title against the testator's estate. *Idem*, 262

5. Under all the circumstances the administrators held to have properly and honestly made the sale. *Idem*, 262

6. A large amount of Confederate States treasury notes having come into the hands of the administrators in the course of the execution of their duty, and they being unable, by reason of the war then existing and the number and scattered location of the legatees, to distribute the entire fund remaining in their hands after the payment of the debts of their testator, they were justified in investing these notes in Confederate bonds, and are entitled to be credited for the same in their administration account. *Idem*, 262

EVIDENCE.

1. For what may be evidence in proof or disproof of a subscription to the stock of a railroad company,

See Subscription to Stock of R. R.

Co's, No. 3, 4, 5, 8, 9, and

Stuart v. Valley R. R. Co., 146

2. The books of a partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts.

Shackelford's adm'r v. Shackelford & als., 483

3. A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee at the time he received it from the principal obligor, had notice that other

persons were to sign it in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory.

Nash v. Fugate & als., 595

4. Evidence of the effect of a dam in raising the bottom of a stream and overflowing the lands lying on the stream above the dam in the county of Albemarle is admissible to prove similar effects from a dam in the county of Louisa.

Ellis v. Harris' ex'or, 684

5. Circumstantial evidence must always be scanned with great caution, and can never justify a verdict of guilty, especially of murder in the first degree, the penalty of which is death, unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt.

Dean's case, 912

973 *6. On a trial for murder, the evidence connecting the accused with the killing is wholly circumstantial; but as to time, place, motive, means and conduct, it concurs in pointing out the accused as the perpetrator of the crime—Held: Accused was properly convicted of murder in the first degree. *Idem*, 912

7. Upon the question whether the accused bought goods knowing them to have been stolen, the evidence being circumstantial, evidence of the good character of the accused is competent.

Hey's case, 946

EXCEPTIONS.

1. Where, in a criminal case, a bill of exceptions taken to the refusal of the court to set aside the verdict on the ground that it is not warranted by the evidence sets out the evidence and not the facts proved, the appellate court can only consider the evidence introduced by the commonwealth, and will not reverse the judgment unless upon that evidence, taken to be true, the decision of the court below appears to be erroneous. Read's case, 22 Gratt. 924.

Dean's case, 912

FERTILIZERS.

1. Section 48 of ch. 86 of the Code of 1873, and those sections following, in relation to the inspection, labeling, &c., of fertilizers, are not in conflict with the provisions of the act approved March 29th. 1877, entitled "an act to establish a department of agriculture, mining and manufacturing for the state" (acts 1876-7, p. 240), are not repealed by the last named act; and are in force in this state.

Atlantic & Va. Fert. Co. v.

Kishpaugh, 578

2. The A & V F Co. were the manufacturers of a fertilizers which was labeled on the bags containing it—"Eureka. 200 lbs. Ammoniated bone superphosphate of lime"—and which was sold by its agents to differ-

ent parties, some of whom gave their negotiable notes, with K as endorser, for the same. The notes were not paid, and in an action of debt by the Co. against K, his sole defence under the plea of nil debet was, that the labels on the bags were not in conformity with the statute (§ 48, ch. 86, Code 1873), and that consequently the sales made to the makers of the notes for whom he was endorser were illegal and void—Held:

The label aforesaid was a sufficient compliance with the terms of the statute, and that the company is entitled to recover on said notes given for the price of said fertilizers. *Idem*, 578

FIXTURES.

1. Where the machinery in a factory is permanent in its character and essential to the purposes for which the building is occupied it must be regarded as realty, and passes with the building; and whatever is essential to the purposes for which the building used will be considered as a fixture although the connection between them may be such that it may be severed without physical or lasting injury to either. See *Green v. Phillips & als.*, 6 Gratt. 752.

Shelton v. Ficklin, trustee & als., 727

GAMING.

1. The game of poker, or draw poker, is not a game of the like kind with faro, keno, &c., and does not come within the meaning of statute, Code of 1873, ch. 194, § 1, p. 1212. *Nuckolls' case*, 884

2. A person who does not take part in the game, but furnishes the room and gas in which poker or draw poker is played, for which he receives a moderate compensation from the persons playing, is not guilty, under the statute, of being concerned in interest in the keeping a table of the like kind with faro, keno, &c. *Idem*, 884

HEIRS.

1. Where real estate in the hands of heirs is sought to be subjected to the payment of the decedent ancestor's debts, and that portion of it assigned to one of the heirs before the commencement of the suit has been aliened to a bona fide purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who have not aliened it, is liable, not only for the proportionate share which each heir would at first have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him. See *Lewis v. Overbys*, 31 Gratt. 601. *Ryan's adm'r v. McLeod & als.*, 367

2. In March, 1875, the circuit court rendered a decree that the heirs of a decedent, who had not aliened the land of their father, were liable only, each for his or her proportion of the decedent's debts; fixed the amount to be paid by each of them, and in default of such payment, directed commissioners named

to sell so much of the real estate of each, as was necessary to pay his or her proportion of the debts; the sale to be upon a credit of one, two and three years; the purchase money to be secured by bonds and deed of trust on the land, and the commissioners to report their proceedings to the court at the next term. On a petition filed in March, 1879, by a creditor of the decedent for a rehearing of said decree—Held: The decree of March, 1875, was not a final but an interlocutory decree, and being erroneous should be reheard and reversed. *Idem*, 367

3. As to when a decree is final and when interlocutory, see the opinion of *Staples, J.* *Idem*, 367

4. A decree cannot be in part final, and in part interlocutory, in the same cause, for and against the same parties who remain in court. *Idem*, 367

5. Whenever a particular relief is contemplated, if anything remains to be done by the court to make the relief effectual, the decree is interlocutory. When no further action is required the decree is final. *Idem*, 367

6. In this case there were four heirs. The land of one of them sold for more than enough to pay his fourth of the ancestor's debts, and under a subsequent decree of March, 1876, he received a part of this surplus, and a part of it was still in court, and he was insolvent: A creditor of his filed his petition in the cause to have this surplus applied to pay his debt—Held:

1. Upon reversing the decree of March, 1875, that this surplus still in the hands of the court, was liable to pay the debts of the decedent, in preference to the debts of the heir. *Idem*, 367

2. The creditors of the decedent not having objected to the payment of a part of this surplus to the heir at the time the decree was made, and not having filed their petition for a rehearing of the decree of March, 1875, and March, 1876, until March, 1879, when the heir was insolvent, the other heirs who are able to pay, will be allowed a credit for the amount of the said surplus received by him, upon the deficiency of the other insolvent heirs' payments of their proportion of the debts. *Idem*, 367

HOMESTEADS.

1. An unmarried man, who has no children or other persons dependent upon him living with him, though he keeps house, and has persons hired by him living with him, is not a householder or head of a family, within the meaning of these terms as used in the constitution and laws of Virginia, and therefore is not entitled to the homestead exemption as provided by the same. *Calhoun v. Williams*, 18

2. The terms "householder" and "head of family," held to have the same meaning in the provisions of the constitution and statute relating to homesteads. *Idem*, 18

HUSBAND AND WIFE.

1. In June, 1859, G and R, his wife, in con-

sideration of \$1,000, did sell and convey to A all their interest in and claim to any
 975 property, real and personal, *of which C, the father of said R, may die possessed. This deed is duly executed, and the wife privily examined. After the death of C, in the lifetime of G, A is put in possession of R's share of her father's estate, real and personal; but upon the death of G, R. files a bill against A to recover the property, on the ground that the deed was a nullity as to her. In 1878 there is a decree in her favor; and then A brings assumpsit against G's ex'or to recover back the \$1,000 he had paid for the property—Held:

1. The deed was properly held to be a nullity as to R.

Garber's adm'r v. Armentrout, 235

2. Assumpsit by A will lie to recover the purchase money. Idem, 235

3. The cause of action of A did not arise until the decree setting aside the deed in favor of R; and the action having been brought immediately thereafter, the statute of limitations was no bar to it.

Idem, 235

2. M, the wife of P, was entitled to real estate by descent from her father and by devise from W, but her husband had not reduced any part of it into possession when he made a deed, by which he conveyed to C and L all his interest and right in said estate in trust for the sole and separate use of his wife M, free from all claim by him, with full power in her to control and dispose of the same as if she was not a married woman. The real estate was afterwards divided, and M came into actual possession of it, and she sold a part of it to McD, retaining the title, who improved it, and sold it again to her; and she executed her bond to S, by direction of McD, for a part of the purchase money. She also executed to B a bond as security for G. Upon a creditors' bill by S to subject the land of M to pay his debt—Held:

1. Whatever interest the husband had in the real estate of his wife M, whether as tenant by the mere marital right, or as tenant by the courtesy initiate, was conveyed by the deed in trust for his wife; and such estate was liable for his debts and subject to his disposal by deed without the concurrence of his wife.

Garland v. Pamplin & als., 305

2. By this deed M acquired in equity a separate estate in her husband's estate and interest in her lands conveyed to the said trustees, distinct from her legal estate in fee in said lands, and which did not merge in said legal estate. Idem, 305

3. Under this deed, and upon the well settled principles of equity, M had full power to use, control, alien and dispose of her said separate estate as if she were a feme sole; and as incident to this absolute power of alienation, she had the right and power to charge and encumber said separate estate with the payment of debts.

Idem, 305

4. M, by executing the bonds to S and B, must be presumed to have intended thereby to charge the said separate estate with their payment, and the said separate estate is therefore in equity liable for such payment. But such liability extends only to said separate estate in the interest of her husband and acquired under the deed aforesaid, and not to the legal estate in fee of M in said lands; which legal estate is distinct from said separate estate, and could not be charged by the mere execution of said bonds, with the payment thereof, by reason of her disabilities of coverture.

Idem, 305

5. M by reason of her disability of coverture, had no power to sell to McD the fee in any part of her lands; and so the contract was not voidable merely, but absolutely void. She could make a valid sale of her separate estate, and only to that extent she did or could bind said land; and such interest, but not the fee, was subject to sale for the payment of the bond of S.

Idem, 305

6. The court below should order accounts to be taken of the said separate estate, and of all debts or claims for which said estate is liable, upon the principles aforesaid, including the debts of S and B; and when said debts have been established, to
 976 proceed to subject said *separate estate to the payment of the same.

Idem, 305

7. The bonds, though void at law, are valid in equity, as evidences of debt against the separate estate of M; and the debts are not barred by the statute of limitations as simple contract debts. Idem, 305

3. In March, 1862, H sells the farm on which he lives for \$22,500, a Confederate contract. His wife refuses to join in the deed, and proposes to her to buy land and build on it, and have it conveyed in trust for her and her children; and upon that consideration she does execute the deed. H does buy the land for \$3,200, and builds on it; and they live on it and it is recognized as hers; but the deed to the trustee is not made until April, 1867. At the time of the contract H is not indebted seriously, and these debts are paid off before April, 1867. In April, 1867, H qualifies as administrator of D's estate and wastes it, and dies in 1871 insolvent. Upon bill by the distributees of D to set aside the deed—Held:

1. There having been no fraud in the arrangement between H and his wife, the contract between them is valid, and though the deed to the trustee was not made until April, 1867, the title of the wife is good against creditors of H; they having become such since the date of the agreement between H and his wife in 1862.

Payne & als. v. Hutcheson & als., 812

2. At the time of the agreement in 1862, H being forty years of age and his wife thirty-two, according to the tables of mortality the land settled on his wife was at

that time in excess of the value of her contingent right of dower in the farm sold; but H having died before the suit was brought to set aside the deed, it is not in excess of her right of dower in the farm sold by H, after his death; and looking at all the facts in the case, the settlement is not more than a just equivalent for the interest relinquished by the wife.

Idem, 812

INDICTMENTS.

1. An indictment charging the prisoner with stealing certain papers of the value of \$110, not otherwise describing the papers charged to have been stolen, is fatally defective.

Robinson's case, 866

INSURANCE AND INSURANCE COMPANIES.

1. By the act of the Virginia convention of 1861, the ordinance of secession, which was passed on the 17th of April, 1861, was submitted for ratification or rejection to the people of Virginia by a vote to be taken on the 4th Thursday in May following—Held: The act was merely inchoate until that vote was taken; and the state was not until after that vote was taken and declared in a state of war with the United States.

Portsmouth Ins. Co. v. Reynolds' adm'x & al., 613

2. The subsequent ratification of the act by the vote of the people could not have the effect, by relation to the day of its passage, to change the actual status of the two governments on that day, so as to make acts tortious which otherwise would not be so, and defeat the rights of private persons.

Idem, 613

3. On the 21st April, 1861, the shiphouse and other buildings at the U. S. navy yard at Portsmouth were set fire to and burned by order of the officers of the United States forces, acting under the authority of that government, and the fire extended to buildings in the neighborhood, and consumed them. Upon two of these buildings there were policies of insurance against fire; with a proviso, that the insurance company shall not be liable to make good any loss by fire which may happen to take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power—Held: That the ordinance of secession not then being in force, the burning of the buildings caused by the firing of the U. S. buildings at the navy yard, does not

bring the loss within the *operation of the proviso as to any military or usurped authority.

Idem, 613

4. A distinct denial by the insurer of liability, and refusal to pay, on the ground that there is no liability, is a waiver of the condition of a policy requiring proof of loss; and such waiver may be express or implied, and may be shown by acts as well as words.

Idem, 613

5. The policies being from year to year

before the buildings were burned, and the insured having died intestate leaving a widow, who qualifies as his administratrix, and an infant son, and the administratrix continuing to pay the premiums, and it being a question whether the insurance money when recovered should be treated as real or personal assets, and disposed of as the one or the other, a court of equity has jurisdiction, at the suit of the administratrix and the heir, to enforce the claim against the insurance company.

Idem, 613

6. It was proper to allow interest during the war on the amount of the policies.

Idem, 613

7. On a bill to have the assets of the Insurance Co. of the Valley of Va. administered, in the progress of the cause the debts of the Co. are paid, and there are assets consisting of debts of stockholders not yet collected, to be divided among the stockholders. Some of these stockholders had paid in full for their stock before the war; others had paid in part before the war, and the balance in Confederate notes and these two classes had received their certificates of stock. Others, at the end of the war, had paid nothing on their stock. In ascertaining the amount of the fund to be received by each stockholder—Held:

1. In the statement of account between the stockholder and the Co., the payments in Confederate money must be taken as valid payments without abatement.

Hartman & als. v. the Ins. Co. of Valley of Va. & als., 242

2. But in the account between the stockholders to ascertain what dividend each one shall be entitled to in the distribution of the assets, the payments of stock in Confederate money, whether in whole or in part, since the 1st of January, 1862, should be scaled as of the date of payment; and each stockholder is entitled to share in proportion to his input, ascertained as hereinbefore stated.

Idem, 242

3. Preparatory to a division, accounts should be taken upon the foregoing principles; and the stockholders in arrear should not be required to pay until the accounts are taken and the dividend of each stockholder ascertained.

Idem, 242

4. Each stockholder in arrear should then be credited with his dividend, and be ordered to pay into the hands of the receiver the balance due on his stock, to be divided among the other stockholders in the proportion of their respective dividends.

Idem, 242

5. The court of equity, having all the parties before it, should enforce the payment of the moneys due from the several stockholders, and should not direct actions at law.

Idem, 242

6. An insurance company, incorporated by the laws of New York having its principal place of business in that state, which had complied with the laws of Virginia in relation to foreign insurance companies

doing business in this state, by making the deposit, and appointing a citizen of Virginia an agent, by power of attorney, &c., as required by the statute of Virginia (Code of 1873, ch. 36, § 19), is not a resident of this state, within the meaning of the foreign attachment laws of Virginia, and the property of said insurance company is liable to such attachment as a non-resident.

Cowardin & als. v. Universal Life
Ins. Co., 445

JUDGMENTS.

1. What not sufficient evidence of notice of an undocketed judgment by *the trustee in a deed of trust to offset the cestui que trust with notice.

See Notice, No. 1, 2, and
Morrison v. Bausermer & Co.
& als., 225

2. Another creditor cannot question the validity of a judgment against his debtor, except upon grounds that would award it between the parties to it, or on the ground that there was fraud and collusion between them in procuring it.

Gentry v. Allen & als., 254

3. How a judgment is to be enforced against the land of sureties.

See Principal and Surety, No. 14,
and
Idem, 254

4. These are two actions of debt by the Bank of O D against J, the maker, and W as the endorser, of the notes sued on, pending in the same court, at the same time, in both of which the defence and the evidence is the same. There is a verdict and judgment for the plaintiff in one case; and the defendants propose to appeal. And then in the second case the following entry is made: "Bank of O D v. J & al.—judgment by consent in favor of plaintiff for \$10,760, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs. Execution on the judgment to be stayed for ninety days; and in the event of an appeal being obtained and perfected in the Bank of O D v. J & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case: provided the appeal bond in that case be sufficient to secure the amount of both judgments. C, p. q.; B & W. p. d." The writ of error was obtained, but the appeal bond was only in the penalty of \$200. The judgment was on the appeal reversed—Held:

1. The entry in the second case, if a judgment at all, is a judgment by consent or confession, not absolute, but on the terms and conditions set out in the agreement annexed.

Bank of the Old Dominion v.
McVeigh, 530

2. Under the agreement, which is a continuing one, it is competent for the court which rendered it to deal with it in a

summary way, and see that its terms are complied with. Idem, 530

3. The entry, taken in connection with the record of the case in which it was made, has the requisite certainty of a judgment as to parties, amounts, dates, &c., and is a valid judgment. Idem, 530

4. In construing the agreement, to ascertain the intention of the parties, the court will look to the language employed, the subject matter, and the surrounding circumstances at the time of its execution, and thus to place the court in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of words, and of the correct application of the language employed. Idem, 530

5. So considering the agreement, the true construction is, that the stipulation for the suspension of the execution for ninety days, and also that the judgment should abide the result of the decision by the court of appeals in the other case, was in each particular absolute; and the giving of the bond was required as a condition precedent only to the suspension of the execution on that judgment while the other case was pending in the court of appeals on writ of error. Idem, 530

6. No supersedeas bond having been given, as provided in the agreement, if it was possible legally to give such bond, execution could have been sued out at any time, to subject the personal property of the defendants, or proceedings in equity instituted and prosecuted to subject their real estate. Idem, 530

7. If there were any doubt as to the construction which should be given to the agreement, that construction should be adopted which would be more to the advantage of the defendants, upon the general ground, that a party who takes an agreement prepared by another (as 979 *this was by plaintiffs' counsel), and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground, that when an instrument is susceptible of two constructions, the one working injustice, and the other consistent with the right of the case, that one should be favored which standeth with the right. Idem, 530

5. Judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book or any other book in his office, and the only evidence of it is an unsigned memorandum endorsed on a declaration which seems to have been filed, and the bond enclosed in the declaration, is a valid judgment and entitled to rank as such as against other creditors of the debtor.

Shadrach's adm'r v. Woolfolk & als., 707

6. If the entry of a judgment confessed in the office upon the order or minute book has

not been made at the time of its confession, the clerk may make the entry at any time; and if he fails to do it, the court may at any time direct him to make the entry.

Idem, 707

JUDICIAL SALES.

1. The English practice of—as a matter of course—opening the biddings of a sale made by the master under a decree of the court, upon the offer of a reasonable advance bid, has not been adopted in Virginia.

Roudabush v. Miller & als., 454

2. Whether the court will reopen the bids after such a sale, is a question addressed to the sound discretion of the court, subject to the review of the appellate tribunal; and the propriety of its exercise depends upon the circumstances of each case, and can only be exercised when it can be done with a due regard to the rights and interests of all concerned—the purchaser as well as all others.

Idem, 454

3. When a sale has been fairly made, and for a fair price, it should never be set aside when there is a good reason to believe that the upset price has been offered to gratify ill will towards the purchaser.

Idem, 454

4. Where two or more persons desire to acquire different parts of a tract of land which is offered for sale at public auction by commissioners under a decree of the court, with respect to the convenience of the several parcels to their own lands respectively, is not unlawful or improper for them to bid for the whole tract when it is offered to the highest bidder, with the understanding that they will divide it between themselves, and how they will divide it, if they should become the purchasers, and that each one shall be bound to comply with the terms of purchase as to his own part, as agreed between themselves.

Idem, 454

LANDLORD AND TENANT.

1. In an action of ejectment brought against one person in possession, the landlord of each person may come in and be allowed to defend the action under § 5, ch. 131, Code of 1873, whether the actual relations of lessor and lessee exist between them or not; and this will be permitted even where the plaintiff and defendant in possession have submitted the matters between them to arbitration, an award made in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him.

Hanks, &c., v. Price, &c., 107

2. In general, the law will imply a tenancy wherever there is an ownership of land on the one hand and an occupation by possession on the other.

Idem, 107

LIMITATIONS—STATUTE OF.

1. What parties cannot set up the statute of limitations to the plaintiff's claim.

See Equity Jurisdiction and Relief, No. 2, 3, and

Clayton & Tyson v. Henry, 65

990 *2. Where the sureties of an administrator are protected by the statute, Code of 1873, ch. 146, §§ 8, 9.

See Executors and Administrators, No. 2, and

Tilson v. Davis' adm'r & als., 92

3. See Actions, No. 3, and Garber's adm'r v. Armentrout, 235

4. A deposition of the maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of the statute of limitations in an action on the note by the obligee against him.

Dinguid v. Schoolfield, 803

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, the judgment of the justice before whom the plaintiff C was brought upon the complaint of the defendant W. that C had attempted to bribe H to burn W's property, requiring C to give security for her good behavior, though upon appeal the judgment of the justice is reversed and C discharged, is conclusive evidence of probable cause for the prosecution, unless W knew the testimony before the justice was false.

Womack v. Circle, 324

MANDAMUS.

1. A writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be performed, and where there is no other specific and adequate legal remedy.

Millener's adm'r v. Harrison, register, &c., 422

2. In 1830, an allowance of bounty land was made to the heirs of M. as an officer in the Virginia navy. The warrants were issued, but were returned to the land office in 1833, where they have remained uncanceled ever since. Upon an application by the representative of the heirs of M for a mandamus to the register of the land office to deliver to him these warrants, he produces from the files of his office the copy of a letter from the secretary of the commonwealth to the register of the land office, dated in September, 1833, in which he says he returns the warrants by the order of the governor, the order making the allowance of the bounty having been rescinded—Held: There being doubt upon the case, the mandamus will not be issued.

Idem, 423

MILL DAMS.

1. In an action by E against H's executor to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream on which H had built a dam in 1848, in the county of Louisa, evidence of the effect of a dam in raising the bottom of

the stream and overflowing the lands lying on the streams above the dams in the county of Albemarle is inadmissible.

Ellis v. Harris' ex'or, 684

2. A person who all his life had been familiar with the effect of a dam upon the channel of a stream, and who had twice superintended the putting up the dam, and was also familiar with the effect upon the channel of the stream when the dam was washed away by a flood, but who was not a millwright or mechanic of any sort, but only a farmer and owner of the mill, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county thirty miles distant. *Idem*, 684

3. H, who built the dam, being dead, the plaintiff E is not a competent witness to prove anything occurring in the lifetime of H. *Idem*, 684

4. The executor of H, though a part owner of the land on which the mill was built, is a competent witness in the case. *Idem*, 684

5. E having sued H in his lifetime for damages to his lands from the erection of the dam, and a judgment in that case having been rendered in 1859 in favor of H, in this second suit E can only recover for damages occasioned by the continuance of the dam subsequently. *Idem*, 684

981 *6. E may recover full damages for all the land owned by him at the time of the erection of the dam. But for land since acquired by him, he can only recover such damage as was not actually foreseen and estimated for by the jury when the dam was built; and the jury must presume that the jury of inquest and the county court did foresee and estimate for all damages which it was then practicable to foresee and estimate for. *Idem*, 684

MURDER.

1. All homicide is presumed to be murder in the second degree. In order to elevate the offence to murder in the first degree, the burden, is on the commonwealth; and to reduce it to manslaughter, the burden is on the prisoner.

Willis' case, 929

2. Whilst voluntary intoxication is no defence to the fact of guilt, yet where the question of intent, or premeditation is involved, evidence of it is admissible for the purpose of determining the precise degree of the crime. And in all cases where the question is between murder in the first and second degree, the fact of the prisoner's drunkenness may be proved to shed light on mental status, and thereby enable the jury to determine whether the killing was from a premeditated purpose, or from passion excited by inadequate provocation. But caution is necessary in the application of this doctrine, as there may be many cases of premeditated murder, in which the prisoner previously nerves himself for the deed by liquor. In such cases as these, drunkenness is entitled to no consideration in favor of the prisoner

in determining the degree of his crime, but, on the contrary, tends to elevate the offence to murder in the first degree.

Idem, 929

3. Circumstances, which reduce a homicide committed by a drunken man, from murder in the first degree, to murder in the second degree, and in which the court of appeals so held, notwithstanding the verdict of a jury, convicting the prisoner of murder in the first degree, which verdict was sanctioned and approved by the trying court, and notwithstanding the further fact that the prisoner had some time previous to the homicide, when drunk, made threats against the life of the deceased, their relations being apparently friendly till a very short time before the homicide was committed.

Idem, 929

4. See Evidence, No. 6 and Dean's case, 912

NEGLIGENCE.

1. For what degree of negligence railroad companies will be liable in damages, and for what damages may be assessed.

See Railroad Companies, No. 3,

4, 5, 6, and

Balt. & Ohio R. R. Co. v.

Noell's adm'r, 394

2. When the negligence of an agent is a question of law to be decided by the court, and when a question of fact to be decided by the jury.

See Principal and Agent, No. 2,

3, 4, and

Carrington v. Ficklin's ex'or, 670

3. In an action by C against the city of Richmond to recover damages for an injury sustained by falling on a sidewalk of one of the streets, it appeared that a small space of the pavement had been broken up, and some loose bricks lay about, against one of which the plaintiff struck her foot and fell. But it appeared also that she was well informed of the condition of the pavement, and only fell from inattention.—Held:

1. Quære: Whether the defect in the sidewalk was such as to subject the city to liability for an injury sustained there.

City of Richmond v. Courtney, 792

2. The inattention of C having contributed to the injury she is not entitled to recover damages for it from the city.

Idem, 792

NEGOTIABLE INSTRUMENTS.

1. Though a judgment upon a note rendered by a court not having jurisdiction *of the case is void, the note is still a valid security.

982 *Linn & als., trustees, v. Carson's adm'r & als.*, 170

NEW TRIALS.

1. To obtain a new trial on the ground of newly discovered testimony, it must be shown, 1st. That the testimony has been discovered since the former trial; 2d. That the

new testimony could not have been obtained with reasonable diligence on the former trial; 3d. That it is material to the issue; 4th. It must go to the merits of the case, and not to impeach the character of a former witness; 5th. It must not be merely cumulative.

St. John's ex'ors v. Alderson, 140

2. In determining whether or not evidence is cumulative, the courts must see if the kind and character of the facts offered, and those adduced on the former trial are the same, and not whether they tend to produce the same effect. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pre-tence for saying they are cumulative.

Idem, 140

NOTICE.

1. M claimed to subject the proceeds of land under a deed of trust duly recorded. B claimed priority of M's deed under an unrecorded judgment rendered before the deed of trust was executed, on the ground that N, a trustee in M's deed, had notice of the judgment at the time of the execution of the deed—Held:

1. If an agent, before the commencement of his agency, receive notice of an unrecorded lien on real estate of which his principal afterwards becomes a purchaser, such notice of the agent will not be imputable to the principal unless there be very strong evidence that at the time of the purchase, the agent remembered the fact that he had received such notice.

Morrison v. Bausemer & Co. & als., 225

2. Though N, then a deputy clerk in the clerk's office where the judgment was recovered, made a copy of said judgment about twelve months before the execution of M's deed, this is not of itself sufficient evidence of his recollecting the fact when the deed was executed; and there being no other evidence of the fact, the deed of M has priority over the judgment of P. Idem, 225

3. A covenant having been duly recorded, it is notice to all parties claiming under the covenant.

First Nat. Bank of Alexandria v. Turnbull & Co., 695

NOVATION OF DEBT.

1. When a bond given by an administrator to the widow for her portion of the estate in his hands was considered a novation of the debt, so as to release his sureties as administrator.

See Executors and Administrators, No. 2, and
Tilson v. Davis' adm'r & als., 92

PARTNERS AND PARTNERSHIP.

1. Ordinarily a partnership estate is liable to the payment of the debts of the firm in preference of the individual debts of the partners. This is the right of the partners

inter se. The creditors of the partnership have no such right of priority over the creditor of the partners individually; but only by substitution to the rights of the partners inter se. The partners may release this right, and the creditors of the partnership can not complain; for it is not their right, except subject to the disposition and control of the partners themselves, to whom it belongs.

Shackelford's adm'r v. Shackelford & als., 481

2. When one partner sells out to another the former's interest in the partnership, the question, whether the former has a right after the sale *to require the partnership estate to be applied to the partnership debt in his exoneration, depends upon the true meaning of the contract of sale in this respect. Under the contract in this case, the vendor has a right to have all the assets of the partnership so applied. Idem, 481

3. S, the partner who purchased the assets, and bound himself to pay the debts of the partnership, dies, leaving debts unpaid, and leaving assets of the former partnership, which go into the hands of his administrator c. t. a.; and this administrator files his bill against the widow and children to have a construction of the will, and to administer the estate under the control of the court. The outgoing partner may file his petition in the cause, to have the assets of the partnership which have gone into the hands of said administrator, applied to the payment of the partnership debts; and for this purpose to have an account of said assets. Idem, 481

4. The security of the said administrator not being sufficient, the court may appoint a receiver to receive from said administrator the partnership assets in his hands, and to proceed to collect the same. Idem, 481

5. If the security of the receiver is not sufficient, the court may make a rule upon him to show cause why he should not give other sureties, and upon his failure to show cause, may remove him. And it must very plainly appear that the court below erred before the appellate court will reverse its action. Idem, 481

6. An account of the assets collected by the receiver having been ordered and taken, showing the amount collected, after deducting an amount claimed by the receiver for fees as counsel in collecting the assets, the court, without deciding on his right to a credit for the fees, directs him to pay the amount after deducting the fees into bank. Another account is taken showing a further amount collected by him. And it appearing that he had not complied with the previous decree, the court may set aside that decree, remove him from his office of receiver, and appoint another in his place, and direct him to pay to the second receiver the amount he has collected, and to deliver to the second receiver all partnership assets in his hands.

And may further direct that if he does not so pay over the funds in his hands, counsel named shall proceed to bring a suit against him and his sureties on his bond as receiver. *Idem*, 481

7. The books of a partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts. *Idem*, 481

8. The administrator of the purchasing partner is liable to the selling partner for all moneys of the partnership collected by his attorney at law, and for all payments made by such attorney by his direction or approval. *Idem*, 481

9. It seems one partner cannot sell or pledge the partnership property in payment of his individual debt, without the consent of his co-partner, and the title is not divested by such sale or pledge in favor of a separate creditor, even though the latter may not know it was partnership property. *Binns v. Waddill*, 588

PAYMENTS.

1. The mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same. *Brown v. Taylor's committee*, 135

2. Where a debtor owes various debts to the same creditor, and makes a payment, the application of the payment may be made by himself at the time he makes it; and if he fail then to make it, the application may be made by the creditor. And if he fail to make it, the court before which the transaction comes may direct it to be made accordingly as may, in the judgment of the court, appear *to be equitable and just under all the circumstances of the case. *Lingle & als. v. Cook's adm'r's*, 262

PLEADINGS AT LAW.

1. In an action under ch. 145, §§ 7-9, of the Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted. *Balt. & Ohio R. R. Co. v. Wightman's adm'r*. 29 Gratt. 431.

Balt. & Ohio R. R. Co. v. Noell's adm'r, 394

2. Where a declaration would be good without the averment of a scienter, that averment may be treated as surplusage. *Gerst v. Jones & Co.*, 518

PLEADINGS IN EQUITY.

1. An amended bill, which is not repugnant to the original bill, presenting no new case, and is only ancillary to the original bill in presenting the case made by it more fully and accurately with additional averments, to the end that there may be a decision on the merits, and complete justice done between

the parties, is not demurrable as inconsistent with the original bill.

Linn & als., trustees v. Carson's adm'r & als., 170

2. Upon a bill by L against M and others setting up a contract of partnership between them, it appears that in a previous suit the matters alleged in that bill were sufficient to put in issue the fact of such a contract as is alleged in this case, and in that case it was held that the contract was not valid—Held: The decree in the first suit is a conclusive bar to the second. *McComb v. Lobdell & als.*, 185

3. A supplemental bill sets up a new contract of partnership entirely different from that set up in the original bill. The supplemental bill is demurrable. *Idem*, 185

4. The case stated in the supplemental bill, not sustained by the proofs in the cause. *Idem*, 185

PRACTICE AT COMMON LAW.

1. In an action of assumpsit, if the plaintiff proceeds under the statute, Code of 1873, ch. 167, § 4, a copy of the account sued upon, served on the defendant, must be intelligible to him and inform him of the precise nature of the claim of the plaintiff and its extent. *Burwell v. Burgess, collector*, 472

2. If there is a special count in the declaration, setting out the plaintiff's claim, but a copy of the count of the declaration is not served upon the defendant, the service of the copy of the account, which, of itself, is unintelligible to the defendant, is not a compliance with the statute. *Idem*, 472

3. While it is true that the allegata and probata must always agree, it is well settled that under a count in a declaration alleging a warranty, the plaintiff may prove an express or implied warranty, the legal effect of the two being the same. And so where a declaration would be good without an averment of a scienter, that averment may be treated as surplusage. *Gerst v. Jones & Co.*, 518

4. There are two actions of debt by the Bank of O D against J, the maker, and W as the endorser, of the notes sued on, pending in the same court, at the same time, in both of which the defence and the evidence is the same. There is a verdict and judgment for the plaintiff in one case; and the defendants propose to appeal. And then in the second case the following entry is made: "Bank of O D v. J & al.—judgment by consent in favor of plaintiff for \$10,760, the debt in the declaration mentioned, with interest thereon from the 1st day of January, 1866, till paid, and costs. Execution on the judgment to be stayed for 90 days; and in the event of an appeal being obtained and perfected in the Bank of O D v. J & al., decided at this term, then this judgment to await the decision of the court of appeals, and abide the result thereof in the said case: provided the appeal bond in that case be sufficient to secure the amount of both judgments. C. p. q;

985 *B & W, p. d." The writ of error was obtained, but the appeal bond was only in the penalty of \$200. The judgment was on the appeal reversed—Held:

1. The entry in the second case, if a judgment at all, is a judgment by consent or confession, not absolute, but on the terms and conditions set out in the agreement annexed.

Bank of the Old Dominion v. McVeigh, 530

2. Under the agreement, which is a continuing one, it is competent for the court which rendered it to deal with it in a summary way and see that its terms are complied with. Idem, 530

3. The entry, taken in connection with the record of the case in which it was made, has the requisite certainty of a judgment as to parties, amounts, dates, &c., and is a valid judgment. Idem, 530

4. In construing the agreement, to ascertain the intention of the parties, the court will look to the language employed, the subject matter, and the surrounding circumstances at the time of its execution, and thus to place the court in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of words, and of the correct application of the language employed. Idem, 530

5. So considering the agreement, the true construction is, that the stipulation for the suspension of the execution for ninety days, and also that the judgment should abide the result of the decision by the court of appeals in the other case, was in each particular absolute; and the giving of the bond was required as a condition precedent only to the suspension of the execution on that judgment while the other case was pending in the court of appeals on writ of error. Idem, 530

6. No supersedeas bond having been given, as provided in the agreement, if it was possible legally to give such bond, execution could have been sued out at any time, to subject the personal property of the defendants, or proceedings in equity instituted and prosecuted to subject their real estate. Idem, 530

7. If there were any doubt as to the construction which should be given to the agreement, that construction should be adopted which would be more to the advantage of the defendants, upon the general ground, that a party who takes an agreement prepared by another (as this was by plaintiffs' counsel), and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground, that when an instrument is susceptible of two constructions, the one working justice, and the other consistent with the right of the case, that one should be favored which standeth with the right. Idem, 530

5. In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property is the property of the plaintiff—Held: If the first count is defective, yet the second being good, and the jury finding that the property was the property of the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment.

Binns v. Waddill, 588

6. On the trial of the cause the court gives to the jury two instructions; the first of which is correct. And the jury in their verdict say, "We find under the first instruction of the court that the &c., meaning the property sued for, are the individual property of the plaintiff"—Held: Even if the second instruction was erroneous, the jury having expressly said that they find their verdict under the first instruction, the error of the second instruction is not ground for the reversal of the judgment. Idem, 588

7. When a party claiming property by 986 equitable title, which has been levied on under an execution at law, may interplead in the action and set up his title.

See Covenants. No. 1, and
First National Bank of Alexandria
v. Turnbull & Co., 695

PRACTICE IN CHANCERY.

1. H sells to P an interest in King's salt works derived by H from C. In a bill by the trustee of H against P and others, he claims that H only sold to P one-half the interest of C in the salt works. On the bill taken for confessed the court so holds and decrees that the trustee of H shall hold the other half and directs an account of rents and profits. At the next term of the court P asks leave to file his answer in the cause, and in his answer says if he is to make compensation for the excess, there were several incumbrances, which he sets out, on the interest purchased from H, which H was to discharge, and did not, and he (P) had paid them; and he asks to be allowed them. The court allows the petition to be filed as a petition for a rehearing of the decree, and then overrules it. This court reversing the decree sends the case back, allowing P to file his answer; but directing he shall file his cross bill to put in issue the matters between P and H, and the other defendants.

Preston & Massie v. Heiskell's trustee, 48

2. How an objection for want of proper parties should be made, and how such an objection for the first time made in the appellate court will be treated. See opinion of Staples, J.

Clayton & Tyson v. Henley, 65

3. Upon a bill filed by a judgment creditor to subject the land of his debtor to satisfy his debt, the court, in order to ascertain whether the rents of the land will pay the

debt in five years, should generally direct the commissioner to offer it first for one year, and if that will not pay the debt, then for two, and so on, if necessary, up to five years, closing the contract whenever the rents will pay the debt. The terms of payment of the rent to be fixed by the court, looking to the kind of property and the usage of the country. If it will not rent for enough in five years, the commissioner should report the fact to the court.

Compton v. Tabor, 121

4. How a court of chancery should proceed in winding up an insurance company, and distributing its funds, after payment of debts, among its stockholders.

See Insurance Companies, passim, and

Hartman & als. v. Ins. Co. of Valley of Va. & als., 242

5. For the practice in relation to the opening of biddings in a judicial sale.

See Judicial Sales, No. 1, 2, 3, 4, and

Roudabush v. Miller & als., 454

6. When the court may appoint a receiver in a pending cause, and when and for what he may be removed and proceeded against for funds in his hands.

See Partners and Partnership, No. 4, 5, 6, and

Shackelford's adm'r v. Shackelford & als., 481

7. A court of probate is a court of equity, and it may, on a proper bill, review and correct errors in its proceedings after final decree in the cause.

Connolly v. Connolly & als., 657

8. When case may be reheard upon petition.

Purdie & wife v. Jones & als., 827

PRINCIPAL AND AGENT.

1. A gratuitous bailee is only liable for gross negligence.

Carrington v. Ficklin's ex'or, 670

2. The question of negligence on the part of an agent, as a general rule, is a question of fact, and not of law. Idem, 670

3. It is only in that class of cases where a party has failed in the performance of a clear legal duty, that when the facts are undisputed, the question of negligence is necessarily one of law. Idem, 670

4. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence *cannot be determined until one or the other of these conclusions has been drawn by the jury. The inference to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ. Idem, 670

PRINCIPAL AND SURETY.

1. In January, 1858, L, as principal, and P, as his surety, executed to C a bond for \$925, payable in twelve months. P died before the bond became due, and L qualified as his administrator. In December, 1860, C sues L upon the bond; and at the earnest solicitation of L, C accepted from him three negotiable notes, satisfactorily endorsed, payable in three, six and nine months, for the amount of the bond; and in January, 1861, dismissed his suit. \$150 was paid on the first note, and it was twice renewed; the second was also renewed. No more was paid on them, and both principal and sureties on the notes had become insolvent before 1866, when C sued upon them. He then filed a bill to subject the estate of P to the bond—Held:

1. If upon accepting the notes the agreement was to give time upon the payment of the debt, then the surety in the bond was released, and the estate of P is not liable to pay the debt.

Callaway's ex'or v. Price's adm'r & als., 1

2. Though there was no agreement to give time upon the debt, the legal effect of accepting the notes was to suspend the right of action on the bond during the period allowed for the payment of the notes; and that operated as a release of the surety in the bond. Idem, 1

3. While the mere taking of a negotiable security, payable at a future day, does not, unless so agreed, operate as a payment of an antecedent debt, it does operate to suspend the right of action on the original demand until the maturity of the bill or note. It is a conditional satisfaction with respect to the principal; and with respect to the surety it is absolute, unless it plainly appears the parties intended otherwise. Idem, 1

4. If the parties agree that the right of action on the original debt shall not be stayed, the surety will not be released. But in the absence of such agreement, the effect of taking the notes or bill in the case of a pre-existing debt, is a suspension, and a consequent discharge of the surety. It is not for the surety to prove an agreement to stay the action, but for the creditor to show that by agreement the negotiable security does not entitle the debtor to forbearance. Idem, 1

5. C, by his dealings with L, had produced an irreconcilable conflict between the interests of L, as an individual, and his duty as administrator of P, and it is not for C to insist that L, as administrator of P, was not prevented by the arrangement from taking the necessary steps to protect the estate of his intestate, either by giving notice to C to sue upon the bond, or by paying the debt out of the assets of P's estate, and then give a lien on his own estate to indemnify P's estate. Idem, 1

6. If L had applied the assets of P's es-

tate to the payment of his own debt, he would have been guilty of a gross breach of trust, a devastavit on the part of L, for which C would have been responsible. C cannot relieve himself of the effects of an improvident arrangement with his debtor by insisting that a personal representative ought to have misapplied the assets in his hands. *Idem*, 1

7. If L, as administrator of P, might have consented to the arrangement made between himself and C, it would be necessary to show that he actively concurred and consented, as administrator, to be bound by the new arrangement. *Idem*, 1

8. Any one who consents with an executor or administrator, in any manner
988 contrary to the duty of the *latter, will himself be held answerable. If, therefore, C obtained the consent of L, as administrator of P, to the arrangement, the effect of which is to throw the loss upon the estate of P, the surety, he can stand on no higher ground than L, himself occupies; and he is precluded from claiming any benefit from that consent, to the injury of P's estate. *Idem*, 1

2. Two of the sureties of a United States collector, who has made default, and died insolvent, are entitled to be subrogated to the right of priority of the United States, in the payment of the debt, when they have paid it, as against the estate of another surety who had died before the insolvency of the collector.

Robertson v. Trigg's adm'r & als., 76

3. In such case there having been six sureties to the bond, two of whom were insolvent at the time of the collector's death, and continued to be so until their death, the two sureties who paid the debt are entitled to recover from the estate of the deceased surety one-fourth of what they have paid. *Idem*, 76

4. The principles of equity in relation to subrogation, are not affected by the U. S. statute, 1 Brightley's Dig. of Laws, 382, § 266, which provides substitution for the surety against the estate of the principal, where the surety pays the debt, as to which the statute gives the United States priority of right to satisfaction. *Idem*, 76

5. When sureties of an administrator are released by his giving his bond to the widow for her share of the estate; and when her claim will be barred by the statute as against the sureties of the administrator.

See Executors and Administrators,
No. 2, and

Tilson v. Davis' adm'r & als., 92

6. G sold a tract of land to W, Jr., the purchase money to be paid in three equal annual instalments, and G retaining the title until the whole was paid. For the first instalment W, Jr., executed a negotiable note with W, Sr., as surety, payable at one year, and he gave his own notes at two and three years for the rest of the purchase money. G assigned the note for the first

payment to M, and M assigned it to H, and it was paid after maturity and protest by W, Sr., the surety. On a bill filed by W, Sr., to be subrogated to the lien rights of G, and to be paid out of the proceeds of the sale of the land before the two bonds given for the second and third instalments held by G, were paid—Held:

1. While the assignment of the note for the first payment by G carried with it to his assignee so much of the lien on the land as was necessary to secure the same, and, as between G and the assignee, gave the latter a prior lien; these equities of the parties inter sese are not available to the surety, W, Sr., by subrogation in a case like this, where the rights of G, the creditor, would be impaired thereby, and therefore the lien of W, Sr., the surety, must be postponed to that of G, the vendor.

Grubbs v. Wysors, 127

2. While a surety who pays a debt of his principal will ordinarily be subrogated to all of the lien rights of the creditor, when the latter has no longer occasion to hold them for his own protection, equity will never displace the creditor to his prejudice merely to give the surety a better footing.

7. A having recovered a judgment against N, M and J, upon a bond on which they were sureties of C, deceased, files his bill against them to subject the lands of N to pay the judgment; and he makes G, who had a deed of trust on the land, a party defendant—Held:

1. G cannot question the validity of the judgment against N, except upon grounds that would avoid it between A and N, or on the ground that there was fraud and collusion between A and N in procuring the judgment.

Gentry v. Allen & als., 254

2. It is error to decree against N's land alone for the whole amount of the judgment, until an enquiry had been made as to whether there were lands held by M and J, which might be subjected to satisfy their portion of the judgment.

Idem, 254

989 *3. The rule stated in *Horton v. Bond*, 28 Gratt. 815, should be followed, viz: The court should order a sale of the lands of each of the sureties, or so much thereof as may be necessary to pay his proportionate part of the said judgment; and if either should make default in the payment of his part, and his lands when sold should prove insufficient to pay such part, the land of the others should be subjected proportionately for the part unpaid; and so on proportionately, upon the further default of any party, until the lands of all have been sold, if the sale of all be necessary for the complete satisfaction of the judgment. *Idem*, 254

8. E was employed by the S Express Co. as freight clerk at P, and whilst so employed, executed a bond, with sureties, by which, after reciting that whereas E is to be hereafter

employed by the S. Express Co. in its business of forwarding by different railroads, &c., packages of any and all kinds, and movable property, including money and securities for money, E, in consideration of said employment and the compensation he is to receive from said Co. for his services, covenants, &c., that he will well and truly perform all the duties required of him in said employment, and truly account for all money, &c., which may come to his possession or control by said employment, &c. And E and his sureties bound themselves for the faithful performance of the above covenants by E in the penalty of \$2,000. After the execution of this bond, E was raised to the office of principal agent of the Co. at P, and whilst acting as such principal agent embezzled money which came into his hands—Held:

1. There being no dispute about the facts, it is for the court to construe the instrument, and the jury are bound to take the construction of the court as correct.

Collier v. The Southern Express Co., 718

2. The obligation, by its terms, extends to any employment of E by the Express Co., and the sureties are liable to the Co. for the money embezzled by E whilst acting as principal agent of the Co. at P. *Idem*, 718

RAILROAD COMPANIES.

1. A railroad company, incorporated in another state, which leases a road lying in this state, and operates it as the owner of the same, is liable to be sued in the courts of Virginia for an injury which occurred on said road operated in this state; and said foreign company has no right to remove the suit to the United States court.

Balt. & Ohio R. R. v. Noel's adm'r, 394

2. Whilst the Baltimore & Ohio R. R. Co., as a corporation of the state of Maryland, can have no legal existence outside of that state, yet, as the lessee of a Va. railroad company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Va. corporation quoad the line of railroad under its control in Va., so far, at least, as its liability to the citizens of Va. is concerned. *Idem*, 394

3. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, wheel or axle, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Idem*, 394

4. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels

them to repel, by satisfactory proof, every imputation of such negligence; and therefore, where the death of a passenger on said railroad is caused by the slightest neglect, against which human prudence and foresight could have guarded, the company is liable in damages for such death. *Idem*, 394

5. Railroad companies are held by *law to the utmost care, not only in the management of their trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers. *Idem*, 394

6. Charles L. Noel's adm'r brought suit against the Baltimore & Ohio Railroad Company, lessees of the Washington City, Virginia Midland and Great Southern railroad, running from the town of Strasburg, in Shenandoah county, to the town of Harrisonburg, in Rockingham county, to recover damages for the death of said Noel, which occurred by what is known as the "Narrow Passage bridge disaster," in the said county of Shenandoah, Virginia. N was an unmarried young man, whose father was dead, and who lived with and cared for his mother. On the trial, on the motion of the plaintiff, the circuit court instructed the jury as follows:

1. If the jury believe from the evidence that such prudence, foresight and skill (as that required of railroad companies as above indicated) were not used by said company in respect to "Narrow Passage bridge," by the breaking of which Charles L. Noel was killed, they shall find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand dollars.

2. In ascertaining such damages, the jury should find the sum with reference, first, to the pecuniary loss of Phoebe Ann Noel, the mother of said Charles L. Noel, by the death of said Charles L. Noel, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, energy and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of said Phoebe Ann Noel, if he had not been killed. Second. In ascertaining the probability of life, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third. By adding thereto compensation for the loss of his care, attention and society to his mother; and Fourth. By adding such sum, as they may deem fair and just, by way of solace and comfort to his said mother, for the sorrow, suffering and mental anguish occasioned by his death—Held: There was no error in either of the instructions. *Idem*, 394

7. In an action under chap. 145, §§ 7-9 of the Code of 1873, it is not necessary to aver in the declaration for whose benefit the suit

is prosecuted. *Balt. & Ohio R. R. Co. v. Wightman's adm'r*, 29 Gratt. 431.
Idem, 394

REGISTRY OF DEEDS.

The clerk's office of the chancery court of the city of Richmond is the proper office for the recordation of deeds conveying land lying within one mile of the city of Richmond on the north side of James river, though outside of the city limits.

Burgess v. Belvin & als., 633

RENT.

1. On proceedings upon a forth-coming bond given on a distress for rent, whether by motion or by action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out.

Carter & al. v. Grant's adm'r, 769

2. On such proceeding, though the warrant of distress was for more rent than was due, the plaintiff may have judgment for the less amount due. Idem, 769

SALES OF PERSONAL CHATTELS.

1. J & Co. were manufacturers of tobacco, and G a manufacturer of boxes for pressing tobacco in. G agreed to furnish J & Co., during the season of 1870, as many boxes as the latter would use in their business, at *the price of sixty-five cents per box, and under this agreement did furnish said boxes in which J & Co. pressed their tobacco, and shipped a large quantity. Much of that shipped, and some which remained in the factory in said boxes, moulded, in consequence of the use of green and otherwise unfit timber in the manufacture of the boxes, and J & Co.'s damages, arising from the moulded tobacco, thus caused, amounted to nine cents per pound of the tobacco contained in said boxes. On a suit brought by J & Co. against G to recover these damages—Held: That G was liable for the same.

Gerst v. Jones & Co., 518

2. While it is an established rule of law that upon the sale of personal property there is no implied warranty as to its quality, and that the maxim caveat emptor applies in the absence of fraud or express warranty, yet there are several well recognized modifications of this rule; and one of them is, that where, on an executory contract of sale, goods are ordered for a particular purpose, known to the seller, he impliedly undertakes that they shall be reasonably fit for the purposes for which they are ordered, and especially is this so if the seller is also the manufacturer of the goods ordered.

Idem, 518

3. Where there is a warranty, either express or implied, neither the ignorance of the seller nor the exercise of care and diligence can exempt him from liability if the goods do not answer the purpose for which they were sold. Idem, 518

4. *Quære*: Would the seller be held liable for a latent defect, of which he was

ignorant, and against which human skill could not provide? Idem, 518

5. In cases like this, the question is not whether the purchaser has had an opportunity of examining the article, but whether he has in fact examined it, and whether the defect is one readily discoverable upon inspection. He is not bound to examine at all, for he has the right to rely upon the judgment of the seller, and to take for granted that the latter has furnished an article answering the terms of his contract.

Idem, 518

SEPARATE ESTATE.

1. What is separate estate of the wife, and does not merge in her legal title.

See *Husband and Wife*, No. 2, and

Garland v. Pamplin & als., 305

2. By deed bearing date the 21st of January, 1849, F conveyed 2¼ acres of land to E the wife of J, in consideration of \$200 paid by J to F. In June, 1871, G filed his bill to subject it to the payment of the debts of J. It appeared that all the debts of J were contracted after this deed was executed, except one of very small amount, and it was doubtful if this had not been paid—Held:

1. There being no pretence of fraud in procuring the deed, the creditors of J upon debts contracted since its execution cannot subject the land to the payment of their debts.

Irvine & als. v. Greever & als., 411

2. Though it is true generally that where land is conveyed to one person, and is paid for by another, the presumption is that there is a trust in favor of the person paying the money; in the case of a conveyance to the wife, where the money is paid by the husband, the presumption is that it is intended by him to be an advancement to his wife. Idem, 411

SHERIFFS.

1. In July, 1870, D, deputy for H, sheriff of Craig county, had in his hands a writ of fi. fa. in favor of L against M. He went to the house of M to levy it, when M claimed the benefit of the "homestead" exemption, and claimed his personal property "to the extent it would go." The law to carry the "homestead" exemption of the constitution of Virginia into effect, had just been passed, and neither the deputy sheriff nor the debtor, M, knew the form in which the exemption could be claimed, *although

M insisted on his right to claim it. D then notified L of M's claim of homestead, and demanded of him an indemnifying bond before levying the fi. fa., which L declined to give. The debt was lost by the failure to levy. On a suit by L against H, sheriff, and his sureties, to recover the debt in the execution, with interests and costs—Held:

The deputy was excusable for not levying and selling under the circumstances, after L had failed to give the indemnifying bond demanded of him; and, therefore, L cannot recover against H and his

sureties, on his official bond the debt thus lost by the failure to levy.

Huffman's *v.* Leffell's ex'or, &c., 41

2. A sheriff cannot amend his return upon an execution after it has been filed, except by motion to the court, upon notice to the creditor.

Hammen, sheriff, & als. *v.* Minnick, 249

3. A deputy sheriff returns upon an execution—"levied upon a lot of wheat," &c., setting out the several species of property. Upon debt by the creditor against the sheriff and his sureties, upon his official bond for failing to make the money on the execution, they plead "conditions performed"—Held: The defendants may prove by the deputy, that he had at the time other executions of prior date, and taxes due the state and the county, all of which had been before levied on the same property, and the whole proceeds thereof were consumed in the payment of these executions and taxes; and that the debtor had no other property unincumbered out of which the plaintiffs' execution could have been made. *Idem*, 249

STATE BONDS.

1. The act of March 30th, 1871, which authorized the holders of state bonds to invest them in tax receivable coupon bonds, was modified and repealed as to the tax receivable coupons by the act of March 7th, 1872, and was wholly repealed by the act of March 23th, 1879, entitled "an act to provide a plan of settlement of the public debt." And a holder of state bonds applying in November, 1879, cannot have them funded under the act of March, 1871, in tax receivable coupon bonds.

Paulsen *v.* Rogers, second auditor, 651

STATUTES.

1. The act, Code of 1873, ch. 38, § 26, in relation to the sale of land delinquent for taxes, construed in.

Gates & Clark *v.* Lawson & als., 12

2. The act, Code of 1873, ch. 146, §§ 8, 9, in relation to the limitations of suits against the sureties of fiduciaries.

See Tilson *v.* Davis' adm'r & als., 92

3. The act, Code of 1873, ch. 145, §§ 7-9, in relation to actions for injuries received, construed in

Balt. & Ohio R. R. Co. *v.* Noell's adm'r, 394

4. The act, Code of 1873, 131, § 5, in relation to defendants in ejectment, construed in Hanks, &c., *v.* Price, &c., 107

5. The act, Code of 1873, ch. 182, § 9, in relation to renting out land to satisfy a judgment, construed in.

Compton *v.* Tabor, 121

6. The act, Code of 1873, ch. 76, §§ 12, 13, in relation to church property, construed in Linn & als., trustees *v.* Carson's adm'r & als., 170

7. The act, Code of 1873, ch. 126, § 19, in

relation to actions by or against a personal representative, construed in

Grubb's adm'r *v.* Sult, 203

8. The act, Code of 1873, ch. 36, § 19, in relation to foreign insurance companies, construed in

Cowardin & als. *v.* Univ. Life Ins. Co., 445

9. The act, Code of 1873, ch. 167, § 44, in relation to service of the account sued on, on the defendant, construed in

Burwell *v.* Burgess, collector, 472

10. The act, Code of 1873, ch. 148, § 27, p. 1015, in relation to attachments, construed in

Anderson *v.* Johnson & als., 558

11. The act, Code of 1873, ch. 86, § 48, in relation to the inspection, &c., of fertilizers, is not repealed by the act of March 29th, 1877, sess. acts, 1876-7, p. 240, establishing a department of agriculture.

Atlantic & Va. Fert. Co. *v.* Kishpaugh, 578

12. The act of March 30th, 1871, in relation to state bonds was modified by the act of March 7th, 1872, and wholly repealed by the act of March 28th, 1879, for settling the public debt.

Paulsen *v.* Rogers, second auditor, 654

SUBROGATION.

1. When the sureties of a collector of revenue of the United States will be subrogated to the rights of the United States against other sureties.

See Principal and Surety, No. 9, 10, 11, and

Robertson *v.* Trigg's adm'r & als., 76

2. A surety in the first of three notes given for the price of land of which the vendor retains the title, pays the note. Though he may be subrogated to the vendor's lien as against the principal in the note, he will be postponed to the lien of the vendor for the other two notes.

Grubbs *v.* Wisors, 127

SUBSCRIPTIONS TO STOCK OF R. R. CO'S.

1. The V. R. R. Co. gave notice to S that it would move the court for a judgment against him for the sum of \$300, with interest on \$150, part thereof, from the 1st of October, 1871, and on \$150, the residue thereof, from the 3d of March, 1873, till paid, it being for the first and second quotas of 30 per cent. on five shares of stock of said company called for by the board of directors of said company—Held: That the notice sufficiently alleges and describes a contract of subscription by S.

Stuart *v.* Valley R. R. Co., 146

2. S denies that he was a stockholder in the company; and the controversy involved the validity of his subscription for the whole of said five shares, which was \$500—Held: That though the judgment against S for the

\$300 and interest was less than \$500, yet the subject in controversy was the validity of the subscription for the five shares, and the court of appeals has jurisdiction to hear the case upon appeal. *Idem*, 146

3. To make a subscription to the stock of a contemplated railroad company, it is not necessary that the subscription shall be made upon the books of subscription opened by the commissioners named in the charter; and a subscription paper, by which the signers bind themselves to pay for the shares of stock in said company opposite to their names, is competent evidence against a subscriber of the paper; the plaintiff Co. stating that it intended to show that the amount so subscribed was duly entered on the stock lists and stock ledger of the company. *Idem*, 146

4. A stock ledger and a shareholders' list, kept by the company, and a memorandum made by an agent appointed by the company to collect quotas due from subscribers, including that of S, with the figure 5 opposite thereto, showing the number of shares subscribed, which stock ledger and shareholders' list were shown to have been subsequently compiled therefrom and from many original subscription lists similar to that mentioned in § 3, are competent evidence for the plaintiff Co.; and it is not competent for S then to propose to prove that before the said ledger list and memoranda were in existence, S had, by withdrawal of his proposal to subscribe, accepted and acted upon by the plaintiff, ceased to occupy any relation of contract or subscription to the plaintiff. *Idem*, 146

5. S, to prove that he never became a legal subscriber to the capital stock of the plaintiff Co.; that his proposal to become a subscriber was revoked by him with the consent of those to whom it was made previous to the organization of the plaintiff Co. in 1871, and that the company, upon its organization, refused to receive it as a subscription, or treat S as a subscriber to its stock—offered, in connection with oral evidence to be introduced, the records of the company in relation to its organization; in which records, in two statements of lists of subscribers, the name of S does not appear—Held: The said records are competent evidence. *Idem*, 146

6. A subscription to the stock of a railroad company may be valid, though the subscription is not made on the books of the commissioners named in the charter, though two per cent. on each share of stock is not paid at the time of subscription, and though the subscription was made before the railroad company was organized, and before the commissioners named in the charter of the company had opened books of subscription to the capital stock of the company. *Idem*, 146

7. The subscription of S, upon the paper referred to in § 3, did not of itself constitute a contract of subscription by S to the stock of the plaintiff Co. for five shares of said

stock at \$100 per share: whether a contract or not depended on its acceptance, and the conduct of the parties. *Idem*, 146

8. Though a contract of subscription could be released only by the stockholders of the Co. or by the action of the board of directors duly authorized to do so by the stockholders, yet such release may be proved, not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the Co. as binding upon it, and that the subscriber was not regarded by himself or by the Co. as a stockholder thereof. *Idem*, 146

9. Though S may have executed and delivered the subscription paper referred to in § 3, and it came into the custody of the Co., and has been entered on its stock lists and ledger, and though there may be no evidence from the records of said company, or of any order or resolution of said company releasing said subscription, yet it may be shown by other evidence that S was not a stockholder of the company. *Idem*, 146

TAXES AND TAXATION.

1. By deed dated the 16th of February, 1864, T sold and conveyed to R a tract of land in Patrick county; but the deed was not recorded in that county until 1874, though R paid the taxes from 1866 inclusive. This land, standing on the land-books of the county in the name of T, was returned as delinquent for the tax of 1865; and in 1873 was sold as delinquent land, and purchased by G, to whom the clerk afterwards conveyed it. In ejectment by G against R to recover the land—Held: Under the statute, Code of 1873, ch. 38, § 26, a purchaser at a sale of land delinquent for taxes only acquires such estate as was vested in the person assessed with the taxes at the commencement of the year for which the taxes were assessed; and as T had in 1864 sold and conveyed the land to R, T had no estate in the land in January, 1865, and G took no title to the land under his purchase and the deed to him.

Gates & Clark v. Lawson & als., 12

2. The supreme court of the U. S. having decided that the act of congress requiring the collection of 25 cents on each package of manufactured tobacco for exportation from the exporter, is not a tax on the exportation of the article, the question whether that act is a violation of Article I, § 9, clause 5, of the constitution of the United States, is res adjudicata; and this court is bound by it.

Burwell v. Burgess, collector, 472

TRUSTS AND TRUSTEES.

1. What is not sufficient evidence of notice by a trustee of an unrecorded lien at the time of the execution of the deed.

See Notice No. 1, 2, and

Morrison v. Bausemer & Co. & als., 225

2. M being the owner of a large
995 *real estate consisting of iron works, ore banks and lands, as well as a large personal estate, but being indebted to insol-

vency, with judgments and executions against him, made a deed, in which his wife joined him, by which he conveyed to a trustee the whole of his property of every kind for the payment of his debts. In this deed it was provided that the value of the wife's contingent right of dower in the real estate should be ascertained in a mode specified, and in consideration of which sums so ascertained she joined in the deed releasing her contingent right of dower in said real estate. The trusts of the deed were, that C and S, who had undertaken to pay off the executions, and who were creditors of M, and the wife of M, should be creditors of the first class, C and S each for the amounts they should pay, and the amount due them, and the wife for the amount of the value of her contingent right of dower, ascertained as prescribed in the deed; and all other creditors in the second class. The whole property did not sell for enough to pay the first class creditors in full, and a judgment rendered against M, and docketed before the deed was executed—Held: That the wife of M must abate ratably with C and S for the payment of said judgment, and for any deficiency of the trust fund to pay the said C, S and the wife, in full of their claims.

Miller & als. v. Crawford & als., 277

3. By deed of February 16, 1849, K conveyed to L two acres of land in M, in trust for the exclusive use of E and her children by her husband I. In a suit in equity in which these were the parties, it was decreed that I should sell the land and invest the proceeds. I reports the sale and investment, and the court by its decree of March 3, 1863, confirms the report, and decrees that I shall take a deed from the vendor to I, conveying the land purchased upon the same trusts as those delivered in the deed from K to L. The vendor in fact conveys the land to I absolutely. On a bill filed by G, a judgment creditor of I, in June, 1871, to subject the land to the payment of I's debts—Held:

1. The deed to I must be held in equity to be upon the same trusts declared in the deed from K to L, and the land is not liable to satisfy the debts of I.

Irvine & als. v. Greever & als., 411

2. The fact that E was a married woman, that the children, except perhaps one, were infants when the suit of G was brought, and the disturbed state of things in March, 1863, when the deed was made, will excuse any laches of E and her children in not filing their bill to have the deed corrected.

Idem, 411

4. If a conveyance of land to a married woman is paid for by the husband, it will not raise an implied trust in favor of the husband, but is an advancement by him to his wife.

Idem, 411

5. B, to secure a debt of \$3,000 for money lent to him by S, conveyed to C in trust a lot of land in the town of F, described as containing one acre of land on which B has

erected a planing mill and spoke factory; and by the same deed he conveyed and assigned to C a policy of insurance he had taken out on the said planing mill, spoke factory and machinery, and covenanted to keep the policy in full force until the debt was paid. The lot and building independent of the machinery was not worth more than \$1,000—Held: The machinery in the building passed under the deed.

Shelton v. Ficklen, trustee, & als., 727

6. T conveyed to S a tract of land of eleven hundred and seventeen acres, in trust to secure a debt of \$4,000, with interest, to F, and the deed provided that the trustee should sell the land, or so much as should be necessary to pay the debt. S declining to act, F has R, who was his counsel and was insolvent, substituted as trustee, and R advertises the land, or so much as might be necessary to pay the debt, for sale. T then applies for and obtains an injunction, on the grounds that R was insolvent and the counsel of F, and because they refused to divide the 996 land and sell it in parcels; *alleging that there were four separate improvements on the land, and insists that the trustee shall not sell without giving security for the safety of the trust fund—Held:

1. Insolvency does not disqualify a person to act as trustee; but when money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of equity ought undoubtedly to require of the trustee security before he is allowed to proceed with the execution of the trust.

Terry v. Fitzgerald & als., 843

2. Although R was substituted as trustee by an order of the court, on motion of which T had notice, he is not thereby precluded from applying to a court of equity to require of him bond and security before he proceeds to execute the trusts.

Idem, 843

3. The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell so as to get the best price for it.

Idem, 843

4. If the land will bring a better price by dividing it, and selling in separate lots, and the owner desires and requests it, and the trustee refuses, the owner may invoke the intervention and assistance of a court of equity, in a proper case, to control the trustee in the exercise of his discretion.

Idem, 843

5. The court, having possession of this case, ought, instead of dissolving the injunction, to have retained the case, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of di-

vision into different tracts, and in what way, with power to employ a surveyor to lay it off into as many different tracts as would promote an advantageous sale. And if, upon the coming in of the report, the court is satisfied from it and the testimony that it would conduce to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to decree a sale in that way, and the order in which the tracts should be sold, until enough was sold to pay the debt, interest and expenses. *Idem*, 843

VENDOR AND PURCHASER.

1. By deed in 1858 H conveyed to P all his right, title and interest, as well at law as in equity, in and to King's salt works estate, embracing the following interests in the King's salt works estate. The deed then sets out the persons from whom H derived the several interests, and the amount of each, and among them the interests derived from three Cs, stating the interest of each C to be one two hundredth and seventieth. By deed in 1862, between P and H, this first deed is annulled, P releases to H all claim to the interest of H in said King's salt works derived from W—being one twenty-fourth, and H conveys to P, for a certain sum, with general warranty, the interest in the King's salt works purchased by him from—naming all the persons mentioned in the first deed, except W, and setting out their interests in the same way, the interest derived from the Cs being stated at the same amount. In a suit by the trustee of H against P and parties claiming under him, it appears the interests derived by H from the Cs, instead of being 3.270 or 6.540, they were 11.540; and he insisted that the excess over 6.540 did not pass by the deed of H to P—Held:

1. The two deeds of H. to P are so connected that the court may look to the deed of 1858 in construing the deed of 1862. *Preston & Massie v. Heiskell's trustee*, 48

2. The deed of 1862 conveys the interest in the King's salt works estate derived from the Cs; this is a sufficient description to pass the whole interest of H, and it being apparent that such was the intention of both H and P, the addition stating the amount of the interest *derived from the Cs will not restrict the operation of the deed. *Idem*, 48

3. But as both H and P were under a mistake as to the amount of the interest H derived from the Cs—and the contract and conveyance was made under that mistake—H's trustee is entitled to compensation for the excess over what H was supposed to possess. *Idem*, 48

4. The court below, upon the bill taken for confessed as to P, holds that the deed of H to P did not convey the excess of 5.540, and directs an account of rents and profits. At the next term of the court P applies for leave to answer, and in his answer says if he is to make compensation

for this excess, there were several incumbrances, which he sets out, on the interest he purchased from H, which H was to discharge, and did not, and he (P) had paid them; and asks that he may be allowed them. The court allows the answer to be filed as a petition for a rehearing of the decree, and then overrules it, and decrees that the trustee of H is entitled to the excess. This court reversing the decrees, sends the case back, allowing P to file his answer; but directing he shall file his cross-bill to put in issue the matters between P and H and the other defendants. *Idem*, 48

2. T conveyed to S, president of the M mining company and his successors in office, one-half of all the minerals in a certain tract of land in F county, except iron ore, upon the consideration that said M Co. are to test the lands for mineral, until \$2,000 is expended, if they so desired, one-third of the expense to be paid by T; the test to be made or abandoned in two years—Held: This deed vested a fee simple in said minerals in the grantees.

Clayton & Tyson v. Henley, 65

3. This deed having been duly recorded constituted notice to all subsequent purchasers of the land of the interests of the grantees therein, and those claiming under them. *Idem*, 65

4. Any subsequent deeds made by T. conveying the land in trust for his creditors, or deeds made by commissioners under decrees of court to subject the land to satisfy these creditors, conveyed to the purchasers only such title and interest as T then had, and said purchasers and the persons claiming under them acquired no title to the mineral interests previously conveyed by said T.

Idem, 65

5. On a bill by G against B to set aside a contract and conveyance by which G conveyed to B certain real estate in consideration of twenty shares of R Springs Co.'s stock, on the ground of the fraudulent or false misrepresentation of the value of the stock, which at the time was worthless—Held:

1. That a false representation of a material fact constituting an inducement to the contract, on which the purchaser had the right to rely, is a ground for the rescission of the contract by a court of equity, although the party making the representation was ignorant as to whether it was true or false; and that the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it in entering into the contract.

Grim & al. v. Byrd, 293

2. Though the representation must, as a general rule, be of a fact, as distinguished from a mere matter of opinion, which ordinarily is not presumed to deceive or mislead, yet a matter of opinion

may amount to an affirmation, and be the inducement to a contract, especially when the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other.

Idem, 293

3. If the purchaser does not rely upon the representations of the seller, but seeks information from other sources, the law will often impute to him all the knowledge necessary to a proper understanding of the facts. But if the purchaser has not equal means of information with the seller

906 —if it is a case in which he has a right to rely *upon the representation—the evidence to show that he did not rely upon it, but upon information obtained elsewhere, must be of the clearest and most satisfactory character. In such case there ought to be no room for inference or implication. *Idem*, 293

4. In this case held, that whether the representations were fraudulent, or merely false, whether they were of facts or opinion, they were such as the seller had a right to rely upon; and it is a case for the rescission of the contract and the reconveyance of the real estate. *Idem*, 293

6. J, acting as agent of W, wrote to M, proposing to purchase for W a certain tract of land owned by M and his two brothers, at the price of \$12 an acre; and M replies by letter to J, accepting his proposition. These letters were enclosed to W, and not long after he wrote to J, saying I am pleased with your new purchase at twelve dollars; and have again to thank you for your kindness and attention to my interest. Upon bill for specific execution of the contract by M and his brothers against W—Held:

1. The contract is a valid contract, and will be enforced in equity.
Wyeth v. Mahoney & als., 645

2. It was not necessary that J should be authorized in writing to make the contract. *Idem*, 645

3. Though the contract was made with M, yet as he had been authorized by his brothers to sell the land, and they unite in the bill, the contract will be enforced. *Idem*, 645

7. Widow pays balance of purchase money due on land and secured by vendor's lien, and the taxes also. As against judgment creditors of her late husband's all these disbursements are prior liens on the property.

Simmons v. Lyle's adm'r & als., 752

VERDICT.

1. Where there is ground to believe that jurors named had not formed such decided opinions as disqualified them from giving the prisoner a fair trial, the verdict will not be set aside on the ground that they were incompetent jurors.

Shinn's case, 899

WARRANTY.

1. When a warranty on the sale of personal chattels will or will not be implied. See *Sales of Personal Chattels*, No.

1, 2, 3, 4, 5, and
Gerst v. Jones & Co., 518

2. While the allegata and probata must always agree, it is well settled that under a count in a declaration alleging a warranty, the plaintiff may prove an express or implied warranty, the legal effect of the two being the same. And so where a declaration would be good without an averment of a scienter, that averment may be treated as surplusage.

Idem, 518

WILLS.

1. The court in which a bill is filed under the statute to impeach or establish a will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, it may on a proper bill, review and correct errors in its proceedings after final decree in the cause.

Connolly v. Connolly & als., 657

2. On a bill filed under the statute to invalidate the probate of a will, which had been admitted to probate as the will of C, there was a final decree in the cause establishing the paper as the will of C, and this was affirmed on appeal. A relation of C, interested in his estate, who was an infant at the time, and was not made a party, or represented in the case, may file a bill to review the decree. And the bill stating the fact that the plaintiff was an infant at the time of the decree, and was not a party or represented in the case; and also the discovery of evidence since the decree which, as stated, is of great importance and not cumulative—Held:

909 *1. Upon the application for leave to file the bill, the statements of the bill must be taken as true. *Idem*, 657

2. The grounds stated in the bill are sufficient to authorize the bill of review. *Idem*, 657

3. The present state of the law of probate in Virginia is, that a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had but all other persons, and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury and decree thereon in the proceeding by bill under the statute as to a sentence pronounced in any other authorized probate proceeding. *Idem*, 657

WITNESSES.

1. In an action of debt by C against H and I, the surviving obligors in the bond sued on, the defendants plead set off, and file a list of bonds delivered by H to C, which the plea states C received and undertook to col-

lect and apply to the payment of the bond, and that C had collected the debts—Held: That H was not a competent witness, at the time of the trial in April, 1876, to prove what passed between himself and C in relation to said set offs. And the law is the same in an action on the same bond against the administrator of the deceased obligor.

Carter v. Hale & al., 115

Same v. Watson's adm'r, 115

2. A deputy sheriff who levied an execution on property is a competent witness for his principal to prove that he had levied other executions, which previously came to his whole proceeds thereof were consumed in the hands, on the same property, and the payment of these executions, and that the debtor had no other property unincumbered out of which the plaintiff's execution could have been made.

Hammen, sheriff, & als. v. Minnick, 249

3. In an action by E against the executor of H to recover damages for injury to E's land by the erection of a dam across a stream by H; H being dead, E is not a

competent witness to prove any thing occurring in the lifetime of H.

Ellis v. Harris' ex'or, 684

4. The executor of H, though a part owner of the land on which the mill was built, is a competent witness in the case. Idem, 684

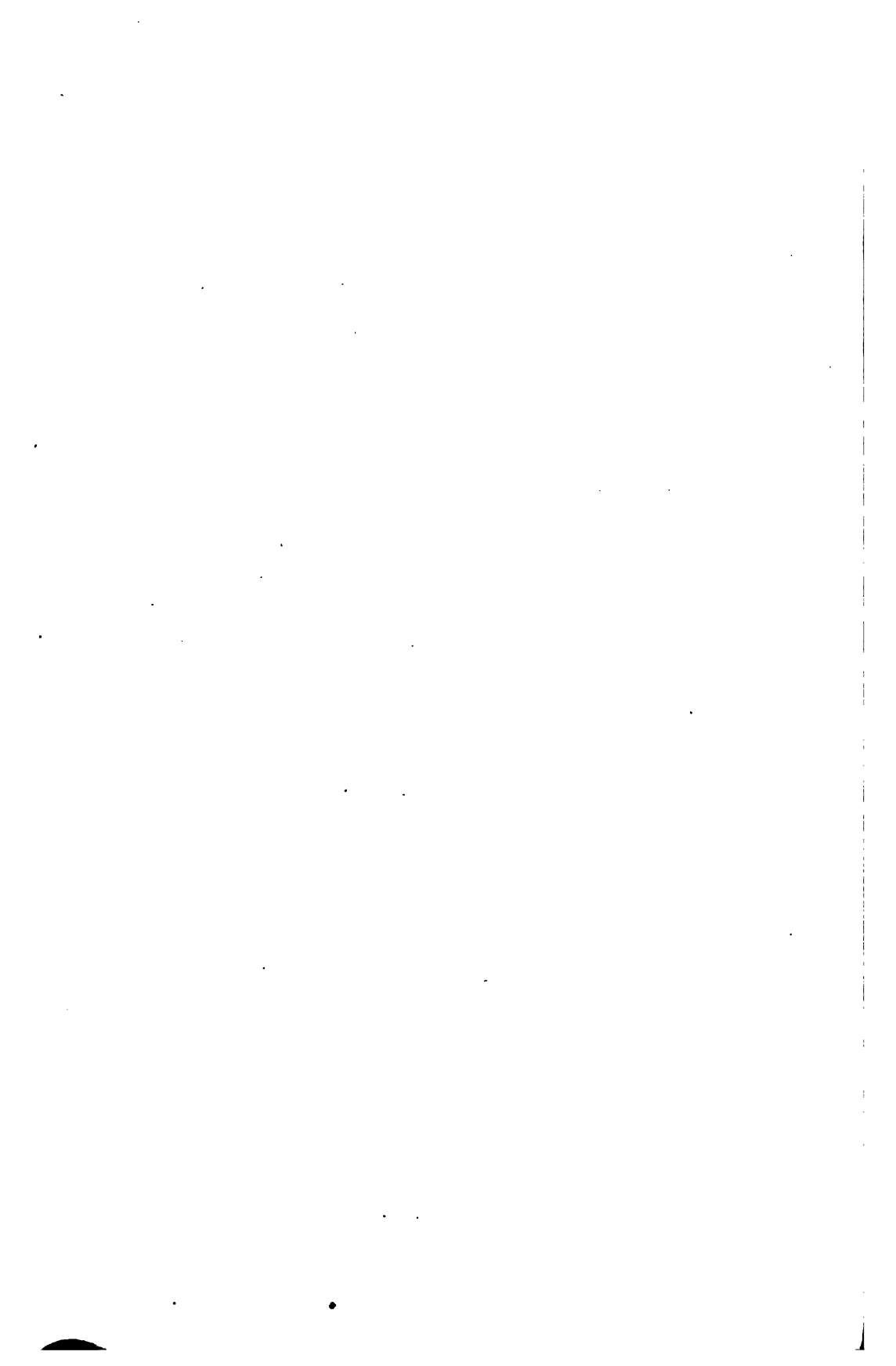
5. For who is not competent to give testimony as an expert,

See Mill Dams, No. 2, and Idem, 684

6. On a trial of a prisoner for receiving goods knowing them to be stolen, on the motion of the attorney for the commonwealth, without objection by the prisoner's counsel, the court directs the witnesses to leave the court room; and they all leave but one, who was in the prisoner's box in the court room, held on a requisition from the governor of North Carolina upon the charge of the larceny of the same goods. In the progress of the trial the attorney for the commonwealth offers this man as a witness, and he is objected to by the prisoner, on the ground alone of his remaining in the court room, after the order of the court. He is a competent witness.

Hey's case, 946





REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATTAN.

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FROM MARCH 1 TO NOVEMBER 1, 1880.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN,
WALLER R. STAPLES,

FRANCIS T. ANDERSON.
EDWARD C. BURKS.

Attorney General, JAMES G. FIELD.

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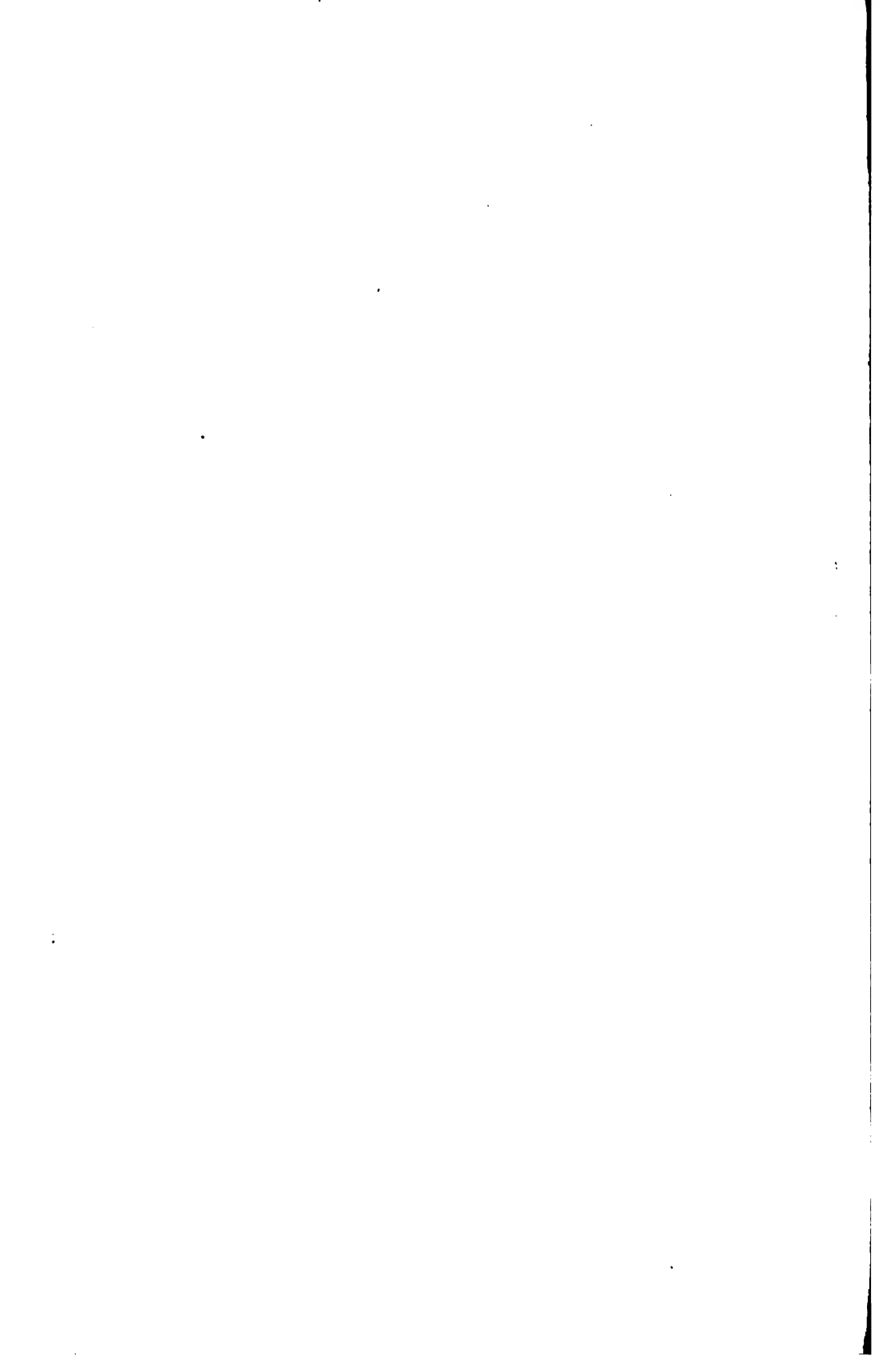
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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Taylor & al. v. Lancaster & als.

March Term, 1880, Richmond.

Payment by Order of Court in Confederate Money—Validity.—Money in court in a pending cause is in 1860 lent out under an order of the court. In 1863 M, the borrower, without notice to the parties claiming the funds, petitions the court to be permitted to repay the money; and under an order of the court authorizing it, he pays the money into court, and by a subsequent order this is approved, and his bond and deed of trust is delivered up and released. **Held:** That the money being in possession of the court, and lent out under its order, and the payment by M having been authorized by the court, it was a valid payment, though made in Confederate money when that money was at a discount of four for one of gold.

By deed dated the 1st day of November, 1852, Warner L. Waring and wife sold and conveyed to William *H. Ellis and Thomas W. Peers a tract of land in the county of Henrico, containing 198½ acres, in consideration of \$9,000, nearly all of which was payable in deferred installments secured by deed of trust on the same land bearing the same date, to Ro. A. Lancaster and Wm. D. Colquitt as trustees. The said Ellis & Peers were partners. The conveyance was not to them as partners on its face, though it was probably so intended, and by some if not all of the parties concerned was so considered.

By deed dated the 27th day of April, 1857, the said Thomas W. Peers in his own right and as survivor of, the late firm of William H. Ellis and Thomas W. Peers, late partners under the style of Ellis & Peers, and the widow and heirs of said William H. Ellis, (though the brother of said Ellis did not unite), sold and conveyed to William Mitchell the said tract of land, in consideration of the sum of \$5,739.16 in cash paid to said Thomas W. Peers surviving partner as aforesaid, and of the further sum of \$11,478.32, secured to be paid to him, with interest from the date thereof. The said purchase money, or the credit portion thereof with interest, was secured by a deed of trust dated on the same day, whereby the same tract of land was conveyed by the said Mitchell to James M. Taylor and A. D. Williams in trust for that purpose.

The legal title to the said tract of land being still in the said Lancaster and Colquitt, under the deed of trust executed to

them by Ellis and Peers as aforesaid, to secure the payment of the notes given by the latter for the purchase money therefor, and default being made in the payment of some of said notes, and they being required to sell the same under said deed of trust, they accordingly, on the 6th of August, 1858, made sale thereof under the said deed of trust, for the gross sum of \$11,114.62, the net proceeds of which *sale amounted to the sum of \$10,748.80, out of which the said trustees satisfied the sum remaining due and secured by said deed of trust to them, which left in their hands the sum of \$7,334.11. in the disposition of which they wished to be governed by the direction of the circuit court of chancery of the city of Richmond, which had jurisdiction of the matter. They were requested to pay over the said surplus in their hands, or so much thereof as was sufficient, in satisfaction pro tanto of what was alleged to be due under the deed of trust from said Mitchell, but inasmuch as the brother of Ellis, and who was one of his heirs-at-law, did not unite in the conveyance to Mitchell, the said trustees, Lancaster and Colquitt, were advised that they could not with safety thus dispose of said fund; and having held the same in their hands ever since it was received by them, awaiting the action of some party interested in the disposition of the said fund, to institute proceedings against them for a rightful disposition thereof, without any such proceedings having been instituted, they were advised to file a bill in said court against the parties interested in the question of distribution, so far as they were known to said trustees, and to ask that the rightful disposition and proper distribution of said fund should be settled and adjudged by the decree of the said court.

The said trustees Lancaster and Colquitt therefore instituted a suit in chancery for that purpose in the said court to which suit they made Peers in his own right and as surviving partner of the said late firm of Ellis & Peers and as late administrator of said William H. Ellis, and all the other heirs-at-law and representatives of said William H. Ellis, who were numerous, and the said Mitchell, and said James M. Taylor and A. D. Williams trustees as aforesaid, defendants to the bill. This said suit was instituted in August, 1859.

*On the 21st of December, 1859, on the motion of the plaintiffs, they were authorized to deposit the amount of the trust fund alleged to be in their hands, after re-

*Confederate Money—Payments in.—See 3 Min. Inst. (2nd Ed.) 400, where the question is fully discussed.

taining a sum sufficient to pay certain clerks' fees and costs, &c., in the Farmers bank of Virginia to the credit of the said cause, subject to the order or decree of the said court, and were required to file a certificate of such deposit.

On the 27th of December, 1859, such a certificate was accordingly filed, for the sum of \$7,476.54.

On the 28th of January, 1860, it appearing to the said court that there was then on deposit in the said bank to the credit of the cause, the sum of \$7,476.54, the court ordered that John G. Williams (who was appointed a commissioner for the purpose), have leave to check on said bank for said sum, and after deducting a commission, &c., "lend out the residue, taking from the borrower a bond with personal security approved, &c., payable to the Commonwealth, and in a penalty, &c., conditioned to pay into the said court interest on the sum borrowed, semi-annually, at the rate of six per cent. per annum, and to pay the principal sum and all interest due thereon into the said court in sixty days after he shall have been served with a copy of an order or decree made herein, directing the payment of the same." And said commissioner was also directed to take a trust deed on real estate ample in value to secure the payment of said bond, the title and sufficiency of said real estate to be approved, &c. But said Williams, before acting under said decree, was required to give bond, &c.

On the 3d of March, 1860, the said Williams filed his report under said order, which was confirmed.

In said report, said commissioner stated that, as directed by said decree, he drew out of bank the sum of \$7,476.54, retained the sum of \$74.76 (a *commission of one per cent.), and loaned to Edward Mayo, the residue, to-wit: the sum of \$7,401.78, taking from him his bond with William C. Mayo as security, in the penalty, &c., conditioned as directed by the decree, with a deed of trust upon the tract of land of said Mayo in Henrico county near Richmond, called Belleville. The security to the bond and the deed of trust having been approved by Commissioner Cary, the deed was duly recorded, and the bond and deed were returned with said report to the court.

On the 15th day of February, 1863, the said Edward Mayo presented to the said court his petition stating that he had borrowed the said fund on the terms aforesaid with which he had complied; but that he was then "desirous to repay the said loan, and thereby discharge his surety from liability, and his real estate from incumbrance." He therefore prayed that an order might be made, directing that the money due on said loan be collected and brought into court. And on the same day, on the said petition of said Mayo, it was "ordered that he pay into the Farmers bank of Virginia to the credit of this cause, the sum of \$7,401.18 with interest from the 1st day of February, 1860, being the amount loaned to him on that day by John G. Williams, acting as commissioner of the court in this cause under an order pronounced

therein on the 28th of January, 1860, which loan is secured by his bond in the penalty," &c., "with William C. Mayo as security therein, on file in this court, and a deed of trust on the tract of land of said Mayo in Henrico called Belleville, of record," &c.; "and upon his filing with the clerk of said court a certificate of such deposit, it" was "further ordered that he have leave to withdraw his said bond, which" was "to be delivered to him by the clerk, and that the said Williams, commissioner as aforesaid, do execute to the *said Mayo a release deed for the said tract of land called Belleville," &c.

On the 11th day of April, 1863, the said Mayo deposited in the said bank to the credit of the said cause, \$8,821.67, and on the 16th day of May, 1863, filed in the said cause a certificate of the said deposit.

On the 9th day of May, 1863, it appearing that R. Milton Cary was trustee in the deed of trust from Edward Mayo conveying his tract of land called Bellville to secure the money loaned to him in this cause as aforesaid, instead of John G. Williams, who by mistake had been supposed to have been such trustee, and had therefore been ordered to release the said land from said deed; it was ordered that the said Cary should execute such a release.

On the 17th day of December, 1867, the defendants, James M. Taylor and A. D. Williams, made oath to the truth of the statements contained in an answer made by them to the bill in the said cause, which answer was filed by them on the 24th of February, 1868. In that answer, for the first time, was any objection made by any defendant in the case, to the payment made by the said Mayo in Confederate money, of the debt due by him for the money loaned to him by an order of the court in January, 1860, as aforesaid. It does not appear that, until then, was any answer filed by any defendant in the cause.

In that answer, the statement made in regard to the said payment is as follows: "Since this suit was instituted, it seems that the money has been deposited in the Farmers bank, and it has been checked out and loaned to Edward Mayo, who gave his bond with William C. Mayo as security, and executed a trust deed conveying a tract of land called Bellville, to secure a compliance with said bond; it further appears that the said Edward Mayo, without notice to these

respondents, *obtained an order from this court, directing him to pay into the Farmers bank of Virginia to the credit of the court in this cause, \$7,401.78, the amount borrowed by him, with interest from 1st of February, 1860, and there is a certificate dated April, 1863, stating that he deposited, as directed by the court, a certain sum, and by a subsequent order, it is directed that the bond he executed be delivered up and the land released. These respondents say that it is a notorious fact, that in April, 1863, neither gold, nor anything equivalent to gold, was paid in discharge of debts due from debtors, and these respondents state that they verily believe that Edward Mayo

did not deposit the said sum in gold or other lawful currency of the United States; and they insist that the order made heretofore in this cause, directing the release of the said land called Bellville, and the delivery of the bond with William C. Mayo his surety be set aside, and that said Edward Mayo be required to make a proper deposit or payment of the money so borrowed by him.

About the time of the filing of the said answer, to-wit: in January, 1868, a cross bill was filed in the case by the said Taylor and Williams, stating in substance, among other things, the facts or most of them stated in said answer. The following, in substance, is stated in the said cross bill: "Your orators have heard and believe that during the pendency of the recent war, when Confederate notes had greatly depreciated in value, and when they were commanding in the market only one-fourth of their face, four dollars of Confederate notes being the equivalent of one dollar of gold, to-wit: in January, 1863, the said Edward Mayo made application to the court to allow him to refund and repay the amount loaned to him. That on the 18th February, 1863, when Confederate money

was not worth one-fourth of their face, an order was entered *that the said Mayo do pay into the Farmers bank of Virginia to the credit of the said cause, the sum of \$7,401.78, with interest from the 1st day of February, 1860, being the amount loaned to him on that day by John G. Williams acting as commissioner, &c.; that upon his filing with the clerk of the said court a certificate of deposit, that the said John G. Williams do execute a deed of release of the property conveyed in trust, &c.

"Your complainants state, that the said order purports to have been made 'on the petition of Edward Mayo'; that no notice was given to them or either of them of such application; that there was no docket of such petition; that at the term at which said application was made, the docket of chancery causes was not (as your complainants believe) called; that as your complainants believe, the said docket was not called during that period, or for a period of, say one year before and one year after that time; that there was nothing to apprise your complainants that any application would be made in the said suit, affecting their interests; that the said petition and application of said Mayo was irregular; and that notice of the same ought to have been given to the parties in the said suit, certainly to your petitioners, before the application was granted.

"Your complainants allege that the said application was made when the said Edward Mayo knew the parties interested would not consent to take Confederate notes; application for that purpose having been made at a previous time to Eaton Nance, one of the counsel in the cause; he refused to consent to the same, and positively objected to it. Your complainants further allege that they have been informed, and they believe, that after the said decree was entered, directing John G. Williams to execute the release

deed therein *provided for, without

notice to the parties, the said Mayo applied again to have the decree changed, and R. M. Cary was appointed a commissioner and directed to make the release. Your complainants allege that the action of the said Mayo in obtaining such decrees and orders, was in fraud of your complainant's rights, and was designed to enable him to discharge a debt of \$7,401 and upwards, by the deposit of Confederate notes, and without the knowledge of the parties chiefly interested in the same," &c.

On the 9th of February, 1870, the said Edward Mayo filed a demurrer and answer, to the said bill.

In his answer he stated, among other things, as follows, to-wit: "that he did petition the court in the said suit of Lancaster, &c. v. Peers, &c., in which he had borrowed the sum of \$7,401, giving his bond with his brother as surety and a deed of trust to secure the same, to be allowed to pay up the loan into court, or into bank to the credit of the court in the said suit, and that the said court made the orders as they appear of record in the said suit, when all the parties in the said suit were before the court and represented by counsel in daily attendance upon the said court; and he denies that there was any impropriety or irregularity whatever, in his said petition and application, or in the granting of the same, so far as he knows or believes, or any objection thereto until after the end of the war, when it became the interest of the complainants to object. And in answer to the complaint that no previous notice was given to the complainants of his intended application before it was made, your respondent says he was and is totally ignorant as to what practice ought to have been pursued in that respect. He employed counsel of long standing in the said court, in whom he confided to represent him in his said petition and application, which was made openly and

10 bona fide to the said court in the said suit, when the complainants were represented by counsel who continued afterwards to represent them in the said suit, and who never made any objection to what was ordered and done in the premises then or afterwards, nor have the complainants themselves ever objected thereto until the filing of their cross bill, when the Confederate States having fallen, and they having taken their chances, objection was, for the first time, made.

"Further answering, respondent denies that at the time of his said application, he knew that the parties in the said suit would not consent to take Confederate notes. He denies that he ever made application to Eaton Nance, one of the counsel in the said suit, for that purpose, who refused to consent to the same and positively objected to it."

After making various other statements in the answer, which need not be repeated here, the respondent thus proceeds:

"This respondent humbly submits that equity and good conscience will not permit the complainants, or any other party who was before the court in the said suit, and who was sui juris and represented by coun-

sel in the said suit, and living within the immediate jurisdiction of the court, to come forward five years after the said orders were made and said release deed was executed, and ask to cancel the same, unless they shall appear to have been obtained from the said court and from the said trustee who executed the said deed of release by deception and fraud; and he here indignantly denies and repels the charge of fraud made in the bill.

"The order of court upon which the said trustee released the said deed of trust, was openly and honestly obtained; was perfectly understood by the said trustee at the time he executed the said deed of release; and

11 *the bond which had been given by this respondent with his brother as surety, for the said loan, was delivered up and cancelled in obedience to the said order, and the said deed of release was duly executed in compliance therewith. No fraud or deception was practiced upon the court or its officers in any part of the transaction, nor upon the said trustee, and no mistake or surprise is alleged or suggested; and the said deed of release was duly recorded in the clerk's office of Henrico county court, where it has since remained without objection until the present bill was filed. And in the absence of any allegation denying actual notice of the parties or their counsel in the said suit, of the said judicial orders and proceedings therein, and of the said deed of release, after they were made and recorded, and before it became too late for them to make objection thereto, this respondent insists, that they will be presumed to have acquiesced in the said orders and in the said payment and release, for the whole time when they should have objected thereto, and when it was their duty to have made known their objections, if they meant to object, and that the same ought now to be held valid and binding on the complainants and other parties to said suit, and cannot be impeached or set aside without proof of fraud, which is denied."

"This respondent relies on the defence of the statute of limitations as if specially pleaded, and on the length of time which has elapsed since the said transaction now complained of took place, and the changed condition of affairs as grounds for refusing to entertain the complainants bill."

The following are copies of other papers filed in the cause on the 2d day of November, 1872:

12 *Statement of L. Nunnally.

"I have been requested to state what was the circulation or currency of the State of Virginia during the late war with the United States. In answer thereto I say that as soon as the Confederate government could prepare a sufficient number of their treasury notes, they became, almost exclusively, the circulation of the State. As early as the 22d March, 1862, the legislature passed an act directing said treasury notes to be receivable by sheriffs and other collecting officers, in payment of taxes and other public dues to the States. After this time the said notes were used, not only in payment

of taxes, but in all current transactions, and as bankable currency in the city of Richmond, none other being in use, except a few Virginia treasury notes, and they to a very limited extent.

"L. Nunnally,
"Late President of the Bank of the Commonwealth."

"Statement of Benja. Pollard.

"At the request of R. T. Daniel, Esq. I hereby certify that from the commencement of the late war to its conclusion, I had charge of the chancery business of the circuit court of the city of Richmond, first as deputy clerk, and afterwards as clerk, and that during that period, from the time that Confederate money came into general use, the money transactions of the court were in Confederate money, although stated in dollars and cents, and that the fee bills of the clerk were paid in that money. I remember no instance in which any objection was made to the receipt of Confederate money under decree of the court.

"Benja. Pollard.

"June 23, 1871."

13 *Endorsed.—"This paper, it is agreed, shall avail as much as if the testimony had been given by Mr. Pollard in a deposition after due notice, but the testimony is excepted to as illegal and incompetent. It is not admitted that such testimony is evidence in this cause for any purpose.

"Steger & Sands,
"Counsel for Taylor and Williams."

And by operation of law in such cases made and provided, the said suits were transferred to the docket of the chancery court of the city of Richmond.

And at a chancery court of the city of Richmond, held on the 20th day of January, 1876, the two causes aforesaid, of Lancaster and Colquitt, plaintiffs, against Thomas W. Peers and others, defendants; and Taylor and Williams, plaintiffs, against Lancaster and Colquitt and others, defendants, came on to be heard:

Whereupon the court passing upon the whole case on the merits, so far as the said Edward Mayo and William C. Mayo are concerned, and without at this time deciding any other question in these causes except that in which said Edward and William C. Mayo are concerned, for reasons set forth in a written opinion filed in the cause and made part of the record, decreed that said amended bill be dismissed as to said defendants Edward and William C. Mayo, and that they recover of said plaintiffs, Taylor and Williams, their (the said defendants) costs in this behalf expended. From which said decree the said Taylor and Williams applied to a judge of this court for an appeal; which was accordingly allowed.

Sands, Leake & Carter, for the appellants.

W. W. Henry, L. R. Page, Ould & Carrington, and Kean & Davis, for the appellees.

14 *MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

In this case, the fund in controversy was, in August, 1859, in the hands of Robert A. Lancaster and William D. Colquitt, trustees under a deed of trust to them from William H. Ellis and Thomas W. Peers and wife, bearing date the first day of November, 1852, executed to secure the payment of a large debt due by the said Ellis & Peers for the purchase of a tract of land conveyed by the said deed, which debt, or the greater part of it, was payable in many deferred installments. After satisfying the purposes of said deed of trust, it was known that there would be quite a large surplus of the trust fund which would be subject to the claims of other creditors, under subsequent deeds of trust or otherwise, which claims, to some extent, appeared to be doubtful and conflicting. And the said trustees, Lancaster & Colquitt, not knowing who, certainly, was entitled to the said fund, and in what proportions; and wishing to dispose of it with safety to themselves and according to the respective rights of all persons concerned, instituted this suit (in August, 1859), for the purpose of paying the said fund into court, and convening before it all persons concerned, and having the matter settled under the direction of the court. They accordingly made all persons then known to have any claim to the said fund defendants to their suit, who were very numerous, and prayed in their bill, among other things, that an order might be made for the payment of the residue remaining in their hands as aforesaid into "one of the banks in the city of Richmond, to the credit of this cause, subject to the future order or decree of this court in the premises; that such other person or persons as shall be discovered to be interested

15 the said fund, be *made defendants to the suit, and required to set forth their interests; that all proper enquiries and accounts shall be decreed to be made and settled; that the plaintiffs shall be protected against costs and risk in the disposition of the said fund; and that all questions arising concerning the rightful disposition of the said fund and the parties entitled thereto, be settled, and the said fund disposed of by the proper decree or order of this court in this suit, and that full and general relief in the premises be granted."

Accordingly, on the 21st of December, 1859, on the motion of the plaintiffs, they were authorized by a decree of the court in the said suit, to deposit the said fund in the Farmers bank of Virginia to the credit of this cause, subject to the order or decree of this court, and were required to file a certificate of such deposit with the clerk of the court.

On the 27th of December, 1859, such deposit was accordingly made, the sum deposited being \$7,476.54 and a certificate of the deposit was filed in said suit.

On the 28th of January, 1860, it appearing to the court that the said sum was then on deposit in the said bank to the credit of the

said cause, an order was made therein that John G. Williams (who was appointed a commissioner for the purpose) "have leave to check on said bank for said sum, and after deducting therefrom a commission of one per. cent. for his services, do lend out the residue of said sum, taking from the borrower a bond with personal security, approved by one of the commissioners of this court, payable," &c. "in a penalty," &c., "and conditioned to pay into this court, interest on the sum borrowed semi-annually," &c., "and to pay the principal sum and all interest due thereon into this court, in sixty days after he shall have been served with a copy of an order or decree made herein directing

16 the payment of the same. And *said commissioner is also directed to take a trust deed on real estate, ample in value to secure the payment of said bond, the title and sufficiency of said real estate to be approved also by one of the commissioners of this court. But said John G. Williams shall not act under this decree until he shall have entered into bond with good security." &c.

On the 3d of March, 1860, the said commissioner Williams filed his report under said decree, to which there was no exception, on consideration whereof the same was confirmed by the court.

It is stated in said report, that the said commissioner Williams, "as directed by said decree, drew out of bank said sum of money, retained his commission, and loaned to Edward Mayo the residue, to-wit: the sum of \$7,401.78, taking from him his bond with William C. Mayo as security, in the penalty of \$14,803.56, conditioned as directed by the decree, with a deed of trust upon the tract of land of said Mayo in Henrico county, near Richmond, called Bellville. The security to the bond and the deed of trust have been approved of by Commissioner R. Milton Cary, the bond is herewith returned," &c.

On the 18th day of February, 1863, the said Edward Mayo presented to the said court his petition, stating that he had borrowed the said fund on the terms aforesaid, with which he complied; and that he was then desirous to repay the said loan, and thereby discharge his surety from liability, and his real estate from encumbrance; and praying that an order be made, directing that the money due on said loan be collected and brought into court.

On the same day, and on the petition then filed by Edward Mayo as aforesaid, it was ordered by the said court, "that he pay into the Farmers bank of Virginia to the credit of this cause the sum of \$7,401.18, with

17 *interest from the 1st day of February, 1860, being the amount loaned to him on that day by John G. Williams acting as commissioner of the court in this cause," &c., "and upon his filing with the clerk of this court a certificate of such deposit, it" was "further ordered that he have leave to withdraw his said bond, which is to be delivered to him by the clerk; and that the said John G. Williams, commissioner as aforesaid, do execute to the said Mayo a release deed for the said tract of land called

Bellville, conveyed by the trust deed aforesaid, to be acknowledged and recorded in the clerk's office of the county of Henrico."

On the 3d of May, 1863, it appearing that R. Milton Carey is the trustee in the deed from Edward Mayo conveying his tract of land called Bellville in the county of Henrico, in trust to secure the sum of money loaned to him in this cause, to-wit: the sum of \$7,401.78, with interest from the first day of February, 1860, so much of the order pronounced in this cause on the 18th day of February, 1863, as directs that John G. Williams, the commissioner therein mentioned, shall execute to the said Mayo a release deed for the said tract of land," was ordered to "be set aside; and it further appearing that the said Mayo" had "complied with the said order by paying into the Farmers bank of Virginia to the credit of this cause, said sum of money with interest, as appears by the certificate of the proper officer of said bank filed in this cause, it" was "ordered that the said Cary as trustee as aforesaid, do execute to the said Mayo a release deed of the said tract of land conveyed to him in trust as aforesaid, with special warranty, to be recorded in the clerk's office of the said county court of Henrico."

The loan to Mayo as aforesaid, having been made in what is called good money, though not in specie, to which it may possibly have been equivalent in value, 18 *and having been repaid in Confederate currency of the same amount, worth at the time of such repayment not more than one-fourth of the then value of the same amount of specie; and the said amount of Confederate currency having since wholly perished, and been lost to the parties entitled to the fund by reason of the fall of the Confederacy; it is contended by the appellants that the loss must fall, not on them or the said parties entitled to the fund, who, it is contended, never consented to, or acquiesced in, said repayment in Confederate currency, but must fall on said Mayo and his surety, and the tract of land conveyed to him as aforesaid, the liability of whom and which therefor, the said appellants seek to enforce by this appeal, though the court below decided to the contrary by the decree appealed from.

It is true there is no evidence in the case to show that the parties entitled to the fund or any of them expressly assented to the repayment of the debt in Confederate currency as aforesaid. Nor is there any evidence to show that they dissented from such repayment, or that they were ignorant of the fact of such repayment at the time it was made, or even for a reasonable period thereafter, when it might not have been too late to make any objection thereto. There was, certainly, no fraud or secrecy in making such repayment. It was openly made on petition setting out the grounds therefor. It was made on application to the circuit court and by consent of the judge thereof (Meredith). It was followed in due time by a deed of release duly executed, acknowledged, and recorded in the city of Richmond, or county of Henrico, where, no doubt, the parties concerned and

their counsel resided. It is extremely improbable that the said parties and their counsel were so ignorant at the time of such repayment and so remained from and after that time during the *whole period of the war, and until the time of the filing of the cross bill in this case, in January, 1868; especially as it is not averred in that bill that they had no information on the subject, though it may be therein averred that they did not receive notice of the transaction at or about the time it occurred. The probability of the case is, that the said parties and their counsel were aware of the transaction at the time it occurred, or in a reasonable time thereafter, and early enough to make an objection to it; and that they made none because they considered the currency as good for present use as could be then obtained, and would ultimately be of the value of specie. The repayment was made when the Confederate cause was very promising, as much so, perhaps, as at any time during the war; and when Confederate currency had become almost exclusively the circulation of the State. See what is said on this subject by Nunnally and Polard in their statements included in the record in this case.

But what seems to be conclusive in this case against the appellants, is the fact that the whole matter was in the hands of the court, and was transacted by the court which was perfectly competent to accomplish the transaction. The money from which the subject of controversy was derived was paid into court because it was not certainly known who was entitled to it, and for the purpose of having it ascertained by the court, who was so entitled and in what proportions; and for the purpose of having it taken care of, and made as productive as possible in the meantime. Now the court having the direct charge of the fund, and alone having such charge, it was competent for the court, and indeed for no other party, to loan out the fund, as it did to Mayo; and to receive it back whenever its repayment should be desired by Mayo or be considered proper by the court. If an executor or administrator bona fide *received Confederate money at par in payment of a debt due to his testator or intestate in good money, at a time when such money was a valuable or as current as it was when Mayo's debt was paid, he could not be compelled to repay the amount in good money after the war was ended and all Confederate money had perished. A fortiori, the debtor bona fide making such payment, could not be compelled to repay the amount as aforesaid. If such be the law in regard to an executor or administrator a fortiori it is the law in regard to a court authorized, as in this case, to receive such payment. Here the money was paid into court because the parties supposed to be the only parties concerned did not know who was entitled to it, and it was so paid in, expressly on the terms that it should be subject to the future order or decree of the court in the premises. Of course it was not necessary when the loan was first made by the court to Mayo, that the parties beneficially

interested should have notice of such loan. Nor was it necessary, when Mayo applied to the court to receive the money loaned and interest due thereon, that the parties beneficially interested should have notice of such application. The court had power by the express terms of the decree under which the deposit was made, to consent to such repayment, and Mayo cannot be liable for the payment of the money over again, in the absence of evidence of fraud on his part.

The money in this case was borrowed by Mayo of the court of chancery, in whose hands it was when loaned, and to which it was payable by the express terms of the loan. It would seem therefore, that the borrower was safe in repaying the money in such currency as the court, the lender, was willing to receive. It was uncertain at that time, who was beneficially entitled to the money,

21 to which there were conflicting claimants, and the court was considered by the borrowers as the legal representative of the party beneficially entitled, whoever he might be. The money was returned early in 1863, when Confederate money was almost the only currency of the country, and was generally considered, in the Confederate States, to be ultimately good. Had repayment therein been refused to be accepted by the court, Mayo might, and probably would, have so used it as to avoid any loss from its future depreciation in value and its ultimate destruction. It might have been used at its par value, in the payment of other debts, or in the purchase of real estate or other property. Instead of affording him an opportunity of so using it, no objection was made by any person to such repayment until several years after the end of the war, and after such currency had become of no value. No doubt the parties beneficially entitled to the money were aware of its repayment in Confederate currency, at or shortly after the time of such repayment. Under all these circumstances, can the purchaser be now required to pay over again the amount of the purchase money and interest? I think not.

The following cases are cited and relied on by the appellants in their petition for an appeal in this case, viz: *Bird's committee v. Bird*, 21 Gratt., 712; *Berry, &c. v. Irick &c.*, 22 Id., 614; *Campbell's ex'ors v. Campbell*, Id., 649; *Crickard's ex'or v. Crickard's legatees*, 25 Id., 410; and *Tosh, &c. v. Robertson, &c.*, 27 Id., 270. But none of these cases need be stated here in detail, as all of them differ materially from this case, in which the subject of controversy was under the special and peculiar direction and control of the court, and none of the parties are personally responsible in the absence of evidence of fraud on their part, of which evidence there is none in this case. The case

22 of *Dickinson's adm'r v. Helms & als.*, 29 Gratt. 462, in which the unanimous opinion of this court was delivered by Judge Christian, strongly sustains this case.

Upon the whole, the court is of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed.

Decree affirmed.

23 *Broun v. Hull, survivor, &c.

March Term, 1880, Richmond.

B the payee of a negotiable note of N payable at the E bank, endorsed his name on it and put it in the bank for collection. It was not paid at maturity, and B withdrew the note, and after holding it for some years, and after the E bank had ceased to exist, he transferred it to H, writing over his name the words "protest waived." H failing to obtain payment of the note from N brought his action against B to hold him responsible upon his endorsement of the note. *Held*:

1. **Negotiable Instruments—Endorsement for Collection—Date.**—When B put his name on the back of the note it was only for its collection, and he was still the owner of it. And when he transferred the note to H his endorsement must be considered as of that date.

2. **Same—Endorsement of Overdue Note.***—The endorsement of an overdue note does not relate back to the date of the note; but as a new and independent contract only takes effect from the time it is made, and must be determined by the laws and circumstances then existing.

3. **Same—Failure of Bank at Which Payable—Effect as to Endorser.**—The E bank having ceased to exist when B transferred the note to H, it was not at the time of the transfer a negotiable note payable at a bank, and under the statute, Code of 1873, ch. 141, § 7, B was not responsible as endorser of the note, but only as assignor or guarantor.

4. **Same—Duty of Assignee.**—As assignee of the note H was not under any obligation to make demand upon the maker, and give notice of non-payment to B; but he was bound to exercise due diligence in suing the maker and obtaining judgment and execution against him, as a condition precedent to his recourse against B, unless the maker was notoriously insolvent. And B had the right to show that H had not used due diligence, 24 *and that the maker was not notoriously insolvent. And he had a right to show that at the time of his transfer of the note to H the E bank had ceased to exist.

This was an action of assumpsit in the circuit court of Loudoun county, brought in February, 1873, by Robert Hull and Thomas W. Atkinson, surviving partners of the firm of Hopkins, Hull & Atkinson, against Edwin C. Broun and John T. Johnston, late partners under the name of Broun & Co. The process was not served on Johnston, and in the progress of the cause the death of Atkinson was suggested.

The object of the suit was to recover from Broun the amount due upon a note made by N. and C. F. Berkeley, bearing date the 1st of January, 1861, and payable in six months, at the Exchange bank of Alexandria, Va., for \$1,865.50. There was a verdict and judgment for the plaintiff for \$1,587.33, with interest from the 13th of April, 1875.

On the trial of the cause the defendant took three exceptions to rulings of the court excluding evidence offered by him, and a fourth to the refusal of the court to set aside the verdict and grant him a new trial on the ground of the erroneous rulings of the court

*See *Davis v. Miller*, 14 Gratt. 1.

excluding the defendant's evidence, and also because the verdict was against the evidence.

The facts were, that the said Berkeleys executed the note as above described; that before the note was due Broun deposited it in the Exchange bank, Alexandria, Va., for collection, and endorsed on said note at the time of said deposits the name of Broun & Co.; that said note was not paid at maturity; that after such maturity he withdrew the note from the bank, and held it until 1868, when he delivered it to Hopkins, Hull & Atkinson, and at the time of such delivery, to-wit: May 6th, 1868, wrote over the name of Broun & Co., "protest waived."

25 *After the plaintiff had introduced the note in evidence, and there rested his case, the defendant proposed to prove that at the time he delivered the note to Hopkins, Hull & Atkinson, viz: May 6, 1868, there was no such bank as that named in the said note; but the court excluded the testimony. And this is the ground of the defendant's first exception.

The defendant further offered to prove, that at the date of the delivery of said note to Hopkins, Hull & Atkinson, and at the date of writing on the back of said note the words "protest waived," viz: on the 6th of May, 1868, the makers of said note were solvent, and continued solvent for sometime afterward. And also to prove that Hopkins, Hull & Atkinson, and the plaintiff, their survivor, had been guilty of laches, and had not used due diligence in endeavoring to collect said note from the makers thereof; and that if due diligence had been used by the holders of said note it might have been collected. But the court excluded the evidence. This is defendant's second exception.

The defendant further proposed to prove that Hopkins, Hull & Atkinson undertook and began the collection of said note by suit at law in the fall of 1868 in Loudoun county, Va., and afterwards by a suit in chancery in said county, against the makers of said note; and that said suits had been so instituted and conducted as to result in the loss of the said debt. And to establish this the defendant further offered in evidence the records in said suits. But the court excluded the evidence. This is the defendant's third exception.

From the judgment in the cause, Broun applied to this court for a writ of error and supersedeas; which was awarded.

W. W. Crump, R. H. Lee, and T. L. Broun, for the appellants.

26 *Norand and Payne & Alexandria, for the appellees.

STAPLES, J. The note which is the subject of the present controversy, was executed in May, 1861, by Norborne Berkely and Charles F. Berkely, to Broun & Co., for the sum of eighteen hundred and sixty-five dollars and fifty cents, and was negotiable and payable six months after date at the Exchange bank, Alexandria. It was deposited by the payees in the bank for collection, but not being paid at its maturity, was subsequently withdrawn by C. E. Broun, the de-

fendant, who was one of the firm of Broun & Co., or himself constituted that firm, and was retained in his possession until the year, 1868, when he transferred the note to the plaintiffs, Hopkins, Hull & Atkinson, of Baltimore. At the time of the transfer, the words "protest waived" were written above the names of Broun & Co., which had been placed on the note at the time it was deposited in bank. In the meantime, between the maturity of the note and its transfer in 1868, the charter of the Exchange bank had expired, and the bank had ceased to exist.

Upon this state of facts, the question is presented, whether the defendant, C. E. Broun, is to be considered an endorser according to the law merchant, or as the mere assignor of the note according to the rules of the common law. The question becomes a very important one, in view of the fact, that as assignees, the plaintiffs may have lost their recourse upon the defendant by the want of due diligence in pursuing the makers.

The whole difficulty in the case grows out of the peculiar provisions of the Virginia statute, which declare those promissory notes only negotiable which are payable in this State at a particular bank, or at a particular

office thereof for discount and deposit, or at the place of business of a savings institution or savings bank. Code of 1873, chap. 141, sec. 7. The *Freemans Bank v. Ruckman*, 16 Gratt., 126. The point, therefore, to be determined is with respect to the operation and effect of an endorsement of an over-due note payable at a bank which had ceased to exist more than five years before the endorsement was made. For although the name of Broun & Co. was placed on the note before its maturity, the evidence shows it was merely for the purpose of collection. They were at that time the holders and payees of the note. They must of course have put their names on the note as authority to the bank to collect. Such an endorsement does not pass the title or render the party making it liable as endorser. It is plain, therefore, that the endorsement to the plaintiffs must be regarded as made at the time of the transfer to them in 1868.

Indeed, this has not been controverted by any one. So treating it, let us consider the principles controlling the case. According to a well settled rule of commercial law, an unqualified endorsement of a negotiable note operates as a transfer and assignment of the paper to the endorsee, and an executory contract by which the endorser agrees upon certain conditions to pay the note to the endorsee. In legal effect, the endorser guarantees that the note will be paid according to its tenor, provided it is presented to the maker at maturity, and if not so paid, he, the endorser, upon due notice, will pay it. *Edwards on Bills*, 284; 1 *Daniel on Neg. In.*, sec. 669, ed. 1879. The endorsement operates as a new and substantive contract, embodying all the terms of the instrument endorsed. 1 *Daniel on Neg. In.*, sec. 669. Presentment and demand of payment, and notice of non-payment, are conditions precedent, upon the

performance of which the liability of the endorser depends. *Watkins v. Crouch*, 28 5 Leigh, *552. And when, in the body of the note, a place of payment is designated, the endorser has a right to presume that the maker has provided funds at such place to pay the note, and a right to require of the holder to apply for payment at such place. If the note is payable at a bank, and the bank is not the holder, an averment and proof of demand at the place appointed in the note are indispensable. *The Bank of the United States v. Smith*, 11 Wheat. R., 171, 183.

These principles apply to an indorsement during the currency of the note before its maturity. After the dishonor of the note, different considerations, to some extent, govern. The mere fact that the note is over-due does not destroy its negotiability. It still retains its negotiable quality, and may be negotiated as freely as during its currency. But the rights, duties, and obligations of the parties are by no means the same. If, by the terms of the note, a day is named for payment, and that day has passed when the endorsement is made, it becomes, according to legal effect, a note payable on demand, so far as the endorser is concerned. In that case, presentment and demand upon the maker must be made within a reasonable time at the place specified in the note, and due notice of the dishonor given to the endorser.

Although (says Edwards) a note remains negotiable after it has been dishonored, still, in one sense, the endorsement and transfer of a note over-due is a renewal of the instrument, which is then declared by law payable within a reasonable time upon demand, and the endorser is bound only upon the same conditions of demand upon the drawer, and notice of non-payment, as any other endorser. *Edwards on Bills and Promissory Notes*, 261.

It has been repeatedly held that the endorsement of an over-due note is equivalent to the drawing of a *bill of exchange payable at sight, the endorser being the drawer, the maker being the acceptor, and the endorsee the payee.

The endorsement of a bill or note is not merely a transfer thereof, but it is a fresh and substantive undertaking, embodying all the terms of the instrument endorsed in itself. 1 *Daniel on Negotiable Instruments*. In *Brown v. Davis*, 3 Term. R., 80, Buller, J. said, when a note is endorsed after it becomes due, he considered it as a note newly drawn by the person endorsing it. *Story on Promissory Notes*, sec. 129; *Young v. Bryan*, 6 Wheat. R., 146; 2 Rob. Prac., 239. See especially *Leidy v. Tammany*, 9 Watts., 353. So entirely distinct and independent is the contract of the endorser from that of the maker, that at common law, a separate action against each was indispensable. *Patterson v. Todd*, 18 Penn. St. R., 426.

It follows as a necessary consequence, and, indeed, is well settled, that the endorsement must also be negotiable in order to create the rights and obligations between the endorser

and endorsee according to the law merchant. It may be conceded, that as a general rule, an endorsement of a note during its currency adheres to the instrument and partakes of its nature. So that if the note be negotiable, so will the endorsement. The reason has been already stated. The endorsement is equivalent to a new note, embodying in itself all the terms of the note endorsed. But there are many cases in which a person endorsing a negotiable note is held not to be an endorser in the commercial sense of the term, but an assignor, guarantor or promisor, as the case may be. An endorsement may be restricted or conditional—it may amount to nothing more than a guaranty—it may be made in a State where the note itself, if originally drawn, would not be negotiable. A note made and endorsed in a *country by whose laws it is negotiable, would be recognized as negotiable anywhere. But if the endorsement be made in a country by whose laws a transfer by endorsement is not allowed, the endorsement would not be negotiable, although the note itself might be. And so I take it if under the laws or usages of a particular country, a fact or state of things essential to the negotiability of the note has ceased to exist when the endorsement is made the endorsement as between the immediate parties, does not confer the rights or impose the duties resulting from an endorsement, according to the law merchant.

An endorsement of an over-due note cannot relate back to the date of the note. As a new and independent contract, it only takes effect from the time it is made, and must be determined by the laws then in force, and the circumstances then existing.

Inasmuch as under the Virginia law a note is not negotiable unless payable at a bank, it would seem to follow that if at the time the endorsement is made, the note is over-due, and the bank has ceased to exist, the endorsement itself as a new and substantive contract, creates no other duties and obligations than those resulting from an ordinary assignment.

In the case before us, the endorsement written out in full is, in effect, an order by the defendant, Broun, as endorser or paver upon the maker, as acceptor to pay to the plaintiffs as endorsee on demand, the sum of eighteen hundred and sixty-five dollars, negotiable and payable at the Exchange bank, Alexandria, with an implied guaranty that the money would be paid at the bank named upon demand and notice within a reasonable time.

When the endorsement was made, the bank had ceased to exist more than five years. It would seem a *legal impossibility to predicate negotiability of such a transaction.

It now remains to inquire whether the addition of the words "protest waived" has had the effect either to change the character of the endorsement, or in some way to alter the position of the parties. In the case of a foreign bill of exchange, the word "protest" means the taking of all the steps necessary

to fix the liability of the drawer or endorser upon the dishonor of the paper. Daniel on Neg. In., secs. 929, 1095. The "waiver of protest" in such case must, therefore, be ordinarily construed as a waiver of the steps necessary for that purpose. But in the case of a negotiable note, a protest is unnecessary. Under our statute the note may be protested and a joint action of debt be maintained thereon against all the parties, maker and endorsers; but the protest is not at all essential to a right of recovery. All that is incumbent upon the holder to sustain an action against the endorser, is to prove demand and notice. Upon this point as to the necessity of protesting or not protesting a negotiable note, some of the judges do not desire to be understood as expressing any opinion.

As applied to a negotiable note, the words "protest waived," according to their literal acceptation must, therefore, be a mere nullity. By a sort of general usage they seem, however, to have a more extensive significance when applied to ordinary commercial paper. The authorities, however, are not entirely agreed as to their precise meaning. By some of them it is held they amount merely to a waiver of demand upon the maker. By others they include a waiver of both demand and notice; and this is the more general and better received opinion. 2 Daniel on Neg.

In., sec. 1095, and cases there cited;
33 1 Parsons on Bills and *Notes, 376; 2 Parsons, 240-5; 1 Parsons' Mer. Law, 118.

In the case of *Union Bank v. Hyde*, 6 Wheat. R. 572, Mr. Justice Johnson strongly intimated that the words "protest waived" of themselves could not be construed as dispensing with demand and notice in the case of a negotiable note. He was of opinion, however, that the words were ambiguous, and might be explained by parol testimony.

In the present case, no evidence has been offered tending to show the meaning the parties themselves attached to the "waiver of protest." It may be that both of them were satisfied of the solvency of the makers; both knew or believed the note would not be paid upon presentment and demand, and without understanding the precise nature and legal effect of the transaction, they intended to provide against any future difficulty growing out of the failure to make demand and give notice, according to the law merchant.

There is one fact tending, however, to show that the plaintiffs certainly did not consider the endorsement as creating the peculiar rights and obligations incident to an endorsement of negotiable paper. It appears that not long after they received the note, they instituted thereon an action at law against the maker in the name of the defendant. Broun, as payee, for their own benefit; and this action was prosecuted to judgment and execution. If, according to the present contention, the plaintiffs were endorsees of the paper in the commercial sense of the law, they were clothed with the legal title, and the suit must have been brought in their own

names. A suit in the name of the payees, though by no means conclusive, would seem to indicate, in some measure, the light in which the transaction was regarded, both by counsel and by the parties at the time. Be

that as it may, if the endorsement was
33 not in fact *of a negotiable character, neither the opinion nor the intention of the parties would make it so. In the case of *Freemans Bank v. Ruckman*, 16 Gratt. 126, the parties believed the instrument negotiable, and so treated it; this court held, however, that the note was not negotiable.

It has been supposed, however, that the case of *Woodward & Bro. v. Gunn*, 2 Va. Law Journal 243, asserts a different doctrine; that this court had there decided that as the parties intended to execute negotiable paper, and thought the notes were negotiable, they must be so held, although not in fact so. This is an entire mis-apprehension, as a careful examination of the case will show. In the opinion of the President, much stress was, of course, laid upon the supposed intention of the parties, because the intention was an important element with respect to the authority of the holder to fill the blanks in the notes. These blanks had been so left on purpose, because it was not known at which of the banks the loan could be obtained. It was proved to be a frequent custom in the city of Richmond, as it is elsewhere, for notes endorsed for accommodation to be left blank as to the place where payable, in order that the blank might be filled by the holder, and it was further proved that express authority had been given to fill the blanks, and that the parties throughout treated the notes as though they were negotiable. This court was of opinion that although the blanks had not been actually filled with the name of the bank, they might have been so filled at the time or afterwards, or even at any time before judgment. Whether the decision be right or wrong, it was not, as will be seen, placed upon any such ground as that mere intention can make a non-negotiable note negotiable. If authority is needed in support of the decision, it may be found in 2 Parsons on Notes and Bills 563; 1 Daniel on Neg. *In., § 145, § 90; *Orrick v. Colston*, 7 Gratt. 189; *Gillaspie v. Kelley*, 41 Ind. R. 158; *Spiller v. James*, 32 Ind. R. 203.

I take it, therefore, to be perfectly clear, that if both parties thought the paper negotiable, and under that error the defendant agreed to waive demand and notice, still, if as a matter of law, demand and notice were unnecessary, the waiver was a mere nullity, and did not change the real nature of the contract. It can hardly be supposed that the defendant in waiving protest intended thereby to waive any other legal right; that he was willing to remain indefinitely bound for the amount of the debt whenever called upon, although the plaintiffs may have been guilty of the grossest laches with respect to the maker.

It has been said, however, that the plaintiffs may have been misled by the waiver of protest. Supposing they were endorsees,

they may have failed to take such active steps against the maker as they would have taken if they had considered themselves mere assignees. If this be so—if the plaintiffs have been misled to their prejudice by the conduct of the defendant, it is a matter for the jury to determine upon all the evidence before it. The court cannot undertake to say in advance that there is any ground of estoppel. It would, however, be very difficult to found an estoppel upon the mere misconception of the nature and legal effect of an instrument of writing. The plaintiffs were in possession of the note, and must be presumed to know and understand at their peril their rights and obligations under it.

My opinion, therefore is, that the "waiver of protest" does not at all change the legal operation and effect of the endorsement. As assignees, the plaintiffs were under no obligations to make any demand upon the maker, and give notice to the defendant
35 of *non-payment, but they were bound to exercise due diligence in suing the maker, obtaining judgment and execution, as a condition precedent to their right of recourse upon the defendant, unless, indeed, the makers were notoriously insolvent. The defendants offered to show that the plaintiffs had not exercised due diligence in this particular; that they might have collected the money from the makers, if they had not been guilty of gross negligence; but the circuit court rejected the evidence; and in this I think it erred.

The defendant also offered to prove that the plaintiffs had instituted a chancery suit against the makers, but had conducted it so negligently and improperly as to result in the loss of the debt. I think the court, for the same reason, erred in rejecting this testimony.

It also erred for a like reason, in not permitting the defendant to show that the bank had ceased to exist at the time the endorsement was made. The same questions are substantially involved in all the bills of exception. I am therefore of opinion, that the judgment of the circuit court must be reversed, and the cause remanded for a new trial in conformity with the views herein expressed. In conclusion I will say, that while the questions here involved are not free from difficulty, the result attains the justice of the case.

The other judges concurred in the opinions of Staples, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in rejecting the evidence set out in the first, second, and third bills of exceptions of the plaintiff in error. Wherefore for the errors aforesaid it is considered by the court that the judgment of the
36 circuit court be *reversed and annulled, and that the defendants in error do pay to the plaintiff in error, his costs by him expended in the prosecution of his writ of error

and supersedeas aforesaid here. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is considered that the verdict of the jury be set aside and a new trial awarded the plaintiff in error. Upon which new trial the said circuit court is instructed to admit the evidence set out in said first, second, and third bills of exceptions, if the same shall again be offered by the plaintiff in error.

Judgment reversed.

37 *Harman v. City of Lynchburg.

March Term, 1880, Richmond.

1. **Matter in Controversy.***—The terms "matter in controversy" as used in reference to the jurisdiction of the Court of Appeals in § 2, art. VI, of the Virginia Constitution, means the "subject of litigation, the matter for which suit is brought, and upon which issue is joined."

2. **Appeal—Jurisdiction—Amount.†**—When the plaintiff seeks a revision of the judgment below, if he claims in his declaration money or property of the value of not less than five hundred dollars, the Court of Appeals has jurisdiction, although the judgment may be for less, or for the defendant. But where the revision is sought by the defendant, the amount or value of the judgment at its date, determines the jurisdiction. This is the general rule. For exceptions to it, see 32 Gratt. 288; and the onus is upon the party seeking the revision, to establish the jurisdiction of the appellate court.

*"Matter in Controversy."—The first head note is approved in *Atlantic & D. R. Co. v. Reid*, 87 Va. 119.

In *Lewis v. Long*, 3 Munf. 136, JUDGE ROANE says: "The matter in controversy is that which is the essence and substance of the judgment, and by which the party may discharge himself." *Umbarger v. Watts*, 25 Gratt. 167; *Duffy & Bolton v. Figgat*, 80 Va. 664.

In *Skipwith v. Young*, 5 Munf. 276, JUDGE BROOKE defined it as "that for which the suit is brought, and not that which may or may not come in question."

So where there is a suit to set aside several deeds on the ground of fraud and to subject the lands thereby conveyed to the debt of the complainants, the debt is the matter in controversy. *Fink, Brother & Co. v. Denny*, 75 Va. 663.

The first headnote was followed in *Taney v. Woodmansee*, 23 W. Va. 714. See also *Arnold v. County Court*, 38 W. Va. 145, where the principal case is cited in support of the proposition that the interest is a part of the matter in controversy.

As bearing on this question, see generally, *Buckner v. Metz*, 77 Va. 107; *Batchelder & Collins v. Richardson*, 75 Va. 835; *Campbell v. Smith*, 32 Gratt. 288; *Norfolk & W. R. Co. v. Clark*, 92 Va. 118.

†**Appeal—Jurisdiction—Amount Involved.**—In several cases, the court of appeals, following the decision of the Supreme Court of the United States, has held that where the plaintiff in his bill or declaration claims money or property of greater amount or value than \$500, but by the ruling of the court obtains a decree or judgment for less, he is entitled to his appeal or writ of error, because as to him the matter in controversy is the sum or amount claimed and he may, upon a reversal or a new trial, obtain a

3. Municipal Corporations—Liability for Unauthorized Acts of Policemen.—A city is not responsible for property destroyed by its police force, without any authority from the city, or its governing power.

4. Appeal—Presumption as to Correctness of Judgment.†—The judgment of a court of competent jurisdiction is always presumed to be right; and a party in the appellate court, alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail.

5. Exceptions—Form of Bill.†—When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed to any other ruling of the court below at the trial,

decree or judgment for the whole amount so claimed. *Gage v. Crockett*, 27 Gratt. 735; *Campbell v. Smith*, 32 Gratt. 288; *Fink, Brother & Co. v. Denny*, 75 Va. 663; *McCrowell v. Burson*, 79 Va. 290; *Duffy & Bolton v. Figgat*, 80 Va. 664; *Hawkins v. Gresham*, 85 Va. 34 and cases cited; *Hartsook's Adm'r v. Crawford's Adm'r*, 85 Va. 413. See generally *Buckner v. Metz*, 77 Va. 107. But where, on a money demand, the difference between the amount decreed to the appellant in the lower court, and the amount of the claim asserted by him in that court, is not sufficient to give the court of appeals jurisdiction, the appeal will be dismissed; and if the actual amount in dispute does not otherwise appear, the court will look to the whole record for the purpose of determining the jurisdiction. *Batchelder & Collins v. Richardson*, etc., 75 Va. 835.

And where the judgment or decree is for less than the jurisdictional amount at the date of the decree, and the defendant applies for appeal the court of appeals has no jurisdiction. *Hawkins v. Gresham*, 85 Va. 34 and cases cited; *Cook v. Bondurant*, 85 Va. 47; *Kendrick's Adm'r v. Crawford's Adm'r*, 85 Va. 413; *Kendrick v. Spotts*, 90 Va. 148.

So where Smith moved the court below to quash an execution issued against his effects on a judgment of a little more than \$500, recovered by Campbell on the ground that he had paid it, and the court allowed a credit to the amount of \$421, from which Campbell appealed to the court of appeals, it was held that the appeal being by Campbell, it was the amount of the credit which was the matter in controversy, and that the court did not have jurisdiction. *Campbell v. Smith*, 32 Gratt. 288.

The fact that the amount of the judgment at the date of writ of error awarded by the court of appeals is over \$500, does not give the court jurisdiction, if, at the time the judgment was rendered, it was exclusive of costs, for less than \$500. *Gage v. Crockett*, 27 Gratt. 735.

Upon a decree against several judgment creditors, none of whose judgments amounted to \$500, dismissing their bill, the court of appeals has no jurisdiction to allow or hear an appeal from the decree, though the united judgments amounted to more than \$500. *Umbarger v. Watts*, 25 Gratt. 167; *Thompson v. Adams*, 82 Va. 672; *Cook v. Bondurant*, 85 Va. 47; *Hartsook's Adm'r v. Crawford's Adm'r*, 85 Va. 413.

As to jurisdiction of suits in equity by same creditors against same defendants, which are each for less than \$500, but have been consolidated by order of lower court, see *Devries & Co. v. Johnston & Wolfe*, 27 Gratt. 805; *Craig v. Williams*, 90 Va. 500;

the bill should be so framed, by the insertion of proper matter as to make the error, if any, apparent; otherwise the exception will generally be unavailing.

In July, 1869, B. Desha Harman brought his action on the case against the city of Lynchburg, to recover *from the city the value of one hundred and sixty-nine gallons of whiskey, worth \$672.00, which he had stored in the said city in April, 1865, with his commission merchants and which he alleged (although this was not shown in the record in the appellate court) the city, through its legally constituted authorities, took possession of, and without the consent of the plaintiff or his consignees, poured it into the streets of said city; so that

Cox v. Carr, 79 Va. 28; *Peters & Reed v. McWilliams*, 78 Va. 567.

A trustee in an assignment for the benefit of creditors, may, as representative of the whole fund, appeal from a decree if aggrieved thereby, though none of the debts secured separately amount to the minimum jurisdictional amount. *Saunders, Trustee, v. Waggoner & Co.*, 82 Va. 316; *Atkinson v. McCormick*, 76 Va. 791.

Likewise in the case of an administrator, though the amount decreed to each ward or distributee is below the jurisdictional amount, the aggregate being the amount in controversy. *Martin's Adm'r v. Fielder*, 82 Va. 455; *Updike's Adm'r v. Lane*, 78 Va. 132.

That the *onus* is upon the plaintiff in error to show by the record that the appellate court has jurisdiction, see also *Saunders, Tr., v. Waggoner & Co.*, 82 Va. 316; *Commonwealth v. Chaffin*, 87 Va. 545; *Buckner v. Metz*, 77 Va. 107; *Martin's Adm'r v. Fielder*, 82 Va. 455.

***Liability of City.**—The third headnote was followed in *Brown v. Guyandotte*, 33 W. Va. 302.

†Judgments and Decrees—Conclusiveness.—The principle stated in the fourth headnote is reasserted in *Womack v. Tankersley*, 78 Va. 242; *Hill v. Woodward*, 78 Va. 765; *Neale v. Farinhot*, 79 Va. 54; 4 Min. Inst. (2nd Ed.) 971, 972 and cases cited; *Forrer v. Coffman*, 23 Gratt. 871-2; *Saunders v. Griggs' Hill v. Woodward*, 78 Va. 765; *Wright v. Smith*, 81 Va. 777; *Wynn v. Heninger*, 82 Va. 172; *Ferguson's Adm'r v. Teel*, 82 Va. 690; *Shipman v. Fletcher*, 91 Va. 473; *Gresham v. Ewell*, 85 Va. 6; *Joslyn v. State Bank*, 86 Va. 287; *Early v. Commonwealth*, 86 Va. 921; *Fry v. Leslie*, 87 Va. 269; *Stevens v. Brown*, 20 W. Va. 463; *McManus v. Mason*, 43 W. Va. 198. See also *Mann v. Bryant*, 12 W. Va. 516; *Miller v. Shrewsbury*, 10 W. Va. 115; *Taylor v. Baughner*, 16 W. Va. 327; *Nease v. Capehart*, 15 W. Va. 300; *Johnson v. Jennings*, 10 Gratt. 1; *McDowell v. Crawford*, 11 Gratt. 387.

But the presumption of jurisdiction may be overcome by the record. *Blanton v. Carroll*, 86 Va. 539; *Dillard v. Central Virginia Iron Co.*, 82 Va. 734; *Wilcher v. Robertson*, 78 Va. 602.

†Appeal—Assignments of Error.—Where error is assigned in the admission or exclusion of evidence, or in the giving or refusing of instructions, the error must be made apparent in the bill. *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; 4 Min. Inst. (2nd Ed.) 973; *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135; *Coleman v. Commonwealth*, 84 Va. 7; *Curtis v. Commonwealth*, 87 Va. 589. See also *Cluverius v. Commonwealth*, 81 Va. 787; *Womack v. Tankersley*, 78 Va. 243; *Wright v. Smith*, 81 Va. 777.

by the wrongful act of the defendant the said whiskey was wholly lost to the plaintiff. Damages \$1,500.

The cause came on to be tried in the circuit court of Lynchburg in November, 1873, when the jury found a verdict for the defendant; and the plaintiff moved the court to set aside the verdict and grant him a new trial. This motion seems to have been based upon an exception taken to an instruction given to the jury. That exception is set out in the opinion of Judge Burks. The court overruled the motion, and rendered a judgment upon the verdict; and the plaintiff obtained a writ of error.

Edward S. Brown, for the appellant.
Kirkpatrick & Blackford, for the appellee.

BURKS, J. Objection is made by the defendant in error to the jurisdiction of this court to review the judgment of the court below, on the ground that the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars. Constitution of Virginia, Art. 6, § 2; Code of 1873, ch. 178, § 3.

The language, "matter in controversy," employed in our Constitution (Art. 6, supra) is of the same import as the terms, **39** "matter in dispute," found in the *act of Congress, commonly called the judiciary act, (Rev. Stat. of U. States, 2nd Ed., § 690), regulating the appellate jurisdiction of the Supreme Court, and the construction of the two phrases has been the same.

"By 'matter in dispute,'" says Mr. Justice Field, "is meant the subject of litigation—the which issue is joined, and in relation to which jurors are called and witnesses examined." *Lee v. Watson*, 1 Wall. U. S. R., 337, 339.

Where there has been a judgment against the defendant in the suit, which he seeks to have reviewed on appeal or writ of error, the judgment is the "matter in controversy" as to him, and the amount or value of it, at its date, determines the jurisdiction of the appellate tribunal. *Gage v. Crockett*, 27 Gratt., 735, 736. Such is the general rule. It is subject, however, to some exceptions or qualifications, as may be seen by reference to the opinion in *Campbell v. Smith*, 4 Va. Law Journal, 42; 32 Gratt., 288.

In *Troy v. Evans*, 97 U. S. R. (7 Otto), 1, it was held, that the amount of the judgment below against a defendant in an action for money is prima facie the measure of the jurisdiction of the Supreme Court in his behalf, and this prima facie case continues until the contrary is shown; and, if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the amount fixed by law as the minimum limit to the appellate jurisdiction. In this court, such sum or value must not be less than five hundred dollars, exclusive of costs.

When the plaintiff by appeal or writ of error seeks a revision of the judgment be-

40 low, if he claims in his *declaration or bill money or property of value not less than five hundred dollars, this court has jurisdiction, although the judgment may be for less or for the defendant. *Gage v. Crockett*, supra. See also *Shacker v. Hartford Fire Ins. Co.*, 93 U. S. R. (3 Otto), 241; *Walker v. United States*, 4 Wall. U. S. R., 163, 164, and cases cited; *Lee v. Watson*, supra.

The onus probandi is upon the party seeking a revision of the case, to establish the jurisdiction, 10 Peters R., 160; and when the jurisdictional value does not appear by the record, affidavits to show such value, taken on notice to the opposite party, have been allowed in some cases by the Supreme Court. *Williamson v. Kincaid*, 4 Dall. R., 20; *Course v. Stead* and ux. and als., Id. 22; *Rush v. Parker*, 5 Crouch R., 287; *The Grace Girdler*, 6 Wall. U. S. R., 441. But where the value is stated in the pleadings or proceedings of the court below, affidavits in the Supreme Court have never been received to vary or enhance it, in order to give jurisdiction. *Richmond v. City of Milwaukee*, 21 How. U. S. R. 391, 393.

In the light of these decisions, the jurisdiction in this case seems clear. The cause of action set out in the declaration is the alleged illegal destruction by the defendant of a quantity of whiskey, the property of the plaintiff. The value of the whiskey at the time it was destroyed is the measure of the claim, and that value is stated in the declaration to be \$672, an amount more than sufficient to give this court jurisdiction. No special damages are claimed. The general damages are laid at \$1,500.

The only assignment of error by the plaintiff's counsel is based on the following bill of exceptions, signed, sealed and made a part of the record:

"Memorandum.—That, on the trial of this case, evidence having been offered **41** tending to prove that the *whiskey in the declaration mentioned had been destroyed by a lawfully organized police force of the city of Lynchburg, the defendant by counsel moved the court to instruct the jury as follows:

"That even if the jury believe from the evidence that the whiskey in the declaration mentioned was destroyed by a lawfully organized police force of the city of Lynchburg, yet, if the jury further believe from the evidence, that there was reasonable ground to believe and apprehend that the city was in danger from the presence of large numbers of fugitive soldiers and other persons riotously disposed, and that there was danger of the immediate occupation of the city by a hostile soldiery, and that the presence of intoxicating liquors was a serious danger to the citizens and the property of the city, and that such danger was so imminent and great as to amount to an overruling necessity, then the destruction of the said whiskey was justifiable as a means of insuring the public safety, and the city is not liable in this action."

"To which the plaintiff by counsel objected; but the court overruled the objection, and

gave the instruction; to which the plaintiff excepted, and prayed that this his bill of exceptions be signed and sealed by the court, which is done accordingly."

I perceive no error in this instruction, certainly none to the prejudice of the plaintiff. The evidence is not spread upon the record. This court cannot know judicially what it was. The only reference to it is in the bill of exceptions which has been copied. It is there stated, that there was evidence tending to show a particular fact, namely, the destruction of the whiskey in the declaration mentioned by a lawfully organized police force of the city of Lynchburg. If there was any other, what it was, or what its purport, is matter of the merest conjecture. The

42 unauthorized *destruction of the plaintiff's property by the police, though lawfully organized, could impose no liability on the city. As well might it be contended, that the city would be liable for a wanton assault and battery committed by its police. 2 Dillon on Mun. Corp., (2nd Ed.), § 773. There was not a scintilla of evidence, so far as the record shows, to connect the city with the destruction of the liquors, either by previous order or subsequent ratification. The court therefore might well have instructed the jury absolutely upon the evidence, as far as we are judicially informed of its purport, that the city was not liable for the act of the police force. It was not essential to a verdict for the city, that such unauthorized act should have proceeded from an overruling necessity induced by the circumstances hypothetically stated in the bill of exceptions. So much of the instruction therefore as made the exemption of the city dependent upon the existence of that necessity, to be deduced by the jury from the circumstances, was more favorable to the plaintiff than the evidence, as far as we can discover from the record, warranted: for, as already stated, the bill of exceptions does not indicate, that there was any evidence whatever tending to prove, that the act of the police force was by authority of the city or its governing power.

True, it is stated in the petition for the writ of error, that it was proved on the trial that on the 12th of April, or some time prior thereto, the plaintiff had in the hands of McDaniel & Irby, commission merchants in the city of Lynchburg, for sale, a quantity of whiskey; that, in consequence of the surrender of the Confederate army at Appomattax Courthouse, some twenty miles distant, danger was apprehended that the city would be sacked and burned by the Federal army, and that disbanded soldiers

43 from the Confederate army and *disorderly citizens would become riotous, and to guard against such danger, the city council ordered its police force to search for whiskey and destroy all they could find; that under these orders, the city police found the plaintiff's whiskey, and took it, without the plaintiff's consent, or the consent of McDaniel & Irby (the commission merchants), and poured it into the streets.

Such are the statements in the petition,

but no part thereof is to be found in the record, except the brief reference in the bill of exceptions to the evidence tending to prove that the liquors were destroyed by the lawfully organized police force of the city. Of course, this court can consider and decide this case only as it is presented by the record. The plaintiff cannot supply omissions by oral statements, nor supplement the record by his petition. Whatever was proved on the trial necessary to be known here to establish error ought to have been embodied in the bill of exceptions.

The judgment of a court of competent jurisdiction is always presumed to be right until the contrary is shown, and a party in an appellate court, alleging error in the court below, must show it in the regular way, or the presumption in favor of its correctness must prevail. When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed to any other ruling of the court at the trial, the bill should be so framed by the insertion of proper matter as to make the error, if any, complained of, apparent, otherwise the exception will generally be unavailing. This court has occasionally reversed a judgment and remanded the cause for new trial, on account of ambiguity or obscurity in instructions given, calculated to confuse and mislead the jury; but the instruction in the present case is not open to any such objection.

44 *In a late case decided by the House of Lords, cited in Broom's Legal Maxims, 946 (marg. p.), Lord Wensleydale thus indicates the degree of weight attributable to a judgment of court of competent jurisdiction when brought under review: "I take it to be perfectly clear," remarks his Lordship, "that when a court of error is considering a former decision on appeal, that decision is not to be overturned unless the court of error is perfectly satisfied that the decision is wrong. Prima facie it is to be considered a right decision, and is not to be deprived of its effect unless it is clearly proved to the satisfaction of the judge that the decision is wrong; but he must consider the whole circumstances together, and if he still feels satisfied upon the whole of the case that the decision is wrong, he ought undoubtedly to overturn it; it is only to be considered as prima facie right. The onus probandi lies on the opposite party to show that it is wrong, and, if he satisfies the conscience of the judge that it is wrong, it ought to be reversed." Mayor, &c., of Beverly v. Attorney-General. 6 H. L. Cas. 310, 332, 333.

It is not necessary to express any opinion upon the instruction applied to the case as stated in the petition of the plaintiff in error, as the case there stated is not the case made by the record.

I am of opinion to affirm the judgment of the court below.

The other judges concurred in the opinion of Burks, J.

Judgment affirmed.

45 *Cockerille v. Dale's Adm'r & als.

March Term, 1880, Richmond.

Wills—Construction—Preferences.—R by his will, after giving to a trustee certain stocks, the interest of which was to be applied to the support of his sister J, and at her death to two of her daughters by name; and a like trust for the support of R a daughter of J, gave to D a son of J, land and stocks; "subject, however, to the full and comfortable maintenance and support of his mother and sister R during their natural lives." The mother died and the stocks left for the support of R became worthless. **HOLD:** The land left to D is liable for the support of R in preference to any debt of D.

This was a suit in equity in the circuit court of Fairfax county, brought in 1858 by Richard H. Cockerille to subject a certain tract of land called Springdale, to the payment of two judgments amounting to \$582.68, which the plaintiff had paid as the surety of John R. Dale.

John R. Dale derived his title to said land under the will of John Richards, deceased, which was admitted to record in August, 1843, and the only question before this court was as to the incumbrances upon the land created by the will of said Richards in favor of the mother and sister of said Dale. The provisions of the will bearing on this question are the second, third, and sixth, which are as follows:

2. I bequeath in trust to my said executors for the use and benefit of my sister Jane Dale, during her natural life, seventeen hundred dollars of the scrip of the corporation stock of Alexandria; the dividend and

46 *interest thereon as it shall be declared from time to time, she is to receive regularly during her life aforesaid; and the stocks or principal at her decease to be equally divided among her daughters, Elizabeth Johnston, Jane R. Triplett, and her son John R. Dale, to each one-third, or their descendants, should they or either of them die before their mother. The descendants of said deceased child receiving the same share or portion which the parent or parents, if living at the time of the death of the said Jane Dale, would be entitled to, and no more.

3. I bequeath in trust to my said executors for the use of my niece Rosanna Dale, twelve shares of the capital stock of the bank of Potomac, Alexandria, and also \$1,000 of the stock scrip of the corporation of Alexandria of six per cent.—the dividends and interest thereon as it shall fall due and become payable to be paid over to her during her natural life by my said executors, and at her death the capital stock aforesaid to be divided among her sisters, Elizabeth Johnston, Jane R. Triplett, and her brother John R. Dale, in three equal parts, or in case of their death to their descendants, in the manner stated in my second bequest mutatis mutandis.

6. In like manner I devise and bequeath to my said executors in trust for my nephew John Dale, and his children my farm in Fairfax county, Virginia, called "Springdale," and on which he now resides, and also ten shares of the capital stock of the Bank of Potomac,

Alexandria, and fifty shares of the capital stock of the Fire Insurance company of Alexandria, and also two and a fourth shares of the Little river turnpike road stock; subject, however, to the full and comfortable maintenance and support of his mother and sister Rosanna, during their natural lives, to be judged of by my said executors hereinafter named, in connection *with the annuities already stated; and in the event of his leaving no lawful issue, then I devise and bequeath it to the children of his sisters Elizabeth Johnston and Jane R. Triplett, to each of their offspring a moiety thereof.

John R. Dale died in 1862, leaving several children, and having in his lifetime made a deed by which he conveyed the Springdale farm to a trustee to secure certain debts therein mentioned; and Jane Dale his mother died previous to 1867.

There were several reports in the cause by a commissioner, and one made in 1867 in which he reported that the fire insurance company had gone into liquidation and the amount paid on John R. Dale's stock was \$575.00 and the income from the corporation stock he states at \$30 a year, making the income from these sources \$64.50 a year, and he reports the other stocks as worthless. In May, 1871, he reports that \$12 a month would be a proper allowance for the board of Rosanna Dale. And he reports that Mrs. Triplett had supported her for ten years; and allowing at the rate of \$12 a month for board, and \$25 a year for clothing, he makes due her for these ten years \$1,690, of which she had received \$972; leaving still due to Mrs. Triplett \$718.

In June, 1871, there was a decree for the sale of the land; on the terms of one-fifth cash and the residue in three equal instalments. And the sale having been reported by the commissioner in November, 1871, another decree was made directing the commissioner to pay to Mrs. Triplett the amount of the purchase money in his hands as a credit on her account, and commissioners were appointed to sell the stock. And the plaintiff R. H. Cockerille having filed a petition in the cause, the subject of the petition was referred to the commissioner for inquiry and report; and the 48 *question as to the amount of allowance for Rosanna Dale was reserved.

At the June term, 1875, the cause came on again to be heard when the court held that though the interest of John R. Dale in the land in the proceedings mentioned was converted into a fee absolute, and was subject to his debts, that he took it also subject to the charge for the support of his mother and sister Rosanna Dale; and that this charge was good against him, and superior therefore, to the rights of any one claiming by, through or under him; and that his creditors could occupy no better position than he might himself claim, and must take his property subject to the charge created upon it under the will of John Richards. It was therefore decreed that the fund derived from the sale of said land be held subject primar-

ily to the support of the said Rosanna Dale to the full extent of the amount necessary to her support. And \$12 per month was allowed for that object. And it appearing that said Rosanna Dale was non compos mentis and that there was at least \$250 then due for her support, a trustee was appointed for her, and the commissioner who sold the land was directed to pay over that sum to the trustee. And a commissioner was directed to state the amount due then for the support of said Rosanna Dale upon the basis of \$12 per month, and to ascertain the amount of the funds in this cause, &c. From this decree Cockerille applied to this court for an appeal; which was allowed.

Francis L. Smith, Jr., for the appellant.
S. F. Beach, for the appellees.

ANDERSON, J., delivered the opinion of the court.

49 *The court is of opinion that there is no error in the decree of the circuit court. The devise and bequest of John Richards, by the 6th clause of his will to John Dale charges both the devise and the legacy with the full and comfortable maintenance and support of his mother and sister Rosanna during their natural lives, in connection with the annuities bequeathed to them by previous clauses of his will. And although said devise and bequest are subject to the debts of John Dale, they are only liable therefor subject to the charge aforesaid in favor of his sister Rosanna, his mother being dead. The said clause in favor of his sister Rosanna was a charge on the land and personal bequest in the hands of John Dale. The judgment creditor can occupy no better position than his debtor.

The court is further of opinion that it does not appear from the will that the testator intended to make the legacy liable to the charge prior to the real estate, both species of property are chargeable pro rata with the maintenance and support of Rosanna during her life. *Elliott v. Carter*, 9 Gratt. 541. But it appears that only \$575.00 of the stocks of which the legacy consists survive, which is insufficient to satisfy the amount charged on the devise and bequest which is in arrear, and that the net proceeds of the sale of the land will not yield a sum sufficient to pay the annual charge for the maintenance and support of Rosanna Dale during her life. We are of opinion therefore that there is no error in the decree directing the fund to be paid to the executor to be administered in accordance with the provisions of the will.

But the fund may not be exhausted in the support and maintenance of Rosanna during her life. What remains, if any, is chargeable with the payment of the debts of John Dale. The decree is interlocutory, and the case has to go back; and the circuit court

50 will *make such order as shall be necessary and proper to secure the application of such sum as may remain after the death of Rosanna Dale to the payment of the appellant's debt. We are of opinion therefore to affirm the decree of the circuit court.

Decree affirmed.

51 *Morriess' ex'or v. Morriess & als.

March Term, 1880, Richmond.

R by his will gives to his wife E for life certain real estate, with power of appointment by deed or will among their descendants, so that not more than one-half shall be given to any one. If she does not appoint it shall pass to his children. By a codicil he give her permission to sell and reinvest in other lands upon the same trusts, but adds—but subject to the following qualification, that is to say—that whatever she shall by will, deed, or otherwise give beneficially to any of my descendants, the same shall be not given absolutely to such descendant or descendants so as to be under his or her control, but given in trust to him or her, and in case of a female to her sole and separate use. E by her will gives the property to twenty of her grandchildren, though in very unequal proportions, directs the land shall not be sold for six years, that her executor shall hold it in the meantime, and when sold he shall divide the proceeds of sale, and invest the portion of each for him or her, and pay it to each one on his or her arrival at the age of twenty-one years. H12:

1. **Wills—Construction.***—That the will and codicil of R required the provision made by E under the power vested in her, for her grandchildren, should be in trust for the several beneficiaries, and for the separate use of the females: that the power vested in the executor by her will which must terminate as to each one as he or she arrived at the age of twenty-one years, did not constitute him such a trustee for the grandchildren as satisfied the will and codicil of R; and that the appointment was therefore invalid.

2. **Same—Sufficiency of Execution of Power—Case at Bar.**—It is not a case of the defective execution of the power, which a court of equity will remedy.

This was a suit in equity in the chancery court of the city of Richmond, brought 52 in November, 1876, by *Charles Y. Morriess and others, infants, by their next friend Robert F. Morriess, against Charles Y. Morriess, executor of Elizabeth A. Morriess, Richard G. Morriess, and Garland Morriess, persons of full age, and a number of others infant grandchildren of said Elizabeth A. Morriess. The object of the suit was to have a construction of the wills of Richard G. Morriess, deceased, and of his widow said Elizabeth A. Morriess, in relation to a devise by said Richard G. Morriess to his widow for life of certain property on Franklin, Adams,

***Restraint upon Alienation.**—The principal case is cited in *McClure v. Cook*, 39 W. Va. 580.

It is also cited in *Freeman v. Eacho*, 79 Va. 43, to sustain the proposition that equity will relieve where the execution of a power is defective. See also *Fountain v. Ravenel*, 17 How. (U. S.) 369; *Knight v. Yarrowborough*, Gilm. (Va.) 27; 18 Am. & Eng. Enc. of Law. 980.

In *McCamant, Ex'or, et al. v. Nuckols & wife et als.*, 85 Va. 331, it was held that where a testator conferred upon his wife absolute control over the distribution and division of his land among his children, the courts could not question, interfere with or supervise her judgment as deliberately expressed in her will. Citing *Morriess' Ex'or v. Morriess*, 33 Gratt. at pp. 81-2.

and Main streets in the city of Richmond, with power of appointment, and of the devise by her of said property by her will.

When the suit was commenced it does not appear that there was any question of the validity of the appointment made by Mrs. Morriss, she having disposed of it, though in unequal portions, among twenty of her grandchildren; but in the progress of the cause the question came up whether Mrs. Morriss had made a valid appointment; and if she had not, then under the will of Richard G. Morriss the property went to his children. The provisions in the will and second codicil of Richard G. Morriss and in the will of Mrs. Morriss, under which these questions arise are sufficiently set out in the opinion of Judge Moncure.

The cause came on to be heard on the 18th of January, 1879, when the court decreed as follows: On consideration whereof the court, being asked to pass upon the rights of the plaintiffs and of the other grandchildren of the said Richard G. Morriss, deceased, claiming under the will of the said Elizabeth Anne Morriss as objects of her appointment under the power conferred upon her by the will of said Richard G. Morriss, is of opinion, for reasons stated in writing and hereby made

a part of the record, but not to be copied *in the order-book, that by the true construction of the will of the said Richard G. Morriss, by the second clause thereof, a life estate was given to the said Elizabeth Anne Morriss in the property embraced in said clause and to the power of appointment of the remainder in fee among the descendants of the said testator, Richard G. Morriss, subject to the trusts prescribed by the second codicil of his will; and that, in default of such appointment, the said property passed in fee to the four children of the testator Richard G. Morriss in equal parts; that the attempted exercise of said power by the said Elizabeth Anne Morriss in her will was defective in matter of substance, in this, that by said appointment the property was given absolutely and not in trust, as prescribed by the requirements of the said second codicil to the will of the said R. G. Morriss; and that this court has no discretion or jurisdiction to aid and correct such defect in matter of substance and body of the powers, and that if such discretion or jurisdiction existed at all, it could not be exercised in favor of grandchildren (who are volunteers and stand upon neither a valuable nor meritorious consideration), against the children of the testator and author of the power, who are alike his devisees and heirs-at-law.

The court doth therefore adjudge, order, and decree that the said appointment to the plaintiff, Charles Y. Morriss, Jr., and the other grandchildren aforesaid, of the Franklin, Adams, and Main street lot by the said Elizabeth Anne Morriss, was not a good and valid appointment under the said power, and that it is void, and that on the death of the said Elizabeth Anne Morriss, the four children of the testator Richard G. Morriss, to-wit: Charles Y. Morriss, Robert F. Morriss, Anne E. Barrett, and Marcella C. Ham-

mond, each took the equal undivided fourth part of said lot in fee simple absolute.

54 *And thereupon Mrs. Morriss' executor obtained an appeal to this court.

John A. Meredith, for the appellant.

John Howard and John Lyon, for the appellees.

MONCURE, P. Richard G. Morriss, a wealthy gentleman late of the city of Richmond, died in that city in May, 1867; leaving a wife and four children, and a large number of grandchildren surviving him; and leaving a will and two codicils, which, after his death, to-wit: on the 21st day of May, 1867, were proved and ordered to be recorded in the circuit court of said city; the will bearing date on the 12th day of December, 1866; the first codicil on the 5th day of January, 1867; and the second codicil on the 12th day of May, 1867. By the 1st clause of his will, he gave to his wife, besides all his plate, "an annuity during her life of two thousand dollars, to be paid her by half yearly instalments of one thousand dollars each, in gold, or in its equivalent at the time of such payment," &c. The 2d clause of the will is in these words:

"2. I give to my wife, during her life, my lots in the city of Richmond aforesaid, on Franklin street, Adams street and Main street, containing in all one acre of ground or thereabouts, whereon I now reside, and all the buildings and improvements thereon, together with all the household and kitchen furniture and cows on the said lots or used with them. All which property, real and personal, in this clause mentioned, I moreover put under the power and control of my said wife, to give absolutely in such other manner as she shall think fit, from time to time while she lives, by deed or other instrument or mode appropriate in law for giving the particular kind of property she shall

55 so give, or after *her decease by her last will and testament, to such one or more of my descendants, and in such parcels or portions as she shall think proper, save and except that not more than one-half of the ground in the lots aforesaid, shall be given by her to any one of my descendants, and whatever parcel or parcels, portion or portions of the said property she shall, in any of the said ways, dispose of, the same shall not be taken into account or estimate, as an advancement out of my estate, in any division hereinafter directed to be made. Whatever of the said property, real and personal, in this clause mentioned, shall not have been so disposed of by her, the same at her decease, shall be divided equally between and among all my children then living and the descendants of them who may be dead; the descendants, of any predeceased child to take among them per stirpes, the share to which such predeceased child would, if living, have been entitled, and if any of my children shall have died leaving no lawful issue then living, all of the said property not so disposed of, shall be divided among my then surviving children and the then living descendants

(taking in manner aforesaid) of such as may be dead."

In the remaining clauses of the will the testator disposed of the remainder of his estate showing that he had made advancements to his four children respectively, amounting to upwards of thirty thousand dollars to each of them.

In the first codicil to the will, no notice is taken of the bequest contained in the 2nd clause of the will.

In the second codicil thereto, is the following provision affecting that bequest, viz:

"I. Considering that it may promote the comfort of my beloved wife to reside elsewhere than in the city of Richmond, I hereby authorize a sale to be made with the consent and concurrence of herself and my

56 *sons, Charles Y. Morriss and Robert G. Morriss, or the survivor of them, if either shall have departed this life before sale is made, of my lots in the city of Richmond aforesaid, on Franklin street, Adams street and Main street, containing, in all, one acre of ground or thereabouts, whereon I now reside, and all the buildings and improvements thereon, and all the personal property which therewith I have in my last will and testament given to my said wife during her life, with power to dispose of the same in her lifetime or after her death, as in and by the said last will and testament is fully and at large expressed; and in case such sale be made, I direct that all the proceeds thence arising shall be invested as follows, to wit: the proceeds arising from the sale of the real estate shall be invested in the purchase of other real estate in the State of Virginia or elsewhere, as my said wife with the concurrence of my said sons, or of one of them in case of death or disagreement, shall determine, and the proceeds arising from the sale of the personal estate shall be invested in the purchase of other household and kitchen furniture and appliances for housekeeping as my said wife, with the like concurrence, shall determine.

"The whole of which, both real and personal estate, so newly acquired, shall be held to the same uses, intents and purposes, and subject to the like interests and power in my wife as is by my said last — and testament given her, in regard to the real and personal estate hereby permitted to be sold during her life, but subject it to the following qualification, that is to say, that whatever she shall, by will, deed or otherwise, give beneficially to any of my descendants, the same shall be not given absolutely to such descendant or descendants, so as to be under his or

57 her control, but *given in trust for him or her, and in case of a female to her sole and separate use."

Elizabeth Anne Morriss, widow of the said Richard G. Morriss, afterwards died in said city, where she resided at the time of her death, leaving a will which was duly proved and recorded in the chancery court of the said city on the 8th day of October, 1872. The 4th, 5th, 6th, 7th and 8th clauses of the said will relate (and are the only portion thereof relating) to the said lots of ground

on Franklin, Adams and Main streets, containing in all one acre of ground or thereabouts, mentioned in the will of the said Richard G. Morriss as aforesaid, and are as follows:

"4. My beloved husband, the late Richard G. Morriss, having in his last will and testament, which was duly proved and admitted to probate on the 2d day of May, 1867, in the circuit court of the city of Richmond, given me the power, subject to certain conditions in said will, which are therein more particularly set forth, to dispose, either by deed or will, of the lots in the city of Richmond, on Franklin street, Adams street and Main street, containing in all one acre of ground or thereabouts, with all the buildings, and improvements thereon (whereon I now reside), I do hereby make the following disposition of the same, by virtue of the power and authority given to me by the said last will and testament of my late husband.

"5th. As the real estate mentioned and described in the 4th clause is not susceptible of judicious division among my grandchildren, I desire that it shall be kept together for six years from the date of my death, unless my executor shall deem an earlier sale judicious; and it shall during that time, or until it is sold, be under my executor's full control and management, and he shall dispose of the rents and profits of the same as I have heretofore directed.

58 "6th. I hereby direct at the expiration of six years from the time of my death, or at such earlier period as my executor may deem most judicious, he shall proceed to sell, all of the real estate mentioned in the 4th section of this will, for the benefit of those of my grandchildren whom I shall hereafter name, and in making said sale, my executor is hereby authorized and fully empowered to sell of my said real estate, upon such terms, as to the time and cash payments for the same, as he may deem most judicious and advisable. Before making sale of said real estate, my executor shall cause a survey to be made of all the same, and also cause its division to be made into two equal portions as to quantity, but not as to value. The division line of said property shall commence on Adams street in the centre of said real estate, and shall run in a direct line entirely through said real estate, from Adams street to the line of Joseph R. Anderson's lot, leaving the same depth of land on either side of said line; and in said division of said real estate into two equal parts as to quantity, one-half of said real estate shall front on Franklin street, and the other half shall front on Main street; and the buildings and other improvements on each half of said real estate shall be sold with and regarded as a part and portion thereof. My executor shall sell the portion of land which shall front on Franklin street, with all the buildings and improvements thereon, for the sole and exclusive use and benefit and advantage of my grandson Garland Morriss, son of Charles Y. Morriss and Pauline B. Morriss, and of my grandson Charles Y. Morriss, the son of Robert F.

Morriss and of Emma Morriss, and of my granddaughter Betty Hammond, the child of Edward L. Hammond and of Marcella C. Hammond, and of my grandson Morriss Gregory Barrett, a son of W. N. Barrett and

59 Anne Elizabeth Barrett. When my executor *shall sell the portion of real estate as aforesaid, for the benefit of my four grandchildren as aforesaid, he shall, after deducting from the gross amount of said sale, a sum sufficient to meet all the expenses attending said sale, proceed to divide the total net amount of said sale into four equal sums, which are to be divided, share and share alike, among my four grandchildren," (naming them,) "as aforesaid." "My executor is further directed to invest judiciously, for each of my four grandchildren as aforesaid, his or her portions as aforesaid, during his or her minority, and also all interest which may accrue from said investments, until they shall each, respectively, reach the age of 21 years, when my executor shall pay, or cause to be paid, to each of my four grandchildren as aforesaid, their distributable share of said real estate, with such interest thereon as has accrued from their investments. Should, however, the necessities of either of my four grandchildren as aforesaid, in the opinion of my executor, render the expenditure of either the principal or interest of their said distributive share necessary for their proper maintenance and education, he is hereby authorized to make such expenditure as he may deem advisable for the purposes aforesaid. Should my grandchild Garland Morriss die before attaining the age of 21 years, I direct that his portion as aforesaid, of the money arising from the sale of real estate as aforesaid, shall be equally divided among the other children of Charles Y. Morriss and Pauline B. Morriss who were born at the time of the execution of this will and who may be alive at the time of the death of my said grandchild, Garland Morriss.

"In the event of the death of my grandchild, Charles Y. Morriss, son of Robert F. Morriss, or of Betty Hammond, daughter of Marcella C. Hammond, or of Morriss Gregory Barrett, or of either of them, before *attaining the age of 21 years, 60 then the portion or portions aforesaid, which they or each of them were to have received, shall be equally divided among those of my grandchildren whose names appear in the second clause of this will and who shall be living at the time of the death or deaths of either of my three grandchildren as aforesaid.

"7th. Having in the 6th clause of this will, by virtue of the authority and power vested in me by my last will and testament of my late husband, devised one-half of the real estate which is described in the 4th section or clause of my will, with the buildings and improvements thereon, to four of my grandchildren as aforementioned, and directed its sale for their exclusive, sole use, benefit and advantage, I hereby give that half of aforesaid real estate, which, in the division I have directed, shall front on Main street, to

the following grandchildren, Richard G. Morriss, Mary Anderson Morriss, Walter Clarence Morriss, Charles Yancey Morriss, Willie Marion Morriss, Virginia Lee Morriss, Elizabeth Yancey Morriss, Julia Cornelia Morriss and Laurance Burr Morriss, the children of my son Charles Yancey Morriss and of his wife Pauline B. Morriss, and to Chapman Wilson Morriss, a child of my son, Robert F. Morriss and of his wife Emma Morriss, and to Betty Yancey Barrett, Marcella C. Barrett, Herndon Barrett, Julia Cornelia Barrett, Pomeroy Barrett, children of my daughter Anne Elizabeth Barrett, the wife of W. N. Barrett, and to a female child of said Anne E. Barrett and W. N. Barrett, now about two years old, who has not been named, but is called 'baby'. I direct that the half of said real estate as aforementioned, which, upon the division of the whole real estate upon which I now reside into two equal portions as to quantity, shall constitute that half or portion which fronts on Main street, shall, at

61 *the expiration of six years from my death, or sooner if an earlier sale is deemed advisable by my executor, be sold by my executor for the sole use, benefit and advantage of my grandchildren as above named upon such terms, as to the cash and time payments for the same, as my executor may deem best.

"My executor, after deducting from the gross amount of the proceeds of such sale, a sum sufficient to meet all the expenses attending said sale, shall divide the total net amounts of said sale into sixteen equal sums or amounts, which are to be divided (share and share alike) among my sixteen grandchildren as before mentioned, each taking one-sixteenth part of the total of net proceeds of said sale.

"My executor is further directed to invest judiciously for each of my grandchildren as aforementioned, his or her share or portion as aforesaid, and also all the interest which may accrue from said investment, until they shall each respectively attain the age of twenty-one years, when my executor shall pay to each of my sixteen grandchildren as aforesaid, their distributable shares of said sale of real estate, with such interest thereon as may have accrued from said investment during their respective minorities. Should, however, in the opinion of my executor, the necessities of any one or more of my aforementioned grandchildren render either the principal or interest of their said distributable shares essential for their proper maintenance and education, my executor is hereby directed in such case, to make such expenditure of either the principal or interest of the shares as aforesaid, as he may deem judicious for the proper maintenance and education of any one or more of my grandchildren as aforementioned.

"Should any one or more of my grandchildren as aforementioned, die before 62 attaining the age of twenty-one *years, I direct in that event, that the distributable share or shares of such decedent or decedents, shall be equally divided among

those of my grandchildren who are named in this, the seventh clause of my will, who may be living at the time of such death or deaths.

"8th. In disposing by this my last will and testament of the real and personal property of which my beloved husband in his last will gave me the absolute testamentary control, I have given it to my grandchildren as my dear children have been provided for in the will of my husband.

"9th. I appoint my son Charles Y. Morriss executor," &c.

The suit in which the decree appealed from in this case was rendered, was brought in the chancery court of the city of Richmond, on the 20th day of November, 1876, by some of the parties against the other parties interested in the provisions hereinbefore recited from the wills of Richard G. Morriss and his wife Elizabeth A. Morriss, for the purpose of having the validity, construction, and effect of the said provisions ascertained and settled by the court, and the rights of the parties, respectively, in regard to the same adjudicated by the court.

The will of the testator Richard G. Morriss, and the will of his wife, the testatrix, Elizabeth A. Morriss, the construction and effect of which, on a particular subject, are involved in this controversy, seem to have been drawn by counsel among the most learned and distinguished in the State, and the work which they were respectively employed as legal counsel to do, appears to have been plain and simple in its nature; and it seems to be wonderful, that so much doubt and difficulty should have resulted from what was done by the said testator and testatrix in the matter, that the same was thereby rendered void and of no effect

63 —in *the judgment of the learned court below. That judgment was, at first, in favor of the validity of the provisions in question of the said two wills, and was sustained by a written opinion of the learned judge. But he afterwards changed his opinion, and rendered judgment against the validity of the said provisions. No man has a higher respect than I have for that individual; both as a lawyer and as a gentleman; and I am glad that my views of the subject under consideration, are sustained by those which he first entertained on the subject; though I regret very much that he afterwards changed his opinion. He may be right and I may be wrong; but as I am of a different opinion, I must be governed by mine and will now state it.

The will and codicils of the testator seem to have been written by William Green. We all know who he is. He was a subscribing witness to each of them. The will of the testatrix seems to have been written by P. H. Aylett, who was a subscribing witness to the same. We all know who he was; and why there should be any doubt or difficulty as to the meaning and effect of an instrument prepared by them, or either of them, on a subject which seems to be plain in its nature, is a question which I confess I cannot solve; at least to my own satisfaction.

The testator, Richard G. Morriss, was a man of great wealth. He resided in the city of Richmond, where a great deal, if not most or all of his property was situated. He died leaving a wife and four children, besides a great many grandchildren. He left a will, by which he gave to his wife an annuity for life of two thousand dollars, payable in half-yearly instalments of one thousand dollars each, in gold or its equivalent. Besides which, he made other and large provisions for her. He had made large advancements to his four children, amounting to upwards of thirty thousand dollars each,

64 *and by his will made large bequests to them, or some of them. Having thus made the most ample provision for his wife and all his children, he chose to set apart one acre of ground in the city of Richmond with the improvements thereon, and place the same at the disposal, and subject to the power of appointment, of his wife; limiting the same however to their descendants according to her pleasure, "save and except that not more than one-half of the ground" aforesaid should be given by her to any one of his descendants. Now, if the testator, having thus amply provided for his wife and children, had chosen to have given to strangers, an acre of ground, the gift would not only have been legal and valid, but might have been very reasonable, and certainly would not have been an act of which his family could justly complain. A fortiori, they cannot complain of his giving to his wife and the mother of his children, a mere power of appointment, not among strangers, but among his and his wife's descendants, their own blood. He was about to leave this world, and to leave his wife behind him, with a family of children amply provided for, and a large number of grandchildren, who though perhaps not then in need, some of them at least might soon thereafter become so. Under these circumstances, he chose to leave in the hands of his surviving wife an acre of ground in the city of Richmond, subject to a life estate in her, with remainder among his and her descendants as she might appoint, not giving to one of them more than one-half of the ground. What could be more reasonable than such a testamentary provision under the circumstances? And is it not a case in which the court should lend its aid to the testator, to carry out his reasonable and natural purpose, rather than exercise its judicial power to thwart such a purpose?

65 *Under the will, there could have been no doubt nor difficulty as to its meaning—"all which property," &c., after fully and plainly describing it, "I moreover put under the power and control of my said wife, to give, absolutely, or in such other manner as she shall think fit, from time to time while she lives, by deed or other instrument or mode appropriate in law for giving the particular kind of property she shall so give, or after her decease by her last will and testament, to such one or more of my descendants, and in such parcels or portions as she shall think proper; save and except that not

more than one-half of the ground in the lots aforesaid shall be given by her to any one of my descendants."

The first codicil to the will, dated less than a month after the will, has no relation to the property in question. The second codicil thereto, dated the 12th day of May, 1867, exactly five months after the date of the will, has some relation to the said property, and contains the words which have produced the difficulty in this case, but which I humbly think ought not to have produced it. The codicils seem to have been written by the same hand which wrote the will—the hand of the same able lawyer. In the second codicil, the testator, in the first clause, surmises that his wife may prefer to remove from the city of Richmond, and to sell the property in controversy and invest the proceeds of sale elsewhere; and he then goes on to dispose of the proceeds of sale, or the property which might be therewith purchased in that event, using the following language:

"The whole of which, both real and personal estate, so newly acquired, shall be held to the same uses, intents, and purposes and subject to the like interests and power in my wife as is, by my said last will, given her in regard to the real and personal estate

66 hereby *permitted to be sold during her life, but subject it to the following qualification, that is to say—that whatever she shall, by will, deed or otherwise, give beneficially to any of my descendants, the same shall not be given absolutely to such descendant or descendants so as to be under his or her control, but given in trust for him or her, and in case of a female, to her sole and separate use."

Now it is doubtful, to say the least, whether this codicil has any effect upon the will. The codicil seems to have been based upon the hypothesis that the lots mentioned in the will might be sold and the proceeds of sale invested in the purchase of property situated elsewhere; and the testator then goes on to provide for the sale of the property which might be so purchased. A sale of the property as it stood when the will was made, was therein amply provided for; and there may have been no occasion for making any change in the provision of the will on that subject, supposing things to continue to remain at the time of the sale as they were at the date of the will. In that view the will would stand at the time of the sale as it was at the time it was written, and the second codicil would be, in effect, as if it had never been written; that is a mere nullity in regard to the ground in question.

But it is unnecessary to take that view; and reading the second codicil as the substitute of the will in regard to the provision for the sale of the ground, can there be any doubt about the meaning of the testator, or the validity of the act of the testatrix in the execution of the power of sale given her by the second codicil? I think not. In neither view have I any difficulty in ascertaining what the testator intended, or in regard to carrying the same into legal effect.

67 *There are but three lines in the sec-

ond codicil which can give rise to the slightest question as to the testator's meaning; and that is certainly not enough to frustrate the plain language of the will and the palpable purpose of the testator as therein expressed. Nothing can be plainer than the will, in my view of it, either as to expression or intention. So much plainness in the will ought not to be frustrated by so much doubt in the codicil, if it does not plainly mean what the will means.

Now it must be remembered that these descendants of the testator were not only numerous but were of extreme youth. One of them was so young as to be called "baby;" perhaps not being old enough to have acquired another name, even before the death of the testatrix, and not having been born before the testator's death. Of course it was not intended that these infants should receive, or have power to dispose of the property absolutely during their infancy, or have control of it during that period; but it was intended, that during that period at least, it should be "given in trust for him or her, and in case of a female, to her sole and separate use." Can it be supposed that these vague and doubtful expressions were intended to change the whole meaning of the will in regard to the trust subject thereby created; to make void, in effect, the trust created by the will. Can it be supposed that it was thereby intended to prevent any of the testator's descendants after arriving at lawful age, however discreet and prudent they might be, from having the charge and disposition of their own property, and subjecting it to the control and management of others, and perhaps strangers? Has not the testatrix amply complied with all the conditions which could have been contemplated by the testator, in the careful provision made in her will

68 to secure to the descendants of *herself and her husband, by the agency of her executor and of other trustees, the use and benefit of the trust subject designed and provided for them by the testator? It clearly seems to me so; and I am therefore decidedly in favor of giving effect to the wills of the testator and testatrix, according to their true intent and meaning as aforesaid.

The whole difficulty in this case arises from expressions used by the testator in the last two or three lines of his second codicil, in the provision thereof relating to the subject under consideration. That provision is in these words: "The whole of which, both real and personal estate, so newly acquired, shall be held to the same uses, intents and purposes and subject to the like interests and power in my wife as is by my said last will and testament given her in regard to the real and personal estate hereby permitted to be sold during her life, but subject to the following qualification, that is to say, that whatever she shall, by will, deed or otherwise, give beneficially to any of my descendants, the same shall be not given absolutely to such descendant or descendants, so as to be under his or her control, but given in trust for him or her, and in case of a female, to her sole and separate use."

The few last lines of the above which are italicized, alone create the difficulty in this case.

Now can it be said that those few lines indicate an intention on the part of the testator, to make so material a change of his will as is contended for by the counsel of the appellant? Or that the will of the testatrix on the subject is unauthorized by the testator, and therefore invalid and ineffectual? I think not.

The said few lines could only have been intended to give to the testatrix the power to give the property in question to a trustee for the use of their descendants during their minority respectively; not absolutely,

69 but *on such trusts as she might prescribe for their benefit. She therefore expressed a desire in her will, that as the real estate in question was not susceptible of judicious division among their grandchildren, it should be kept together for six years from the date of her death, unless her executor should deem an earlier sale judicious; and it should during that time, or until it should be sold, be under her executor's full control and management, and he should dispose of the rents and profits of the same as before directed by her will. In the event of the death of any of the grandchildren to whom the appointment was made by her, before they respectively attained the age of twenty-one years, the shares of such as might so die, were not then to go to their real or personal representatives, but were limited over to other descendants of the testator and testatrix. If there had been no such limitation over, such shares would have gone to such real or personal representatives. Here then is a case, in which effect is given to the provision aforesaid, in the second codicil of the testator. Can it be said that the testatrix had no power under the will of the testator, to give any of the said property to any of the said descendants absolutely, after attaining the age of twenty-one years; but could only give it, subject to such trusts as would prevent such descendants from disposing of it after that period? What would be the nature and extent of such trusts? On that subject, the will and codicils of the testator are totally silent. Can it be said that he only intended she should give the share of each descendant to whom the appointment might be made, to a trustee for the use of such descendant, without any necessity for defining and specifying the nature of such use? If such was his intention, it has been virtually carried into effect, as her executor was a trustee for that purpose. But suppose

70 *trustee for the use of such descendant, without defining or specifying the nature or extent of such use: would not such a gift have had precisely the same effect as a gift directly and expressly to such descendant, without any such definition or specification as to the use of such share? There cannot be a doubt on that subject. The only specification of a use in the will is, that the gift in trust must be, "in case of a female, to her sole and separate use." Now suppose

the testatrix had given any portion of the subject to a trustee expressly for the sole and separate use of one of the female descendants, would not such descendant have had unlimited power to dispose of such portion as her own property, subject only to such limitation as might be imposed on such power in the said gift? That the testatrix in her will, did not expressly declare that the share given to any female descendant as aforesaid was given "to her sole and separate use," can make no difference; because such descendant would take under the wills both of the testator and testatrix, and under those wills, construed together, she could take such share, only "to her sole and separate use."

Now can there be any thing in the power of appointment given by the will of the testator, or in the execution of that power by the will of the testatrix, which can defeat the intention plainly expressed by the testator, in regard to an acre of his land, which he certainly intended to give to some of his descendants, after having most amply provided for his wife and all his children?

I am therefore for reversing the decree of the court below with costs, and in lieu thereof rendering a decree in conformity with the foregoing opinion.

71 *STAPLES, J. The sole question in this case is whether Mrs. Morriss has properly exercised the power conferred upon her by the will and codicil of her husband Richard Morriss. It is not denied that Mrs. Morriss had under the will an unlimited power of appointment with respect to the Franklin street property. The language of the testator is: "all which property I moreover put under the power and control of my said wife to give absolutely or in such manner as she shall think fit from time to time while she lives or after her death by last will and testament." The only limitation imposed by the testator is that not more than half the land shall be given to any one of his descendants.

The codicil which gives rise to the present controversy was not executed until nearly six months after the date of the will. It is apparent that during that time Mr. Morriss' views with respect to the disposition of his property had undergone a considerable change. His idea obviously was, that as it was impossible to foresee what would be the habits, tastes, and dispositions of his descendants it would be best to put some restraint upon their dominion and control of the property he proposed to give them through the agency of his wife. Accordingly in his codicil, while directing that the property should be held to the same uses, interests, and purposes and powers in his wife given her by his will—he confers the power subject to the following qualification, that is to say: "that whatever she shall by will, deed or otherwise give beneficially to any of his descendants the same shall not be given absolutely to such descendant or descendants so as to be under his or her control, but given in trust for him or her, and in case of a female to her sole and separate use."

Comparing this language with that of the

will already cited, it is certain the testator did not mean the same thing in both instruments. It is certain that by the

72 *will he intended to confer upon his wife the power of bestowing absolute estate in fee. It is equally certain that by the codicil he intended to limit that power. His intention was that neither of his descendants should have such absolute estate in fee as would give him the unlimited control. And although the draftsman has used but a few words in expressing that intention, it is as effectually done as if he had used a hundred.

In the argument here and in the opinion of the president, much stress is laid upon the fact that the will of Mr. Morriss and codicil, as also the will of Mrs. Morriss were written by two eminent lawyers; and the conclusion is in some way sought to be deduced—the settlements made by Mrs. Morriss must therefore be held to be valid. I cannot appreciate the justice or force of such an argument. When a writing is brought here to be construed, this court must judge of it as it stands by its own provisions; and not with reference to the attainments of the counsel who prepared it. This is especially true with respect to wills which are often hastily prepared when the testator is in extremis. Usually the counsel writes as he is instructed without undertaking to question or criticize the propriety or validity of the testator's views with respect to the disposition of his property. In the present case it so happens that they who concur in the view now taken think all the provisions contained in the will of Mr. Morriss are valid and ought to be sustained in every particular. In our opinion the whole difficulty grows out of the fact that Mrs. Morriss' will is not a proper execution of the powers conferred upon her by her husband. With respect to that will it is observable no reference whatever is made in it to the codicil of Mr. Morriss. A careful examination of its contents would lead to the conclusion that the draftsman of the will

73 had not seen or read the codicil. Be that as it may, *the attorney no doubt in preparing the will of Mrs. Morriss wrote it as he was instructed, without undertaking to decide whether Mrs. Morriss was carrying properly out the intentions of her husband. I have said this much upon this point simply to exclude a conclusion.

We come then to the question, is the power conferred by the will and codicil of Mr. Morriss capable of proper execution. Is there anything in that power or in the limitations upon it inconsistent with any rule of law or public policy. The answer to this question may be found in numerous adjudged cases. I shall cite but a few of them. In the case of *Leavitt v. Beirne*, 21 Conn. R. 1, Waite, J. in delivering the opinion of the court said—"We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management or in the disposition until it has actually been

paid over to him by the trustees; and the learned judge then proceeds to argue in favor of the existence of this power, from the views, habits or intemperate character of the son, and the right of the father to provide against these misfortunes. In the late case of *Nichols' assignee v. Eaton*, 1 Otto. U. S. R. 716, 727, Mr. Justice Miller discussed this whole question with his usual ability and clearness. In the course of his opinion, he said—"Why a parent, or one who loves another and wishes to use his own property in securing the object of his affection as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own imprudence or incapacity for self protection, should not be permitted to do so, is not readily perceived."

74 *But we have an authority upon this point much nearer home. In *Nickell & Miller v. Handy*, 10 Gratt. 336, this court said, "there is nothing in the nature or law of property which prevents the testatrix when about to die, from appropriating her property to the support of her poor and helpless relations, according to the different conditions and wants of such relations; nothing to prevent her charging her property with the expense of food, raiment and shelter for such relations. There is nothing in law or reason which would prevent her from appointing an agent or trustee to administer her bounty."

I do not cite these authorities for the purpose of showing, nor do I mean to assert, that the owner of property may grant it to another in fee and at the same time impose such restrictions upon the donee as will deprive the latter of the *jus disponendi*, or prevent the property from being taken for his debts. Upon that question there is nothing in the present case calling for an expression of opinion. All I mean to say is, that the owner may undoubtedly grant his property to his offspring or other person without exposing his bounty either to the debts or the imprudence of the beneficiary. That this may be done by creating trust estates, is shown by the authorities already cited. See also *Perry on Trust* 385, 387. And this is precisely what Mr. Morriss desired, and what he declared should be done. The details of the trust, the mode, the manner of the execution were left to the sound discretion of his wife in whose judgment and affection he had the fullest confidence. Whatever she should give beneficially, should be given not absolutely, but in trust, so as not to be under the control of the beneficiary. And where the descendant was a female the property is required to be settled to her

75 sole and separate use, *manifestly so as not to be under the control of or subject to the debts of any future husband.

How have the wishes of the testator been carried out by the will of Mrs. Morriss. To my mind it is too clear for argument that she has given to each one of her descendants an absolute estate in fee. She directs a sale of the property and the proceeds to be invested for the benefit of the children during their infancy—and then to be paid over

to them as they severally attain the age of twenty-one years. If this is not an absolute estate in fee, without the semblance of a trust, it would be difficult to define or create such an estate. The limitations over in the event of the death of the legatee before arriving at age were simply designed to indicate the line of succession, and not to restrict the absolute ownership and control when the legatee should come into the possession. So far as the female descendants are concerned there is no pretense of an estate to their separate use. Not the slightest attention was paid to the will of Mr. Morriss in this particular.

But let it be conceded, for the sake of argument, that the conditions attached to the execution of the power are void and incapable of execution; may the donee of the power disregard them and convey the property absolutely? I do not so understand the rule. Mr. Morriss has declared that in default of the appointment in the mode and manner required by him, the property should descend and be divided among his own children and the descendants of those that are dead. According to a well settled principle of law until the power is executed the estate is vested in the devisee or remainder man, and can only be divested by a proper execution of the power. And if the power can never be executed in the way pre-

76 scribed by the testator it is *a nullity, and the estate remains in the devisee or heir. *Cooper v. Martin*, 3 Chy., appeal 57.

Whether therefore we regard the conditions attached to the power as valid or invalid, the result is precisely the same. In either case the estate descends to and is vested in the testator's own children, and cannot be divested by reason of the failure to comply with those conditions.

Before passing from this branch of the case I must not fail to notice a provision in the codicil which though not averted to in the argument has not escaped the attention of the court. It will be observed that Mr. Morriss authorizes his wife to make sale of the property real and personal which is the subject of this controversy; and further to invest the proceeds in other property to be held to the same uses and purposes as that which was sold. The question has arisen whether this newly acquired property alone is not included or intended to be in the limitations and restrictions mentioned in the codicil. There would be some force in the idea if Mr. Morriss had directed his real estate to be converted into money, and stopped there. But he does not do so. The proceeds of the realty are to be invested in other real estate, and the proceeds of the personality in other personality of like kind. So that no possible reason could arise for applying a limitation to the original estate that would not equally apply to the newly acquired estate. The testator plainly intended that the newly acquired estate should be subject to the same trusts and powers in his wife as the original estate. Whatever was given beneficially should be given not absolutely but in trust. Mrs. Morriss did in fact

by her will direct a sale of the real estate, and the proceeds came literally within the designation of newly acquired estate. The

learned counsel for the appellant
77 manifestly did not attach any *importance to the question as he did not even allude to it, and the court has only done so upon a suggestion that it may have escaped our attention.

Both in the petition for an appeal and in the argument before this court, it was insisted that the effect of Mrs. Morriss' will is to create a trust, that the property is devised to the sole and exclusive use of the grandchildren, and this established a trust, such as was contemplated by Mrs. Morriss. A devise to the sole and exclusive use of a female or married woman may create a separate estate in the donee. It is certainly a novel idea that such a devise to a man in any way operates either as a trust or a limitation upon the estate devised. It is easy, however, to understand what Mrs. Morriss meant by the use of the words in question. She had directed that the property should be equally divided not in quality but in quantity, one-half to front on Franklin street and the other to front on Main street. She then directs that the half fronting on Franklin street shall be sold "for the sole and exclusive use" of three of her grandsons and a granddaughter named; that is to say to the exclusion of the other grandchildren. And so with respect to the half fronting on Main street—it was also to be sold for the exclusive benefit and use of sixteen of her grandchildren named by her—that is to say to the exclusion of the grandchildren taking the Franklin street property. The words were unnecessary, but they were obviously used out of abundant caution to exclude those receiving one-half the proceeds from any participation in the proceeds of the other half. No one reading this part of the will can fail to perceive that no trust is created and that none was intended thereby.

Again it has been insisted that Mr. Morriss' object was merely a provision for his grandchildren during their minority, and this object has been effected by the

78 *will of Mrs. Morriss. Now if we suppose Mr. Morriss not destitute of the most ordinary information on a very familiar subject, he knew that his grandchildren could not dispose of or exercise any control over the estate given them during their infancy, and therefore any restraint upon their *jus disponendi* during that period was wholly unnecessary.

We are gravely asked to believe that when Mr. Morriss declared that the estate should not be given to either of his grandchildren absolutely so to be under his or her control, he meant that the legatee should not have the control during the period of his or her minority. In other words so long as the restraint was unnecessary it should be held to exist, but so soon as the time arrived when it might be of some advantage it must be held to have terminated. Mr. Morriss has not so declared—he has used no words from which it can even be inferred that the limitations and

trusts contemplated by him should continue merely during the minority of his grandchildren. The direction in respect to his granddaughters, that the property shall be given to their sole and separate use is of itself conclusive that such could not have been his intention. He was apprehensive that his grandchildren or some of them might waste the estate given them if left in their absolute control and possession; he therefore sought to place some restrictions upon that control by declaring it should be held in trust for their benefit. Such a provision was of course only necessary when the legatee arrived at the age for taking possession of the estate.

The main ground upon which the appellants rely, however, is that this is a case of defective execution of powers which may be properly aided by a court of equity. The argument in support of this view is that the intent of the testator ought to prevail

79 in all cases *if not inconsistent with the rules of law. And as Mr. Morriss' intention was to confer upon his wife the power to bestow the property upon his grandchildren if such was her wish, the court ought to give effect to that intention by remedying any defect in the execution of the power. In answer to this it may be said Mr. Morriss certainly did not intend that his wife should give an absolute estate to either of his grandchildren—he has expressly declared she should not do so. He has therefore attached to the exercise of the power a condition; and this condition is an element of his testamentary intention, to be considered by the courts as fully as the intention to confer the power itself. So far as Mrs. Morriss is concerned, there is nothing to show that she ever desired or intended to execute the power in the manner and with the conditions prescribed by Mr. Morriss. In her will she refers to the absolute testamentary control of the property given her by her husband in his will; and throughout she utterly ignores the restrictions prescribed in the codicil. Now let me ask is there any case in which the courts undertake to aid the defective execution of a power unless it plainly appears that the donee of the power intended to execute it in the manner designed by the testator. That is a well-established rule. As was said in *Garth v. Townsend*, 7 Law R. Eq., 220, the true test is—is there a distinct intention to execute the power? The jurisdiction of the court is to supply defects occasioned by mistakes or inadvertence, not to supply omissions intentionally made. 1 Lead. Cases in Equity 375.

The jurisdiction of equity to remedy defects in the execution of powers occasioned by mistake or accident is well settled. And therefore it is if a power is required to be executed in the presence of two only, or if it is required to be signed and sealed and it is without seal equity will interfere, upon

80 the ground of *accident and mistake. 1 Story Eq. sec. 174. And so where it is manifest the donee intended to execute the power, but the instrument selected is inappropriate for the purpose, equity will supply

the defect. 4 Kent 380. Sometimes the execution of the power may be good in part and bad in part, and the excess only will be void. This rule, however, only applies where the execution of the power is complete; 2 Sug. 75; and a distinct and unauthorized limitation is added. But the boundaries between the good part and the excess must be clearly distinguishable to warrant the interference of the court. 4 Kent 382, marg. 346. Where, however, there is a defect of substance in the execution of the power equity cannot supply the defect. Story Eq. sec. 175. And as a general rule, the estate or interest given must conform to the power; although it has been said where the nature of the interest is the same equity will uphold it.

The present case cannot be brought under either of these heads. It is a defect in the substance of the power. It is an attempt to give not only a different estate but a different interest from that contemplated by the testator. He intended the estate should not be given absolutely but in trust, so as not to be under the control of the devisees or legatees: Mrs. Morriss intended the very reverse. She intended to give and has given absolute estates in fee: Mr. Morriss intended that the nature and character of the trusts should be declared by Mrs. Morriss. This he confided to her discretion, and to her only. It was a condition attached to the execution of the power. It is only necessary to consider for a moment how numerous and diversified are the trusts recognized by law upon which property may be settled to see at once the utter inability of a court of equity to declare the trusts in this case and to execute a power confided alone to Mrs. Morriss.

81 *But we are met with another difficulty in any attempt to supply the defects in the execution of the powers here. It is well settled that the party invoking this extraordinary jurisdiction must have some legal right, or a superior equity to that of the person against whom the relief is sought. The same principle governs in this class of cases as in applications for specific performance. Where the equities are equal the courts choose rather to leave the parties to their legal remedies if any they have. Story Eq. Jur. 170—a. And therefore it is, while equity will supply a defective execution in behalf of creditors, purchasers for a valuable consideration, charities, a wife and legitimate children, it will not do it in behalf of a grandchild against the testator's own children. I do not mean to say that this is universally so. It is certainly the general rule, and although denied in some cases, it is established by a great weight of authority. Adams' Eq. 235; 2 Sugden on Powers 180; 1 Lead. Cases in Equity 176-7; Bisp. Principles of Eq. 179; 4 Kent 380.

The reason is obvious—the grandchildren do not stand upon any consideration of marriage, blood, or affection superior to those of the testator's own children.

Let us see if there is anything in the present case to warrant a departure from the rule as established. It is impossible to look through Mrs. Morriss' will without at once seeing that the grossest inequality and incongruity per-

vades her scheme of appointments under the powers confided to her. She has given to four of her grandchildren the property fronting on Franklin street of the value of \$21,000. Whilst the property fronting on Main street worth not more than \$9,000, is divided among sixteen of her grandchildren. No reason has been suggested for a distribution so unequal and partial, and none is to be gathered from the face of her will. There are other un-

82 just and *unequal appointments in the will of Mrs. Morriss as may be seen by an examination of the paper; but it is unnecessary to do more than allude to them here. It is very true that under the will of Mr. Morriss his wife is vested with the power of making unequal appointments; and if she had executed the power properly in other respects no objection could be made on the score of such inequality; but when a court of equity is called upon to aid a defective execution of powers as against the testator's own children in behalf of a part of the grandchildren, the court ought to take into consideration all the circumstances in order to determine whether the case is one calling for its interposition. If in the present case the grandchildren fail to get the estate it passes in equal shares or proportions to their parents who represent them, so that no injustice is done. Upon the whole case I am for affirming the decree of the chancery court.

CHRISTIAN and BURKS, Js., concurred in the opinion of Staples, J.

ANDERSON, J., concurred in the opinion of Moncure, P.

Decree affirmed.

83 *Waller v. Waller's Adm'r & als.

March Term, 1880, Richmond.

Dower in Land Purchased at Void Sale.*—

In 1853 W, before his marriage, sells and conveys a tract of land to B, and takes a deed of trust to secure the unpaid purchase money. B returns to the North during the war, and in his absence the land is sold by the trustee under the deed of trust and W purchases it for more than his debt. He is then married. After the war B returns and files a bill to set aside the sale; and the court annuls it, and decrees a sale of the land to pay to W the purchase money due him; and it is sold. HELD: The sale to W at the trustee's sale having been decreed to be a nullity his widow is not entitled to dower in the land.

This was a suit in equity in the corporation court of Lynchburg, brought in May, 1873, by William Waller's administrator against his widow Jane M. Waller, and his heirs and distributees, to have a settlement of William Waller's estate, and that his creditors might be called in and the estate properly disposed of. The only property of William Waller referred to in the proceedings was money and bonds then in the hands of J. A. Jones, who had been appointed by the

decree of the United States court in the case of Bigler v. Waller's administrator and Saunders' administrator a trustee in a deed in the place of Robert Saunders, to sell a tract of land in the county of York, which William Waller had sold in 1853 to James Bigler, and upon which Bigler had given a deed of trust to said Saunders to secure the unpaid purchase money.

84 *Mrs. Jane M. Waller filed her answer in the cause, claiming that she was entitled to dower in the land, and expressing her willingness to accept compensation for her dower out of the purchase money. The court below rejected her claim to dower in the land; and she obtained an appeal. The case is sufficiently stated in the opinion of Anderson, J.

John A. Meredith, for the appellant.

R. T. Armistead, Brown, Robertson, William J. Robertson, Kirkpatrick & Bl. and Peachy, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The only question in this case is whether Mrs. Waller, the appellant, is entitled to dower in the proceeds of the sale of the tract of land in the bill and proceedings mentioned? William Waller the deceased husband of appellant, was once the owner of said tract of land. But in 1853, several years before his intermarriage with the appellant, (their marriage was not until 1863), he sold and conveyed the same to one James Bigler of New York, for the consideration of thirty thousand dollars. The purchaser paid five thousand dollars in hand, and gave his bonds for the residue of the purchase money payable in ten years in installments, and to secure the payment gave a deed of trust on the land, executed to Robert Saunders in trust for that purpose, authorizing him to sell the land in default of payment, and to apply the proceeds of the sale, as far as necessary, to satisfy so much of the purchase money as remained unpaid. James Bigler remained in New York during the war. In April, 1862, there being a large balance of the principal and interest of the purchase money due

85 Waller and unpaid, Saunders the *trustee, at his request, sold the land at public auction, at which sale Waller became the purchaser at the price of \$17,000; and Saunders conveyed it to him by deed, reserving a lien for \$1,165, being the balance due from Waller of the purchase money, after deducting the amount due from Bigler to him.

At the close of the war Bigler returned and resumed possession of the land, and filed his bill in the circuit court of the United States to set aside said sale. In the progress of the suit both Waller and Saunders died, and the suit was revived in the names of their administrators, and in June, 1870, a decree was entered, setting aside the sale and conveyance from Saunders to Waller, for the balance ascertained to be due from Bigler to Waller, and ordering the sale of the land to pay it unless paid by Bigler before

*See 2 Min. Inst. (4th Ed.) 147; Chapman v. Chapman's Tr. et al., 92 Va. 537.

the sale. From this decree an appeal was taken to the Supreme court of the United States, where the decree was reversed in part, and affirmed in part. The Supreme court held that the sale and conveyance by Saunders to Waller were nullities, and were inoperative to divest the ownership of Bigler. The case is reported 14 Wall. U. S. R. 297.

It does not appear from the report of that case, that the decree was obtained by collusion between Waller and Bigler, or that the case was not decided upon its merits. The case seems to have been strenuously contested by the parties, and the decision was upon its merits. The court upon a review of the evidence concludes (p. 304), that the sale was made without requisite notice is an established fact, and sale and conveyance made by Saunders to Waller in 1862 was a nullity, and was inoperative to divest the ownership of Bigler; and that no decree was necessary against the heirs of Waller, (p. 307). Nor do I understand the court to

have declared that the legal title was in the heirs of *Waller; but to have said that if it was, all difficulty could be removed, by the circuit court, when the cause was remanded, requiring deeds of release or conveyance to be executed by the heirs of Waller to the trustee Cabell, before it rendered a final decree against Bigler for the balance of the purchase money; which would remove any shadow of doubt upon his title, if any existed, before he was required to pay the remainder of the purchase money. It seems to have been the suggestion of abundant caution to preclude any pretence of title on the part of the heirs of Waller, before Bigler was required to part with his purchase money, but surely could not be construed to contravene the decision previously enunciated, that said sale and conveyance by Saunders to Waller were a nullity and were inoperative to divest the ownership of Bigler. But if the naked legal title was vested in the heirs of William Waller by the conveyance of Saunders it does not follow that the right of dower vested in the appellant. "A legal title in the husband is nothing as regards the wife's right of dower, unless accompanied by the beneficial ownership; and the beneficial ownership is every thing, though separated from the title," is the language of Baldwin, J. in *Wilson v. Davison & als.*, 2 Rob. Rep. 384.

Appellant further contends in her petition, that independent of the purchase from Saunders, Waller converted his Bigler debt into the land in question. But in the very case referred to, the court decided otherwise, when it decreed the land to be sold to pay Bigler's debt to Waller. (The letters referred to I have not found in the record. But supposing them to be as represented, and that the parties agreed to recall them, after they were written, before there had been any payment of purchase money, or transfer of possession, as we think is the fair presumption in the case *as stated, we

cannot agree with the petition, that it vested in the appellant a right of dower. There was no actual conversion of the debt

of her husband, due from Bigler, into the land. And it would seem that the Supreme court so held, when it decreed the sale of the land; as the land of Bigler, to pay his debt to Waller, the proceeds of which sale, is the subject out of which, the appellant is seeking to recover dower.)

Upon the whole, the court is of opinion, that William Waller the deceased husband of appellant, was at no time seized of the land in question, during the coverture, and that consequently his widow, the appellant, was not entitled to dower therein, and that the circuit court did not err, in refusing to decree to her compensation for dower, out of the proceeds of the sale thereof, and that the decree must be affirmed.

Decree affirmed.

88 *Walden's Assignee & als. v. Walden & als.

March Term, 1880, Richmond.

Wife's Equity as Valuable Consideration.*

—There being a contest among the heirs and distributees of B over a paper offered for probate as his will, they enter into an agreement for the adjustment of their respective interests in his estate, and by deed bearing date the 26th of September, 1866, they convey the whole property, real and personal, to T in trust, setting out the interest which each was to take; and among them was W and his wife A, who was a daughter of B, W and A taking a certain part of the real estate and all the personalty. By deed dated the 27th of September, 1866, reciting what had been agreed upon and the recitals in the previous deed, and a promise by W to B that he would settle on A her share of the estate to the separate use of A, B and A convey the property to T for the separate use of A. **Held:** The deeds must be construed together; and A's equity is a valuable consideration for the settlement; and there being no fraud in the transaction, the settlement is valid against creditors of W, whose debts were contracted before the death of B.

This was a bill in the circuit court of Rappahannock county by Amanda F. Walden, wife of Carnet M. Walden, by her next friend, and Zeph. Turner, her trustee, to enjoin the levy of executions issued upon judgments recovered by Patrick Linane, J. C. Gibson, and S. Y. Hisle against said Carnet M. Walden, upon certain property which had been conveyed by said Walden and wife to Zeph. Turner, in trust for the separate use of Mrs. Walden. The injunction was granted; and upon the hearing was perpetuated. And Walden having during the progress of the

***Wife's Equity as Valuable Consideration.**—Whether wife's equity is valuable consideration, see 2 Min. Inst. (4th Ed.) 688; 1 Min. Inst. (4th Ed.) 332; *Poindexter v. Jeffries*, 15 Gratt. (Va.) 363; 6 Am. & Eng. Enc. of Law 711.

Deeds—Construction of.—Construction together of deeds made at same time, see *Anderson v. Harvey's Heirs*, 10 Gratt. 386; *French v. Towns et al.*, 10 Gratt. 513.

Where deeds were made at different times, see *King v. N. & W. R. Co.*, 90 Va. 210.

cause been declared a bankrupt, his assignee and the defendant *creditors applied to a judge of this court for an appeal; which was awarded. The case is fully stated in the opinion of Judge Anderson.

J. C. Gibson, for the appellants.
Menefee, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is a bill in chancery by Amanda F. Walden, wife of Carnet M. Walden, by Robert L. Menefee her next friend, and Zeph. Turner, trustee of the said Amanda, against the said Carnet M. Walden and Patrick Linane and others, judgment creditors of the said Carnet M. Walden, and the sheriff of Rappahannock county, to restrain them from all further proceedings, upon the executions which had been sued out by the creditors upon their several judgments, to subject the real and personal estate in the bill and proceedings mentioned, which the said Turner claims to hold in trust, for the said Amanda and others, free from the debts of her husband. The injunction was awarded by the circuit court of Rappahannock county, and by its final decree was perpetuated. And this appeal from said decree, is by Thomas R. Campbell, his assignee, who was made a defendant in the suit below, and by creditors of the said Carnet Walden.

The case turns upon the question, whether the property which the creditors of Carnet Walden seek to subject in this suit, and by writs of *fi. fa.* and *elegit*, to the satisfaction of their judgments, was the property of said Carnet, and liable for his debts? Other questions are raised by the bill, as to whether it was competent for the judgment creditors, after they brought their bills in chancery,

to set aside the deeds as fraudulent
90 *which vested said property in the said trustee, and to subject it to the satisfaction of their judgments, and whilst the said suits were still pending and undetermined, to sue out executions at law, and to have them levied on the same property to satisfy said judgments. But if the property in question was not the property of the debtor, nor subject to his debts, it is decisive of the case, and the other questions need not be considered. We will proceed therefore now to inquire, was it the property of the debtor, and liable for his debts?

The record shows that it was the property of Lloyd D. Browning, the father of Amanda F. Walden, in his lifetime, and down to the period of his death, which occurred in 1865. After his death, a paper in writing, purporting to be his last will, was offered for probate, in the county court of Rappahannock, by the said Carnet M. Walden, who was named therein as his sole executor. The said instrument purported to devise and bequeath to the said Carnet and his wife Amanda, the whole of the decedent's estate—real and personal—charged with the payment of his debts, and legacies to his other descendants, amounting to \$6,000. The probate of said in-

strument as the will of the decedent, was contested by all his other descendants, who could take under said instrument, or who would, together with Amanda F. Walden, be entitled as heirs or distributees, if said instrument was not established to be the will of said decedent. The cause was transferred to the circuit court of said county, and upon an issue of *devisavit vel non*, tried in said court, the jury failed to agree, and no verdict was rendered. Subsequently, all the parties to said suit, entered into an agreement for the adjustment, and final settlement of all matters in controversy between them in respect to the estate of said decedent.

91 And in the execution of *their said agreement, two deeds were executed—one bearing date the 26th of September, 1866, between Carnet M. Walden and Amanda F. his wife, Thomas Deatherage and Margaret A. his wife, Samuel J. Spindle and Mary C. his wife, Henry Lloyd Menefee, and A. F. Menefee, who undertook to act for and on behalf of Robert L. Menefee, and John W. Menefee, infants under the age of twenty-one years, of the one part, and Zeph. Turner of the other part; the other, between Carnet M. Walden and Amanda F. his wife, of the one part; and Zeph. Turner, of the other part—bearing date the 27th of September, 1866.

The first deed, after reciting the inducements thereto witnesseth, "that the parties of the first part, in consideration of the premises, and for the further consideration of one dollar, do convey to the said Zeph. Turner all of the real estate of the said Lloyd D. Browning, of which he died seized and possessed, or in any manner entitled to, except a portion, (which is described), and is the same which by the agreement and compromise, was to be conveyed to Mary C. Spindle and others, the children of Mary J. Menefee; and all the personal estate of said decedent, upon the following trusts; that is to say, for the use, benefit and enjoyment of the said Carnet M. Walden and Amanda F. his wife, for and during their joint lives, and for the sole use, benefit, and enjoyment of the survivor of them, with the right of possession during their joint lives, and to the survivor of them during his or her life; and upon the death of the survivor, the said trusts to cease and determine, and two-thirds of the said real estate to pass to the said Mary C. Spindle, Henry L., Robert L., and John W. Menefee, and one-third thereof, to such issue of the said Amanda F. Walden, as she may leave surviving her, at the time of her death; but if the said Amanda F. should
92 die without leaving such *issue, then the whole of said real estate to descend and pass in absolute property, to the said Mary C. Spindle, H. L. Menefee, Robert L. Menefee and John W. Menefee; and as to the personal estate, whenever either the said Carnet M. Walden, or Amanda F. his wife, shall depart this life, then the trusts herein declared in respect of such personal estate, shall cease and determine, and the said personal estate pass to, and become the absolute property of the survivor of them." The

deed then conveys to the other parties the property which they were to have by the agreement and compromise.

The second deed, after reciting the disposition of his property, made by the will of Lloyd D. Browning, the failure to probate it as the will of decedent, the amicable adjustment and compromise made by the parties, and the deed of the 26th of September, 1866, just recited, and a promise made by Carnet M. Walden to Lloyd D. Browning before his death, that he would secure to the said Amanda F. Walden, his daughter, all the estate which he and the said Amanda F. should receive from him, witnesseth, that "for and in consideration of the premises, and of the said promise to Lloyd D. Browning, and the further consideration of one dollar, the said Carnet M. Walden and Amanda F. Walden, do hereby grant and convey to the said Zeph. Turner, all the estate, interest, and title, which they and each of them acquired under the said deed to the said Zeph. Turner, dated the 26th of September, 1866, to be held by the said Zeph. Turner in trust, for the joint lives of the said Carnet M. Walden and Amanda F. Walden, for the sole and separate use of the said Amanda F. Walden, and not in any manner subject to, or liable for the debts, contracts, or engagements at present existing, or hereafter to be contracted, of the said Carnet M. Walden, except as to the said judgment

93 *of the said Edward Lightfoot (with which the property conveyed to them by the deed of September the 26th is charged), and upon the death of either the said Carnet M. or Amanda F. Walden, to hold the said real estate according to the terms and conditions of the said deed of 26th of September, 1866; and as to the personal estate this trust is to cease and determine, and the said personal estate is to become the absolute property of the survivor."

The said deeds should be taken and read together, as parts of the same transaction. One is dated on the 26th of September, 1866, and the other on the following day, before the first was completely executed, and they were recorded on the same day. The latter refers to the former, and its recitals as inducements to its execution, are the same. The former conveys the property on trust, that it shall be held by the grantee, for the use and benefit of Carnet and Amanda Walden, with certain limitations, and they, the next day, before the first deed was perfected by full acknowledgment and delivery, united in conveying the interest which it proposed to vest in them, with the same limitations, to the same trustee for the sole and separate use of Amanda F. Walden, for and in consideration of the premises, in which the conveyance of the 26th of September, and the inducements thereto, are set out by way of recital. Can it be doubted that, when the conveyance was made, for the benefit of Carnet Walden and Amanda F. his wife, by the deed of September 26, it was the understanding and agreement, that they would immediately unite in the second conveyance, with the declaration of trust therein con-

tained? If so, both conveyances are parts of one and the same transaction, so far at least, as the parties to the second conveyance were concerned; and the first deed as to them, was merely the medium of transmitting to *Amanda F. Walden, the 94 beneficial interests with which she is invested, by the declarations of trusts in the second. In this view, there was no interest vested in Carnet Walden, which he could assert, and his judgment creditors were in no better condition. They could only claim what their debtor had a right to claim. And if the conveyance was made to him with the understanding that he would immediately settle it upon his wife, according to the declarations of trust as set out in the second deed, he would be estopped to set up any claim to it under the first deed.

But it will be perceived that these conclusions, are upon the assumption, that the transaction was bona fide and free from the taint of fraud. The answer of J. C. Gibson contains a general charge of fraud. There are no specifications of the grounds upon which fraud is charged; nor is any evidence adduced in support of the charge. There is nothing in the transaction itself which implies fraud. The property in question was not the property of the debtor at the time the debts were contracted, but was the property of Lloyd D. Browning. The judgment of Linane is for \$550, with interest from the 18th of July, 1861, and \$8.64 costs; and the judgment of Hisle is for \$550, with interest on part from the 25th of May, 1854, and on the residue from the 1st of August, 1855. From which it is inferable that the debts were contracted as early as 1861 and 1854—many years before the death of Lloyd D. Browning, and probably before the intermarriage of Carnet Walden with his daughter. They were not therefore contracted on the faith of the property in question. It never was the property of Carnet Walden; but was the property of Browning until his death, and was not liable in law or equity to the debts of Carnet Walden. It is alleged that it was devised and bequeathed by the will of Lloyd Browning jointly to Carnet

95 Walden and *Amanda F. his wife. But that is not established. It is true that there was a paper purporting to be the will of said decedent, but it was never established to be his will. It was denied by the other descendants of the decedent that it was his will. It was offered for probate by Carnet Walden as the will of decedent, which was contested, and an issue of devisavit vel non was ordered, and submitted to a jury, but the jury was unable to agree upon a verdict—and all the parties in interest then agreed to settle it amicably amongst themselves. And they did agree upon a settlement, as they had a right to do, which was not upon the basis of the supposed will, which was never admitted to probate. There was nothing in that compromise and settlement which implies fraud. The transaction seems to have been conducted by all the parties in good faith, and to have resulted from a desire to put an end to litigation, and

to family controversy, and to adjust their differences amicably, and on terms which the members of the family regarded as just and fair—and such settlements for the peace of families, courts of equity are disposed to uphold, rather than to overturn.

Nor can it be inferred that the settlement which Carnet Walden consented to make upon his wife, of the estate which she derived from her father, was fraudulent as to his creditors. It did them no wrong. They had no claim on that property. Their debts were not contracted on the faith of it. Carnet Walden sought to probate the alleged will, which gave it to him jointly with his wife; which bequest he says was made upon his promise to the testator, that he would settle it upon his wife. He failed to establish it as the will of the decedent, and then consented to the determination of the litigation and a settlement upon terms which were acceptable to all the heirs, and distributees of the decedent. It was the wife's

96 equity, which the husband *settled on her. In *Poindexter and wife v. Jeffries & als.*, 15 Gratt. 373, Judge Moncre, in whose opinion the other judges concurred, said, "The wife's equity is so substantial an interest that it will constitute a valuable consideration for a post nuptial settlement by the husband upon her (made while the equity exists), which will be sustained against his creditors, to the extent of the equity, by a court of chancery. The same circumstances which would induce the court (said the V. C. in *Wickes v. Clarke*, 8 Paige's R. 166) to compel a settlement by the husband, or those claiming under him or in his right, will operate to uphold a deed of settlement already made, to the same extent that would be required if one should be directed to be made under the view of the court. See also the more recent case of *White by, &c. v. Gouldin's ex'ors & als.*, 27 Gratt. 491.

By the terms of the deed of the 27th of September, 1867, Carnet Walden reserves a contingent right to real estate for and during his life, if he should survive his wife, and to the whole of the personal property absolutely in that event, which would be subject to his debts, if the contingency should happen. But it is said and I believe was conceded at the bar, that he has departed this life, and Amanda F. his wife survives him: the estate then vests in his wife who survives him. There is no error in the decree of the circuit court, and the court is of opinion to affirm the same.

Decree affirmed.

97 **Ropp v. Minor & als.*

March Term, 1880, Richmond.

A testator gives one-third of his estate to his son E, another third to his daughter-in-law A, and the remaining third to said A in trust for his daughter L, the wife of J, for life, and for the use of her heirs after her death; and then the will empowers and requires the trustee for said L, "as soon as con-

venient and practicable after having received the said legacy or proceeds of said devise, to loan out the same at interest, on good and sufficient security, by bond and mortgage on unencumbered real estate, and to apply the interest or income, which shall or may arise, accrue or be derived therefrom, to the payment and discharge of all the expenses and charges necessary and required for the proper maintenance, support, and comfort of my said daughter L; or the said trustee may, if she shall in her discretion deem it proper, pay over the income or interest aforesaid to my said daughter L, semi-annually, in money, on her sole and separate receipt, independent of any interference, hindrance or control of her husband; and the said interest and income shall not be liable or taken for her husband's debts or contracts, nor be applied to the payment thereof or any part thereof." By a subsequent clause of the will, the executors were empowered and directed to sell the estate, and after paying debts and funeral expenses, and providing for an annuity for the widow, "pay the three legates named in the will." L was entitled to one-third of a farm called "Greenway," under the will, and her husband purchased the other two-thirds from the other two devisees, and in June, 1865, conveyed it to S, trustee, "for the sole and separate use, benefit and behoof of the said L, during her life, and for her heirs after her death, in the manner and form as set forth and provided in the will" of the testator. The son E, to whom all the personal property was given in a codicil, conveyed two-thirds of it by deed to A and L, to be held on the terms of the will. F, a son of L, conveyed his whole

98 interest to her "separate use, with power to dispose of it as a *feme sole*. In April, 1871, J and L his wife, executed a note for \$2,000 to R, and they and S, the trustee, on the same date, executed a deed of trust on "Greenway" to Jancy, trustee, to secure said debt. On a bill filed by R to enforce the lien of said deed of trust. **Held:**

1. **Wife's Equitable Separate Estate—Power as to Corpus.**—L had no power to dispose of, charge or encumber the *corpus* of the estate derived under the will of her father, and

***Wife's Equitable Separate Estate—Power of Alienation.**—In *Bain & Bro. v. Baff's Adm'r et al.*, 76 Va. 376, the court said, "In *Ropp v. Minor* and others, 33 Gratt. 97, 112, the intention to restrain the *cestui que trust* was deduced chiefly from the provision (not found in the present case) that the fund created was to be under the exclusive control and management of the trustee, who was not only empowered but required to apply the interest or income to the proper maintenance, support and comfort of the wife. And in *Bank of Greensboro' v. Chambers* and others, 30 Gratt. 202, a like intention was inferred from the deed as a whole, and from the plan and scheme of the settlement, the design being manifest not only to provide but secure a home for the wife and her family, as well as for their support and maintenance."

And in *Averett, Tr., et al., v. Lipscombe*, 76 Va. 404, the court said, "The cases decided by this court bearing on this question [*jus disponendi* incident to estate settled to separate use of *feme covert*] are too familiar to require citation or comment from the bench. For the distinction to be taken between a case like the present and *Bank of Greensboro' v. Chambers* and others, 30 Gratt. 202, and *Ropp v. Minor* and others, 33 Gratt. 97, we refer to what is said in the opinion delivered a few days ago in *Bain*

under the deeds for her benefit (except such, if any, as was acquired under the deed of her son F) nor to anticipate the profits, income or interest which might arise or be derived from said estate, so far as they might be required for her comfortable support; and the lien of the deed of trust to Janney, trustee, extends, and can be enforced, only on any excess of profits beyond that necessary for her support, derived from "Greenway," if any, and the interest conveyed by the deed of F, the son, if that was any. Nor can the subsequent discovery of L, *per se*, give any greater force or effect to her prior engagements than existed during the coverture.

2. Same—Construction of Will.—Under the will, the whole estate of the testator was equitably converted into money, but whether "Greenway" is treated as equitably converted into money, or as realty, the estate of L and the rights of the plaintiff to enforce his lien thereon remain the same.

3. Same—Same—Jus Disponendi.—If by a fair construction of the whole instrument creating a separate estate in a *feme covert*, the *jus disponendi*, and incidental power to encumber and charge the estate, to an extent involving alienation, be inconsistent with the plan and scheme of settlement, and the exercise of these powers would defeat the plain intent pervading the instrument, they must be considered as much forbidden as if expressly denied. *Bank of Greensboro' v. Chambers*, 30 Gratt. 202.

This was a suit in equity in the circuit court of Loudoun county, brought in September, 1876, by Samuel Ropp, to subject certain

and Brother v. Buff's Adm'r and others, 76 Va. 376." In *Christian & Gunn v. Keen*, 80 Va. 369, it was said, "In the present case the wife is the sole beneficiary in the deed of settlement. The property is conveyed for her exclusive benefit; nor is its management and control confided to the trustee. The case is therefore unlike the case of *Bank of Greensboro' v. Chambers*, 30 Gratt. 202. There the intention to withhold the power of alienation was implied from the manifest purpose of the deed of settlement, not only to provide, but to secure a home for the wife and her children. And substantially the same may be said of the cases of *Nixon v. Rose*, 12 Gratt. 425; *Ropp v. Minor*, 33 Id. 97; *Bailey v. Hill*, 77 Va. 492, and other similar cases to which counsel have referred."

Same—Effect of Discovery.—As to the effect of discovery on the wife's equitable separate estate, see *Nickell & Miller v. Handy et al.*, 10 Gratt. 336; *Burnett et al. v. Hawpe's Ex'or*, 25 Gratt. 481; *Leake, Trustee, v. Benson et al.*, 29 Gratt. 153; *Garland v. Pamplin et al.*, 32 Gratt. 305; *Price v. Planters' Nat. Bank et al.*, 92 Va. 468; *Miller v. Miller's Adm'r*, 92 Va. 510.

See generally as to Wife's Separate Estate, *Burk's Prop. Rights Marr. Women*; 1 Min. Inst. (4th Ed.), 345 *et seq.*

***Wills—Construction.**—In *Carr v. Branch*, 85 Va. 597, the principal case is cited in support of the proposition that the question of conversion depends on the intention of the testator, which need not be expressly declared, but may be derived from the general effect of the will. See also 7 Am. & Eng. Enc. of Law (2d Ed.) p. 465.

Conversion of Realty into Personality.—The principal case was cited in *Board, etc., v. Blair*, 45 W. Va. 825.

real estate which had been conveyed in trust to secure a debt of \$2,000, evidenced by a single bill dated the 12th of April, 1871, and payable two years after date, with interest payable annually* at the rate of twelve per cent. per annum, and executed by John W. Minor and Louisa F. Minor. The deed of trust to secure the payment of this bond bore the same date, was executed by T. Parkin Scott, as trustee of John W. and Louisa F. Minor, and by them, to C. P. Janney as trustee, and conveyed a tract of land in the county of Loudoun containing five hundred and fifty-five acres, known as "Greenway."

This land had been the land of Charles J. Catlett of the county of Loudoun, who died in 1845. By his will which was made in December, 1844, he gave to his wife an annuity of \$1,000 for her life, which he made a charge upon his whole estate real and personal. He gave to his son Erskine Catlett and to his heirs, one-third part of his whole estate real and personal, subject to the annuity to his wife; and he gave to Esther Ann Catlett, widow of his deceased son, and to her heirs, another third of his whole estate real and personal; subject to the annuity to his wife. The other third is disposed of as follows:

"I give and devise one other third part or portion of my whole estate, real, personal or mixed of every kind and description whatever which I may die possessed of or owning, to my daughter-in-law, Esther Ann Catlett, and her heirs, in trust for the use, benefit and behoof of my daughter, Louisa Fairfax Minor, wife of John West Minor, during her natural life, and for the use of the heirs of my said daughter after the death of my said daughter, subject to the annuity aforesaid; and my will is and I hereby empower and require the said Esther Ann Catlett, trustee as aforesaid, as soon as convenient and practicable after having received the said legacy, or proceeds of said devise, to loan out the same at interest on good and sufficient security by bond and mortgage on unincumbered real estate, and to apply the interest or income which shall or may arise, to the payment and discharge of all the expenses and charges necessary and required for the proper maintenance, support and comfort of my said daughter Louisa; or the said trustee may, if she shall in her discretion deem it proper, pay over the interest or income aforesaid to my said daughter, Louisa, semi-annually, in money on her sole and separate receipt, independent of any interference, hinderance or control of her husband or by him; and the said interest or income shall not be liable or taken for her husband's debts or contracts, nor be applied to the payment thereof, or any part thereof."

The powers given to his executors are as follows:

"And further I do hereby authorize, empower and direct my executors and executrices hereinafter named, constituted and appointed, or such of them as shall or may

undertake the trouble and labor of executing this, my last will and testament, and the survivors or survivor of them, at any time or times he, she or they shall or may deem discreet, proper, convenient and practicable, to grant, bargain, sell and dispose of at public or private sale or sales all or any part or portion of my estate whatsoever, and where-soever, real, personal and mixed; and upon such sale or sales to execute and deliver to the purchaser or purchasers thereof or of any part thereof, good and sufficient deeds of conveyance, bills of sale or other proper and necessary transfers; and out of the money which shall or may accrue or arise by or out of such sale or sales, in the first place, to pay my just debts and funeral charges; in the next place, after reserving so much of the proceeds or avails of such sale or sales of my estate as aforesaid as that the interest or income which shall or may be derived from such reservation will be sufficient to secure the payment to my wife of the annuity with which my estate is hereinbefore

101 charged, then, in the first place, *to pay the three other legatees named in this my last will and testament as hereinbefore mentioned and directed. It is to be understood that the annuity hereinbefore bequeathed to my wife is in lieu of her dower, and is to be taken and accepted; and that on her demise the sum herein authorized and directed to be reserved as aforesaid for the purpose above mentioned shall revert to my estate and be divided equally between my three last mentioned legatees in the like manner as herein mentioned and directed."

On the day after the will was written the testator executed the following codicil:

"All the personal and mixed property I may die possessed of or owning, I give and bequeath to my son Erskine; and further it is my will and desire that the sale of my real estate should not take place until after the death of my wife."

As soon as the will was admitted to record Erskine Catlett released to the other two legatees two-thirds of the personal estate left to him by the codicil, and it was provided in the deed that the three beneficiaries should take it as under the will. And Esther Ann Catlett declining to accept the trust in favor of Louisa F. Minor, by an order of the court, John West Minor was appointed trustee in the place of said Esther Ann Catlett.

In 1846 the tract of land called Greenway was divided under an order of the court, each of the three devisees taking a specific part. And by another decree in another case, John West Minor became the purchaser of the two parts allotted to Erskine and Esther Catlett, which was conveyed to him by a commissioner appointed by the court. And then by deed bearing date the 12th of June, 1865, between John West Minor of the first part, Louisa F. Minor, of the second part, and Thomas Parkin Scott of the third part, after

102 *reciting the provisions of the will of Charles J. Catlett, and the appointment of John West Minor as trustee for his wife, and that John West Minor afterwards with the separate means and estate of his

said wife, and intending to secure the same to her use according to the terms of the trust in the said will of her father, purchased the two-thirds of the said Erskine Catlett and Esther Ann Catlett in the land called Greenway, and for the purpose of carrying out said intention hath agreed to execute these presents, and the said Louisa F. Minor hath become a party thereto for the purpose of showing her assent to this deed and the selection of the trustee made, the said John West Minor in consideration of the premises and of one dollar grants and releases to T. Parkin Scott and his heirs all his said John West Minor's right, title, interest, estate, claim and demand at law and equity, of, in, to and out of the real estate and property of which Charles J. Catlett died seized and possessed lying and being in the county of Loudoun, and especially the estate and farm known by the name of Greenway, howsoever held or acquired by the said John West Minor, except about ten acres, part thereof, sold and conveyed to T. Gore, &c. In trust for the sole and separate use, benefit and behoof of the said Louisa F. Minor, wife of the said John West Minor, during her natural life, and for the use of the heirs of the said Louisa F. Minor after her death, in the manner and form as set forth and provided in the will of the said Charles J. Catlett as aforesaid.

A month before this deed was executed, to-wit: by deed bearing date on the 11th of May, 1865, Fairfax Catlett Minor, a son of Louisa F. Minor, reciting the bequest by Charles J. Catlett to Esther Ann Catlett of one-third of his estate in trust for the use of Louisa F. Minor during her natural life.

103 and for the use of her *heirs after her death, in consideration of natural love and affection, and of ten dollars, granted and conveyed to the said Louisa F. Minor, all the estate of the said Fairfax Catlett Minor in the said devise, and in all the lands, estates and other property referred to and embraced in said devise, both at law and in equity, and in possession, reversion and remainder, to and for the sole and separate property and estate of her the said Louisa F. Minor, independently of, and without the let, hindrance, control or interference of her present or of any future husband, and not to be liable for his debts, contracts or obligations, and to be receivable by and payable to the said Louisa F. Minor, solely and separately, and on her sole and separate receipt and acquittance, and with power and authority in the said Louisa F. Minor to bargain, sell and convey, bequeath and devise the same, or any part thereof, in as full, free and effectual a manner as if she were an unmarried woman, her present or any future husband notwithstanding.

The bill of the plaintiff after setting out the single bill and the deed of trust to Janev to secure it, and charging that the single bill was given for money required for the support of Mrs. Minor, sets out her interests under the will of Charles J. Catlett, and the several deeds hereinbefore mentioned: charges that Mrs. Minor has a separate estate for life under the will in the one-third of the

property which she took under the will, and in the two-thirds taken under the deed from John West Minor to Scott; that she took a fee simple estate under the deed of Fairfax Catlett Minor to her, and that her interest under the deed of Erskine Catlett, is doubtful, and it is necessary that the court shall construe said deed.

He further states that the only children of Louisa F. Minor were Fairfax Catlett
104 Minor, and a daughter *Esther who has died leaving two children, Minor Heiskell and J. Wallace Heiskell, who are infants; that Scott the trustee is dead, and James M. Wallace has been substituted as trustee in his place. And making Mrs. Minor and her husband, the trustee Wallace, Minor Heiskell, and J. Wallace Heiskell, and certain creditors of Mrs. Minor parties, he prays that all necessary accounts may be taken, that the liens and charges binding the separate estate of Mrs. Minor, the nature, character, and value of the estate and the priorities of said liens and charges may be ascertained; that the said separate estate may be subjected to the payment of his debt, and that the lien under the deed to Janney may be enforced, and for general relief.

The infant defendants answered by their guardian ad litem; Wallace, the trustee, answered at great length, insisting that Mrs. Minor was not bound for the plaintiff's debt; that it was not given for her benefit, but was the debt of John West Minor; and that Mrs. Minor had no separate estate at the time said debt was contracted, which she did or could bind or in any way make liable for its payment; and he proceeds to comment upon the will of Charles J. Catlett, and the several deeds hereinbefore referred to, and insists that John West Minor had no authority to convey to Scott the one-third of the land allotted to Mrs. Minor on the division of the estate of Charles J. Catlett; and Scott had no authority to execute the deed to Janney in trust to secure the plaintiff's debt.

John West Minor having died pending the suit, Mrs. Louisa F. Minor in January, 1878, filed her answer in the cause; which takes substantially the same grounds taken in the answer of the trustee Wallace.

The cause came on to be heard on the 24th of January, 1878, on consideration whereof the court being of opinion that the will

105 of C. J. Catlett having been *made prior to the abolition of the rule in Shelley's case," by the terms of said will Louisa F. Minor took an estate in fee in the one-third part of the tract of land known as "Greenway," and that in two-thirds of said estate, to-wit: that part thereof purchased by John West Minor from John Janney and by said Minor conveyed to T. Parkins Scott, said Louisa F. is entitled to an estate for life, and that said estates in fee and for life are the separate property and estate of the said Louisa F. Minor.

And being further of opinion that the power and control of the said Louisa F. over her said "separate estate" is absolute and unrestricted, and that the said estate has been charged by the said Louisa F. with complainant's debt;

and being further of opinion that said debt bears interest at the rate of 12 per centum per annum from April 12th, 1871, until paid, doth adjudge, order and decree that a master commissioner of this court do enquire into and ascertain the fee simple and annual value of "the separate estate" of the said Louisa F., the amount due complainant, whether or not said "separate estate" has been charged with other debts due by said Louisa F., and if so charged when, how, and for what amounts and their priorities, and report to this court.

The commissioner returned his report, by which he fixed the value of Mrs. Minor's estate in the land at \$15,000, and the annual rent at \$1,200; and he reported the debts of Mrs. Minor binding her separate estate at \$16,304.73; nearly all of which was secured by deeds of trust and the balance by judgments or bonds.

The court seems to have granted a rehearing of the decree of January 24th, 1878; and the cause came on again to be heard on the 6th of May, 1879, when the court made the following decree:

106 *This cause coming on for a further decree under the rehearing had at the last term, and being further argued by counsel, and the court being of opinion that under the true construction of the will of Charles J. Catlett the property thereby settled to the use of his daughter, Louisa Fairfax Minor, is to be regarded and dealt with as personality and not realty; that said Louisa had no power to dispose in any way of the corpus of said property; that her power during coverture to alienate (in advance of its receipt) the income therefrom is prohibited by a clear implication from the terms of said will; that the several deeds of trust to secure the debts in the proceedings mentioned are therefore ineffective to create any lien upon said income for their payment; and that the plaintiffs have no right or equity to interrupt the application of said income (both that heretofore accrued and that hereafter to accrue) "to the proper maintenance, support and comfort" of the said Louisa during her lifetime; it is therefore ordered, adjudged and decreed that the plaintiffs' bill, so far as it seeks to subject said income to the payment of said debts mentioned in said deeds of trust, be and is hereby dismissed, and that said bill be also dismissed so far as it seeks to subject the corpus of the property in the proceedings mentioned to the payment of said debts, except as to the interest or estate therein which became vested in said Louisa Fairfax Minor under the deed from Fairfax C. Minor dated on the 11th day of May, 1865, which said interest or estate the court now adjudges to be subject to the payment of said debts.

From this decree the plaintiff obtained an appeal to this court.

Brook and Scott, William H. Payne and Charles P. Janney, for the appellant.
107 *S. F. Beach, for the appellees.

BURKS, J., delivered the opinion of the court.

There can be no doubt, both upon principle

and authority, that the execution by Mrs. Minor, in conjunction with her husband, either as principal or surety, of the bond for two thousand dollars, the payment of which with the interest thereon, the appellant is seeking to enforce, operates a general charge upon her separate estate, and that the several deeds of trust on the "Greenway" farm, to the extent of her interest therein, which is the principal portion of said estate, are specific liens on said interest, unless her power to alien or encumber her separate estate was restrained or denied by the instruments creating it. *McChesney & als. v. Brown's heirs*, 25 Gratt. 393; *Burnett & wife v. Hawpe's ex'or*, Id. 481; *Darnall & wife v. Smith's adm'r & als.*, 26 Gratt. 878; *Bank of Greensboro' v. Chambers & als.*, 30 Gratt. 202; *Justis v. English & als.*, Id. 565, and cases there cited. See also *Garland v. Pamplin & als.*, 32 Gratt. 305.

She derived her interest in one-third part of the farm under the will of her father, Charles J. Catlett, who died in 1845, and in two-thirds under the deed of her husband, executed June 12, 1865. The conveyance by this deed is to T. Parkin Scott, in trust, as declared, "for the sole and separate use, benefit and behoof of the said Louisa Fairfax Minor, wife of the said John West Minor, during her natural life, and for the use of the heirs of the said Louisa Fairfax Minor after her death, in the manner and form as set forth and provided in the will of the said Charles J. Catlett as aforesaid."

We are thus referred by the deed to the will, and the extent of the wife's power over the estate created *by the former is to be ascertained and measured by her power over the estate given by the latter.

By his will, the testator, after giving to his wife an annuity of one thousand dollars during her life and charging his whole estate with its payment, gives to his son Erskine Catlett and to his daughter-in-law Esther Ann Catlett and to their heirs respectively, each one-third part of his whole estate subject to the annuity bequeathed to his wife. The remaining third part he gives to his daughter Mrs. Minor by the following clause: "I give and devise one other third part or portion of my whole estate, real, personal or mixed of every kind and description whatever which I may die possessed of or owning, to my daughter-in-law, Esther Ann Catlett, and her heirs, in trust for the use, benefit and behoof of my daughter Louisa Fairfax Minor, wife of John West Minor, during her natural life, and for the use of the heirs of my said daughter after the death of my said daughter, subject to the annuity aforesaid; and my will is and I hereby empower and require the said Esther Ann Catlett, trustees as aforesaid, as soon as convenient and practicable after having received the said legacy, or proceeds of said devise, to loan out the same at interest on good and sufficient security by bond and mortgage on unincumbered real estate and to apply the interest or income which shall or may arise, accrue or be derived therefrom to the payment and discharge of

all the expenses and charges necessary and required for the proper maintenance, support and comfort of my said daughter Louisa, or the said trustee may, if she shall in her discretion deem it proper, pay over the interest or income aforesaid to my said daughter, Louisa, semi-annually in money on her sole and separate receipt independent of any interference, hindrance or control of her husband or by him; and the said interest or income shall not be *liable or taken for her husband's debts or contracts, nor be applied to the payment thereof, or any part thereof."

By a subsequent clause, the executors are empowered and directed to sell his property, and from the proceeds of sale, first pay his debts and funeral charges; next, set apart a sum, the annual interest or income from which will be sufficient to pay the annuity to his wife, and then, in the language of the will, "pay the three other legatees named in this my last will and testament as hereinbefore mentioned and directed. He further directs, that the principal sum set apart to provide the annuity to his wife, shall, on her demise, be equally divided among the legatees aforesaid. By a codicil, he gives all his personal property to his son Erskine, and declares it to be his will and desire that the sale of his real estate shall not take place until after the death of his wife.

We are of opinion, that by the provisions of this will, the whole estate of the testator was equitably converted into money.

It is well settled, that land directed or agreed to be sold and turned into money (upon the principle that what is agreed or ought to be done is considered as done) shall be treated as assuming the quality of personalty, and as continuing impressed with that character, until some person entitled to the proceeds shall elect to take the subject in its original character of land. *Per Baldwin, J. in Siter Price & Co. v. McClanichan and others*, 2 Gratt. 280, 294. See also *Fletcher v. Ashburner*, and notes, *English and American*, 1 Lead. Cas. Eq. Part 2. (4th Ed.), 1118 et seq.; *Craig v. Leslie*, 3 Wheaton R. 563; *Harcum's adm'r v. Hudnall*, 14 Gratt. 369 and cases there cited.

In the last named case, it is said, (p. 377), that no discrimination appears to be made in this doctrine of "equitable conversion" between the case of a conversion which is not required to be made at any particular period, and which therefore, in case of a will, should be made presently after the death of the testator, and one in which the conversion is to be made at some future period prescribed. In the latter case, "we must consider the property as converted from the time when it ought to have been converted." *Per Cranworth, Lord Chancellor, Ferrie v. Atherton*, 28 Eng. Law and Eq. R. 1.

To have the effect in equity of a conversion, the direction to sell must not be merely optional. It must be imperative. *Tazewell and others v. Smith's adm'r*, 1 Rand. 313, 320. The intention, however, to convert may be implied without express words di-

recting a sale. It is sufficient if such intention be clear. 1 Lead. Cas. Eq. (4th Ed.), 1138.

Looking to the clause which authorizes the sale, the language in the first part is mandatory. * * * "I do hereby authorize, empower, and direct my executors * * * to sell and dispose of," &c. In *Green v. Johnson*, 4 Bush (K'y) R. 164, the language of the will was, "I authorize and request my executors * * * to sell and convey all my lands, except," &c. The word "request" was considered as synonymous with "require—direct—order," the latter words being regarded as mandatory.

By the will of Charles J. Catlett, the only discretion given to the executors is as to the time or times and manner of sale of the different portions of the property. In a case in New York, where a like discretion was given, the direction to sell was nevertheless considered imperative. *Stagg v. Jackson*, 1 Comstock R. 206.

If the clause directing the sale be read, as it should be, in connection with the 111 other parts of the will, and *especially with the clause already quoted, which makes provision for Mrs. Minor, the intention to convert the estate into money is clearly manifested: for, the provision and the only provision made for her presupposes a sale, one-third part of the proceeds of which is required to be put out on loan for her benefit.

In *Phelps' ex'or v. Pond*, 23 New York R. 69, where a testator authorized his executors to sell real estate, and it was apparent from the general provisions of the will, that he intended such estate to be sold, the doctrine of equitable conversion was applied, although the power of sale was not in terms imperative. See also *Power v. Cassidy*, 9 Reporter 351; *Burr v. Sims & als.*, 1 Wharton (Penn.) R. 252, 262.

The entire real estate of the testator being equitably converted into money, the important inquiry is, what limitation or restraint, if any, was placed upon the power of Mrs. Minor to alien or encumber the portion given in trust for her? And here it may be remarked that the same rule applies, which has been already adverted to as applicable in determining the question of equitable conversion. The restriction need not be expressed in negative words. No particular phraseology is required, but the intention must be clear. It is sufficient if the intention can be gathered from the whole instrument. 2 Perry on Trusts, § 670 and cases cited; *Freeman, adm'r v. Flood*, 16 Ga. 528.

In *Bank of Greensboro' v. Chambers & als.*, 30 Gratt. 202, restraint upon alienation was deduced by construction from the instrument as a whole. In the opinion in that case, it was said, "We do not find in the deed of settlement in this case any express interdiction or limitation of the *jus disponendi* and of the incidental power to encumber and charge the separate estate to an extent involving alienation, but, if by a fair construction of the instrument, the ex-

112 ercise of *these powers would be inconsistent with the plan and scheme of the settlement, and would defeat the plain

intent pervading the deed, they must be considered as much forbidden as if expressly denied."

The will, which fixes the limitation, if any there be, to the wife's power over her separate estate in the present case, does not in terms forbid her to alien, charge or encumber the estate, nor does it contain any formal clause against anticipation, such as is sometimes found in settlements, especially in England, but the intention to restrain seems to be plainly implied. The main object of the testator in the provision made for his daughter manifestly was to secure to her a comfortable support and maintenance as long as she lived. To accomplish this object, two things at least were necessary to be done—to exclude the rights of the husband and limit the powers of the wife. The first was effected by giving to the wife a separate use and the second by creating a permanent fund to be under the exclusive control and management of a trustee, who was not only empowered but required to "apply" the interest or income "arising from the fund to the payment and discharge of all the expenses and charges necessary and required for the proper maintenance, support and comfort" of the wife. Unlimited power in the wife to dispose of the fund or to anticipate the income would be a power to frustrate the main design of the testator in creating the trust, namely, the providing and securing to his daughter with reasonable certainty support and maintenance during her life, and it must therefore be taken that he intended to deny to her any such power.

The alternative provision, which authorizes the trustee, instead of personally applying the interest or income to her support, to pay it over to her "semi-annually in money on her sole and separate receipt, is 113 *permissive only. The trustee could not be compelled so to pay it over "in money," but is merely authorized to do so, "if she (the trustee) shall in her discretion deem it proper." The imperative duty first imposed on the trustee to "apply" the income or interest, and the alternative discretionary power subsequently conferred to pay "semi-annually in money," would seem to be inconsistent with the power of the cestui que trust to alienate the income by anticipation, at least so much of it as might be required for continuous support.

There are adjudged cases in the English chancery to the effect, that to direct the "profits to be paid from time to time into the proper hands of the wife," or that the "profits shall be paid to such persons and in such manner as the wife shall from time to time, during her life, notwithstanding her coverture, by any note or writing appoint, and in default of appointment, into her proper hands for her separate use," or that the profits shall be paid "as the same became due and payable, into the hands of the wife, and not otherwise, and that the receipts of the wife alone for what shall be actually paid into her own proper hands should be a sufficient discharge," does not sufficiently evince an intention to restrain anticipation

of income. These cases are referred to in 1 Minor's Institutes 327 and have been examined. Some of them were cited in argument by the learned counsel for the appellant. Without meaning to question the correctness of the decisions, it is sufficient to say, that the language employed is not the same as that used in the will which we have to construe in this case. Owing to the diversity in phraseology and attending circumstances, decided cases can seldom have a controlling influence in the construction of instruments. We may however, for illustration, refer to Perkins, &c., v. Hays and others, 3 Gray's R. 405, which is somewhat analogous to the case in judgment.

114 *A testator bequeathed an annuity to his widow, to be paid to her, clear of all charges and deductions whatever, during her life; or, in case of her incapacity, at any time, by sickness or otherwise, to receive it, to any person lawfully appointed to represent her; or, in default of such appointment, to be applied by his executors to her support, and the support and education of his minor children. It was held, that the widow had no power to alienate any part of the annuity by anticipation—that the power of alienation by anticipation was inconsistent with and would tend directly to defeat the main object and purpose of the will, to-wit, the support and maintenance of the wife, and the support and education of the children during their minority. "If the alienation were made," says the judge delivering the opinion of the court, "and the event anticipated and provided for in the will was to occur, the duty of the executors or surviving executors to apply the annuity to her support would still remain, and must be discharged, or the main object and purpose of the trust be defeated.

Our conclusion is, that Mrs. Minor had no power to dispose of, or charge, or encumber the corpus of the estate derived by her under the will of her father or acquired by the several deeds set out in record, except such, if any, as was acquired under the deed of her son Fairfax C. Minor, dated the 11th day of May, 1865. If she took anything under the last named deed, though to her separate use, she was expressly empowered by the deed to dispose of it as if she were "an unmarried woman." Nor did she have the power to anticipate the profits, income or interest which might arise or be derived from said estate (except as to the interest, if any, acquired as aforesaid under the deed of her son Fairfax), so far as they might be

115 required *for her comfortable support; but, we think, the restrictions upon her powers does not extend to so much of said profits, income or interest as shall exceed what may be necessary for such support. The effect therefore of the several deeds of trust was to create liens for the debts mentioned therein on such excess, if any, of the profits or income arising from the Greenway farm during the life of Mrs. Minor, and also on the estate, if any, acquired by her under the deed of her son Fairfax; and this is the full extent of the encumbrances created by said deeds.

It was earnestly argued by the learned counsel for the appellant, that even if the real estate devised by the will was equitably converted into money (a proposition they do not admit, but which to us seems clear), yet it was reconverted into real estate by the election of the parties, shown by the suit for partition in 1846, the actual division of the land under a decree in that suit, and subsequent acts and conduct of the parties. In the view we take of this case, it is not at all necessary to decide, whether any valid election was made or not. For if it be conceded, that it was made, and that the Greenway farm is to be treated as land, the concession does not help the appellant. Whether the estate be realty or personalty, it remained the separate estate of Mrs. Minor, and bound by all the fetters put upon it by the will; the portion acquired under the deed of her husband being placed by the deed on the same footing with the portion derived under the will. Election might change the form in which she would take and hold the estate, but it could not enlarge her powers over it. The restraint imposed was a modification of the separate estate, which she could not change or effect by election or otherwise.

116 *The Greenway farm having been equitably converted into money, whether it should be treated as personalty, or as reconverted into realty, and whether the estate of Mrs. Minor therein be absolute or for life only, or as to a portion absolute and as to the residue for life, are immaterial questions in this case; as her powers over her separate estate (the only matter we have to deal with), during coverture at least, were limited and restrained in the manner and to the extent already indicated.

The subsequent discovery of Mrs. Minor cannot per se give any other or greater force and effect to her prior engagements than they had during her coverture. Such engagements did not bind her personally either at law or in equity, so as to warrant a personal judgment or decree against her. They affected her separate estate to the extent and only to the extent of her then existing powers over it. They had no other operation. Her subsequent discovery could not, upon any principle known to us, operate by estoppel or otherwise to enlarge the liabilities of that estate imposed by the engagements when entered into.

The only error in the decree appealed from is the dismissal of the appellant's bill, so far as it seeks to subject the income of the estate to the payment of the debts mentioned in the deeds of trust. Such dismissal, in respect of said income, should have been confined to so much of the bill as seeks to subject the income required for Mrs. Minor's support and maintenance.

For this error, the decree must be reversed in part, and the cause remanded for further proceedings.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript *of the record of the decree aforesaid and the

arguments of counsel, is of opinion, for reasons, stated in writing and filed with the record, that so much of the income which has accrued and so much as shall hereafter accrue from the separate estate of the appellee Louisa Fairfax Minor as shall exceed what may be necessary for her comfortable support and maintenance continuously during her life is liable for the payment of the debts mentioned in the several deeds of trust referred to in said decree, and that so much of said decree and so much only as dismisses the complainant's bill as far as it seeks to subject such excess to the payment of said debts is erroneous: therefore, it is decreed and ordered, that so much of said decree as is hereinbefore declared to be erroneous be reversed and annulled and the residue thereof be affirmed, and that the appellant recover his costs by him expended in the prosecution of his appeal aforesaid here, to be paid out of such excess, if any there be, of said income now under the control of the said circuit court or which may hereafter arise, and the said circuit court is directed by proper order to provide for the payment of said costs out of said excess: and this cause is remanded to the said circuit court with directions to apply the said income accrued and which shall hereafter accrue first to the comfortable support and maintenance of the said Louisa Fairfax Minor continuously during her life, varying the allowance to her for that purpose from time to time, if need be, so as to secure to her at all times such comfortable support and maintenance, if the income be sufficient, and if necessary for that purpose the whole of said income shall be so applied. And if the income be more than sufficient for that purpose, the surplus shall be applied to the payment of the debts aforesaid: and the said circuit court is *directed to take further proceedings in this cause in conformity with the foregoing opinion and directions in order to a final decree: all of which is ordered to be certified to the said circuit court of Loudoun county.

Decree reversed in part.

119 *Meredith, ex parte.

Harrison, ex parte.

April Term, 1880, Richmond.

[36 Am. Rep. 771.]

Absent *Burks*, J.*

Judges—Election—Term of Office.†—A judge of the county court who has been elected to fill a

*Judge *Burks* was interested in the question involved in the case.

Judges—Election—Title to Office.†—Reviewed and overruled in *Burks v. Hinton*, 77 Va. 1; *Fitzpatrick v. Kirby*, 81 Va. 467.

In *Howison v. Weedon*, 77 Va. 704, which was a petition to compel defendant to surrender the office of judge, it was held that the parties to the controversy were privies to the principal case and that the decision therein, not having been reversed, was binding on them.

See also in reference to the question *Estes v. Ed-*

vacancy occasioned by the death of a former judge, is elected for a full term of six years, and not for the unexpired term of the former judge. And this is equally true of judges of the court of appeals and the circuit courts.

The question in this case was, who was the judge of the county court of Prince William. In March, 1878, John C. Weedon was elected by the general assembly and commissioned by the governor, judge of the county court of Prince William to fill the vacancy in the office occasioned by the death of Judge Aylett Nicol. In January, 1880, Charles G. Howison was in like manner elected and commissioned as judge of said county court. To have the question settled as to which of these was the judge of the court, each of them held the court at its March term; and Judge Weedon made an order committing William G. Harrison, the deputy sheriff, for refusing to obey an order made by him, and Judge Howison made a like order committing Elisha E. Meredith, the attorney for the Commonwealth, for his refusal to proceed with the prosecution of a prisoner. And *Harrison and Meredith thereupon applied to this court for writs of habeas corpus.

Benjamin T. Suttle and Frank W. Christian, for Meredith.

There was no counsel for Harrison.

STAPLES, J. This is an application for writs of habeas corpus in two cases. The petitioners are, however, merely nominal parties. The real controversy, which is of an amicable nature, is between Honorable John C. Weedon on the one hand, and Honorable C. G. Howison on the other, each claiming to be the judge of the county court of Prince William.

The former was elected in the month of March, 1878, to fill a vacancy occasioned by the death of Judge Nicol. The latter was elected at the last session of the legislature. The sole question to be decided is whether Judge Weedon was elected and is entitled to hold for the full constitutional period of six years, or for the remainder of Judge Nicol's unexpired term. This question involves the official tenure of one of the judges of this court, two or more judges of the circuit court, and several judges of the county court, and is otherwise of considerable importance and interest in the administration of justice.

By reference to 13th section of article 9 of the Constitution we find the following provision upon the subject of the county judges:

"County judges shall be chosen in the same manner as the judges of the circuit courts. They shall hold their offices for a term of six years, except the first term under this Constitution, which shall be three years." The provision relating to the

monson, 33 Gratt. 510; *Bland & Giles County Judge's Case*, 33 Gratt. 443; *Montague v. Massey*, 76 Va. 307; *Neal v. Allen*, 76 Va. 437, the foregoing cases having been overruled by *Burks v. Hinton*, *supra*; *Jameson v. Hudson*, 82 Va. 279; *Shumate v. Sup'rs of Fauquier County*, 84 Va. 574. And see 19 Am. & Eng. Enc. of Law (1st Ed.) 562n.

circuit judges is as follows: "For each circuit a judge shall be chosen by the
 121 *joint vote of the two houses of the general assembly, who shall hold his office for a term of eight years. It is also provided that the judges of the court of appeals shall hold for a term of twelve years, and the judges of the corporation courts for a term of six years." These are all the provisions of the Constitution having any bearing upon the question that need now be mentioned. It will be observed there is no reference whatever to unexpired terms of judicial officers. No distinction is made between the term of a county judge elected at the expiration of the constitutional period of six years and the term of a judge elected to fill a vacancy occasioned by death, resignation, or removal.

Whenever elected, or for whatever purpose elected, the incumbents shall hold for six years. The language is general and positive. It embraces all the judges. It refers to the offices of all. If, therefore, in any case we hold the duration of a term to be less than six years, it must be done by supplying words not found in the Constitution. The second section of the fifth article provides that the governor, during the recess of the general assembly, may fill pro tempore all vacancies in those offices for which the Constitution and laws make no provision, but his appointments shall expire at the end of thirty days after the commencement of the next session of the legislature. Now, as the duration of the governor's appointment is expressly limited, if it was intended that the legislative appointment, upon the happening of a vacancy, should be also limited, the fair inference is it would have been so expressly declared. The term of an office is the estate or interest the incumbent has in it. When he abandons or forfeits that interest by resignation or removal the office reverts to the people or other appointing power.

Vacancy *ex vi termini* means vacancy in the office and not in the term. When
 122 we speak of vacancy in an *office we mean there is no incumbent—no one entitled to exercise its powers and receive its compensation. 2d Abbott, Law Dictionary 624; *People v. Waite*, 9 Wend. 58. When an election is made to fill a vacancy, the election carries with it all the rights, immunities, and privileges attached to the office, one of which is the right to hold for the full period prescribed, and not to merely serve out a vacant term of office of a predecessor.

Under the Constitution of 1829, the election of judges was for the life of the incumbent. Upon his resignation, or removal, his successor was also elected for life. Could it be said, with any sort of propriety, that in such case the election was merely for the unexpired term; that the incumbent would hold only for the life of his predecessor? This would be the inevitable result if the proposition sometimes advanced be correct, that the vacancy is in the term and not in the office, and the incumbent is entitled merely to the residue of the unexpired term.

By the express words of the present Constitution the only mode of filling the office permanently, however the vacancy may occur, is by election, and when that is made it is declared "they (the county judges) shall hold their offices for the term of six years."

Similar words are found in the constitutions of nearly all the States, and it so happens they have been judicially construed in numerous cases involving the identical question now before us. A reference to some of these cases will materially aid our inquiries here.

In *Banton v. Willson*, 4 Texas 400, Hemphill, J., in commenting upon like provisions in the Texas constitution, said, when the term of an office is fixed by the Constitution at say four years, each succeeding incumbent, although elected to fill a vacancy, is entitled,

unless it be otherwise provided in the
 123 Constitution, to *hold the office for the full period. See *Bradley v. McCrabb*, Dallam Digest 504-511. In *Brewer v. Davis*, 9 Humph. 208-213, the court says: "The amended Constitution in plain terms provides that clerks of inferior courts shall be elected for four years. There is no authority to be found in the Constitution for an election for a shorter period. And although the election may be fixed, as in this case, at a time different from that appointed by law for the election of county officers in other courts of the State, or to fill a vacancy occasioned by the death, resignation, or removal of the prior incumbent, still, in either case, the person elected will be entitled to hold his office for the full constitutional term. It is not competent for the legislature to shorten the term, and any enactment to that effect is void. The argument that this rule will lead to confusion and want of uniformity in the time of holding elections is of little force; for, as is said in the case of *Powers v. Hurst*, 2 Humphrys 24, such uniformity is of no practical utility; and were it otherwise, is not attainable. In *Hughes v. Buckingham*, 5 Smedes & Marshall 632, 648, Chief Justice Sharkey discussed this question with his usual ability and learning. In the course of his opinion he said the law declares how long the clerk shall hold when appointed, but it does not declare when the appointment shall be made. On general principles, then, each appointment must hold for the length of time prescribed by the statute. If the incumbent so appointed should choose to abandon or forfeit his interest the term of his successor commences as soon as he may be designated by the chancellor and the law, or the grant, gives him the full term, not the remnant which has been abandoned by his predecessor. This question is not a new one in this State. It arose as early as 1834, and frequently since. The distinguished chancellors who have had it before them
 124 seem to have bestowed on it *due consideration, and have decided it with entire unanimity. In the case of *The People v. Green*, 2 Wendell, 272. Marcy, J., delivering the unanimous opinion of the Supreme court of New York, said: "By the general

provisions elections for the sheriff are not to be held oftener than once in three years, except in cases of vacancy. In what part of the Constitution is it declared, or from which of its provisions are we authorized to infer an exception in case of a person elected to an office vacant by the death, resignation, or removal of his predecessor? Why should he not hold as long as he should have done if elected to the end of a full term? Green was elected, as I understand the provision, to fill the vacant office, and not merely to serve out the vacant term of his predecessor. When Green came into the office he took it with all the rights, powers, and incidents belonging to it under any circumstances, one of which was a tenure of three years." See also *The People v. Constant*, 11 Wend. 132.

These citations may be multiplied almost indefinitely, for this identical question has been repeatedly decided in other States—besides those mentioned—and those decisions have been almost uniformly the same way. I shall content myself with simply referring to some of the cases on the subject, for which I am mainly indebted to the researches of counsel, and an article in January No. of the Law Journal. *Marshall v. Harwood*, 5 Md. 423-431, and cases there cited; *Sansbury v. Middleton*, 11 Md. 297; *The State v. Huison*, 1 McCord 240; *The State v. McClintock*, Id. 245; *Crowell v. Lambert*, 9 Minn. 283; *Keys v. Mason*, 3 Sneed's R. 6; *People v. Burbank*, 2 Cal. 378; *Wam-mach v. Holloway*, 2 Ala. 31.

The decisions in all these cases, or nearly all, were based upon Constitutions of the different States, which, *like ours, contained no express provisions with respect to unexpired terms.

In all of them the requirement that the judge or other officer "shall hold for a term of years specified" has received the same interpretation. In every instance those words have been construed as requiring an election for the full constitutional term, whether the vacancy be created by death or resignation, or by expiration of a regular term. Each incumbent holds for the length of time prescribed by the Constitution, unless prohibited by express enactment or implication equally plain. When we see certain provisions incorporated into our Constitution also found in the Constitutions of other States, and these provisions have received uniformly the same construction in numerous cases, we must suppose it was intended they should be construed in like manner here. At all events it would be a little surprising if this court should now give to these provisions a construction entirely different from that given in every other State by judges of the highest respectability and learning. So far from there being in other parts of our Constitution anything militating against this interpretation, there is abundant matter to confirm and sustain it.

The second section of the sixth article of the Constitution, after providing for the election of clerks, sheriffs, Commonwealth attorneys, and other county officers, further

provides that all regular elections for county officers shall be held on the first Tuesday after the first Monday in November, and all said officers shall enter upon the duties of their offices on the first day of January next succeeding the election, and shall hold their respective offices for the term of three years, except that the county and circuit court clerks shall hold them for four years. With respect to the township officers, like provision is made for filling them at *regular elections, to be held at stated periods through the State.

These references are sufficient to show that in filling the offices elected by the people the primary object is uniformity, to avoid as far as possible the necessity of special elections, and to establish a system of general elections throughout the State.

And although it is not expressly so provided, it follows by necessary implication that whenever a vacancy occurs the election is for the unexpired term only. For if the incumbent is permitted to hold for the full constitutional term, in the course of time the deaths, resignations, and removals occurring in the different counties would have the effect practically to abrogate the system of regular elections. When, therefore, the Constitution provides that certain officers shall be elected at a regular election, and that this election shall take place on a certain day, named at regular stated periods, it follows by inevitable implication that the terms of all such offices are to be controlled by the regular election held throughout the State.

By this system the confusion and expense incident to frequent special elections are avoided, and the importation of fraudulent votes from other counties in some measure prevented.

We look in vain for the slightest indication of any such policy in the election of judges. No day is appointed for the purpose. Nothing is said even as to the years in which they are to be elected. If the legislature should fail to make an election at the expiration of the regular term the incumbent would hold over until his successor is chosen and qualified. This distinction between the offices of judges elected by the legislature and offices elected by the people is not accidental. It is recognized in the Con-

stitutions of other *States, and has been the subject of judicial discussion elsewhere.

In the cases of *Hughes v. Buckingham*, 5 Smedes & Marshall 648, and *Smith v. Half-acre*, 6 How. Miss. R. 582-602, this very distinction was much considered by the Supreme court of Mississippi. In the latter case Chief Justice Sharkey, in the course of his opinion, said: "Counsel rely entirely on the force of the provision contained in the 11th section of the 4th article, which declares that the circuit judges shall be elected by the qualified electors of each judicial district, and hold their offices for the term of four years."

This section considered alone might justify this construction, but the whole instrument

is to be taken together with reference to all its parts. Other parts of the instrument provide that a general election shall be held biennially in November for the purpose of electing officers under the Constitution. The term of four years is to be taken in connection with this other provision.

The conclusion irresistably forces itself on us that the Constitution intended that all terms of office should begin and terminate with the regular election. The same view is strikingly presented in the cases decided by the Supreme court of Maine, but it is unnecessary to do more than refer to them here—61 Maine 601; 64 Maine 596.

Whether, therefore, we look at the clause of the Constitution relating to the election of judges by itself, or, what is more correct, in connection with other parts of the instrument, we are led to the same conclusion. There is but a single circumstance which at all militates against the view now taken. The Constitution of 1851 contained a provision that special elections to fill vacancies in the office of judge of any court shall be for the full term. See Article 4, section

128 38, Constitution *of 1851. That provision is not found in the present Constitution, and it has been argued that the omission is evidence of an intention to change the law on the subject.

To this it has been very properly answered that the motives that influenced the framers of the Constitution in leaving out the provision are at best a mere matter of conjecture and inference. They may have thought it superfluous, and therefore unnecessary. They may have supposed such a provision with reference to the term of the judges might be construed as establishing a different rule with respect to the terms of all other offices, and therefore calculated to mislead.

In the Constitution of 1851 such a provision found its appropriate and necessary place. Inasmuch as all the judges under that instrument were elected by the people, it might be inferred that all of them were to be elected at some regular or general election, and it was no doubt apprehended the legislature might so construe it. It was to guard against these contingencies, to place the terms of office beyond all interference, that the framers of the Constitution, out of abundant caution, adopted the provision in question. In the present Constitution it has been seen that such a provision was wholly unnecessary, because the judges are now elected by the legislature, and their terms of office fixed in words of plain and unambiguous import.

If we are to believe the attention of the men who framed the present Constitution was called especially to this subject, if their purpose was that in cases of vacancy the incumbent shall hold only for the unexpired term, would they not have said so in plain and unmistakable language? Would they have left a matter of so much importance in doubt and uncertainty? A single line, the change of a word in the phraseology of the Constitution of 1851, would have

129 *accomplished the purpose. In the

language of Judge Marcy, in *The People v. Green*, already cited, "the framers of the Constitution must have foreseen that such cases would happen very frequently, and it is therefore reasonable to infer that if they intended that persons elected to fill vacancies in the office of sheriff should hold for a shorter period than the general term, they would not have left that intention to be evolved by ingenious distinctions and dubious inferences."

We come next to consider the joint resolution passed by the legislature the 18th of December, 1872, which declares that all elections by the general assembly to fill all vacancies shall be only for the unexpired term of the predecessor. This resolution was adopted nearly four years after the Constitution was framed, by a legislature composed of entirely different men from those who sat in the Convention. It is therefore not entitled to any weight as a contemporaneous exposition of the Constitution.

It seems, however, to show that, in the opinion of that legislature at least, elections by the general assembly to fill vacancies would be for the full term of office in the absence of legislation on the subject, and therefore it was a different rule that was sought to be established by statute.

The only provision in the Constitution which, by possibility can be construed as authorizing the general assembly to exercise a power of that sort is found in the twenty-second section, article fifth, of that instrument. It declares that the manner of filling vacancies in office in cases not specially provided for by the Constitution shall be prescribed by law. Clearly, however, the manner of filling a vacancy has no sort of connection with the term of the incumbent after the vacancy is filled. The Constitution fixes the term of office, but leaves to the legislature the power of declaring the
130 *manner in which vacancies shall be filled; and this power has been repeatedly exercised with respect to all officers elected by the people. Sec. 21, chap. 6, Code 1873.

It is universally conceded to be a most delicate exercise of authority to pronounce an act of the legislature unconstitutional. It is one which a judge, conscious of his fallibility, will shrink from exercising in any case where he can conscientiously avoid the responsibility. But when the conflict between the Constitution and the law is plain and palpable, the court must decide between them. One of them must of necessity give way to the other. The Constitution is the supreme power in the State, and we are sworn to obey it. If that supreme power gives one rule and a subordinate authority gives a contradictory rule, the latter is inoperative and void, and the court must so decide.

If the Constitution of Virginia fixes the tenure of all her judicial officers, and upon this point there can be no doubt, it is clear that any attempt of the legislature to change that tenure is a plain usurpation of power. Upon this point, fortunately, there is abun-

dant authority. In *Washington Keys v. Mason*, 3 Snead, 6, it was held that as the Constitution of Tennessee fixed the term of justices of the peace at six years, the incumbent, although elected to fill a vacancy, was entitled to hold for the full term, and the act of the legislature limiting the term to the remainder of that of his predecessor in office was unconstitutional and void.

In *People v. Burbank*, the Supreme court of California said: "The legislature may direct the time and prescribe the mode of election, but it cannot change the tenure. It can no more prescribe that the judge elected shall hold for a part of a constitutional period than for double the time."

131 If a commission, issued by *the governor, cannot control the provisions of an act of the legislature, neither can an act of the legislature control a provision of the Constitution."

"As soon as the ordinary is elected he is in office under the Constitution, and entitled to all the rights and immunities conferred by that instrument." "If," says Mr. Justice Huger, of the constitutional court of South Carolina, "the people declare and ordain in their constitution that an office shall be held by a particular tenure, it would be as much usurpation in the legislature to alter that tenure as it would be in the governor to commission for a longer period than directed by the legislature."

In the case of *Bradley v. McCrabb*, already cited, Chief Justice Hemphill, on delivering the opinion of the court, said: "There is nothing in the terms of the Constitution which can militate against the plain and just conclusion that the person appointed by the elective power to the office of district clerk is entitled, whenever he may be elected, to hold the same for four years. It cannot, therefore, be material, in point of fact, to ascertain whether McCrabb was elected for a less or even a greater period than the term of four years."

"The Constitution prescribes the tenure of his office, and under its high guarantees he could not be disturbed even by a solemn act of the legislature without subverting the fundamental principles of the social compact." There are numerous other authorities to the same effect, but these sufficiently illustrate the principle. See the cases already cited, and *Horn v. Gamble*, 62 Penn St. Reports 343, and *Howard v. State*, 10 Ind. 99; *Lowe v. Commonwealth*, 3 Met. R. 237; *Brown v. Booth*, *Grover v. Booth*, 1.

If the legislature of 1872 and '73 was constitutionally competent to enact that every judge elected to fill a vacancy shall hold

for the unexpired term only, another **133** *legislature is equally competent to repeal the enactment, and thus the tenure of office is left to be determined by the conflicting and changing opinions of different legislatures. Such plainly is not the spirit of the Constitution; such was not the intention of its framers, and such has not been the policy of the State.

If the tenure of judges in cases of death, resignation, or removal, is not fixed by the

Constitution, what was the tenure before the joint resolution was adopted? What would it be had the legislature failed to take action? The Honorable Wood Bouldin was elected a judge of this court to supply a vacancy occasioned by the death of Judge Joynes. This was nearly a year before the passage of the joint resolution. What was his term of office at the time of his election? Was it uncertain? Had the Constitution made no provision for the term of its highest judicial offices in cases constantly recurring? Such an idea is at war with the whole spirit of that instrument; no one can read it without an absolute conviction that the term of every constitutional office is plainly prescribed therein.

Judge Bouldin was entitled, as soon as elected, to hold for the term of twelve years, or merely for the residue of Judge Joynes' unexpired term. It was one or the other. Which was it? The Constitution says the judges of the court of appeals shall hold for the term of twelve years. There is no other term prescribed.

My opinion, therefore, is that when a vacancy occurs in the office of judge by reason of death, resignation, or removal, the incumbent elected to fill that vacancy holds for the full term, as declared in the Constitution. This has been the policy of the State from the beginning.

Under the Constitutions of 1829 and 1776 the judges were elected for life of the **133** appointee, whether the *vacancy was occasioned by the resignation, removal, or death of the previous incumbent. And when, under the Constitution of 1851, the term for years was substituted for the life tenure, the distinguished men who framed that instrument were careful to provide, out of abundant caution, that in every case the election of judges should be for the full term prescribed in the Constitution. A rule thus adopted, a policy thus adhered to, through all the changes of the government, should not be abandoned upon light and fanciful ground. We ought to be able to find in the Constitution evidence of such abandonment expressed in plain and unmistakable language. The reasons which no doubt influenced the various conventions in requiring the elections of judges to be for the full term are numerous and obvious. This is no time or the occasion for their discussion. Some of them may be briefly mentioned. I pass by the fact that the election devolving upon different legislatures is calculated to prevent those combinations sometimes so hurtful to the public interests. I pass by the fact that when the election is for part of a term only, and sometimes for a very small part, men of large attainments and lucrative practice will be reluctant to give up their business engagements and prospects to accept an office held by a tenure so brief and precarious.

There is no doubt, however, the main purpose of the framers of the several Constitutions was to secure the complete independence of the judiciary.

This is the cardinal principle of constitu-

tional government. It is recognized and enforced in the Federal Constitution and in the Constitutions of nearly all the States. The paramount object is to make the judges secure from interruption in any quarter; to protect them against the action of other departments of the government, and even against the people themselves in times of great political and party excitement.

This is not done from any special regard for the judiciary department, but because its peculiar function is to expound the Constitution and laws, to settle controversies, to punish crime, to enforce the safeguards thrown around persons and property, and, if need be, to protect private rights against the exactions of arbitrary government. It is, therefore, wisely provided that the compensation of the incumbents shall not be diminished during their terms of office, and those terms are fixed by the Constitution only to be changed by the people themselves in the exercise of the highest sovereign powers. Men do not change their natures when they become judges. They are none the less prone to be swayed by the suggestions of self-interest, the promptings of ambition, and timid apprehensions of loss of power and official position.

When the incumbent understands that his tenure of office is brief, and that he is again to undergo the ordeal of an election, there is always more or less danger that he may unconsciously to himself conform his action to the dominant power in the State, or shape his conduct with a view to his re-election.

Considerations of this sort, as well as others which might be mentioned, led, no doubt, to the adoption of those constitutional provisions, here and elsewhere, under which the judicial tenure of office is the same, whether the vacancy be occasioned by death, removal, or resignation, or by the regular expiration of the constitutional term. But whatever may have been the motives of the framers of the Constitution, with which the courts have perhaps but little to do, the language of the instrument is plain, and in my judgment admits of but one interpretation. If there

existed a reasonable doubt on the subject, that doubt would of course be solved in favor of the action of the general assembly, to whose opinions, at all times, this court owes the highest respect and consideration. But where, as in the present case, the provisions of the Constitution are free from all doubt or difficulty, we are not permitted out of mere deference to another department of the government, to give to these provisions an interpretation at variance with their plain import and meaning. Other views might be presented in support of the grounds already taken, but they would only swell this opinion to an unreasonable length. If those already presented fail to convince, further discussion would only be a useless consumption of time and labor. My opinion, therefore, is that the Honorable John C. Weedon was elected and is entitled to hold his office of judge of the county court of Prince William for the full term of six years.

CHRISTIAN and ANDERSON, Js., concurred in the opinion of Staples, J.

MONCURE, F., dissented.

Judgment in favor of Meredith, and against Harrison.

136 *Daingerfield v. Thompson.

[36 Am. Rep. 783.]

April Term, 1860, Richmond.

In an action of trespass on the case, the declaration charged the defendant with an assault in various forms, one of which was, by a wounding from a pistol shot, so as to cause the amputation of the leg of the plaintiff; and also set out an ordinance of the city in which the wound was inflicted, prohibiting the discharge of firearms therein, also alleging the continued sickness, disorder, and suffering in consequence of said wound; the expense, medical attendance and other costs, consequent on said wound, which, plaintiff claimed, amounted to a large sum, and for which he claimed damages amounting to \$10,000. On demurrer, *Held*:

1. **Pleading and Practice—Trespass—Sufficiency of Declaration.**—The declaration alleges a case of *trespass* at common law, and under our statute (C. V. 1873, ch. 145, § 6) *trespass* on the case will lie, wherever *trespass* will, and is sufficient.

2. **Appeal—Evidence—Review.**—Where the record contains only a certificate of the evidence, and not of the facts proved, the appellate court will only consider the evidence introduced by the party prevailing, and will not reverse the judgment unless, after rejecting all the *parol* evidence of the exceptor, and giving full faith and credit to that of the adverse party, the judgment of the court below still appears to be wrong.

3. **Trespass—Abettor—Burden of Proof.**—Whilst the mere presence of a person at the commission of a trespass will not make him liable for its consequences, yet every one present encouraging or inciting a trespass by words, gestures, looks or signs, or who, in any way, or by any means, countenances, or approves the same, is, in law, assumed to be an aider and abettor, and is liable as a principal to the extent of the injury done. But the burden is on the plaintiff to show that the party charged was present, aiding, encouraging, or inciting the trespass.

137 *4. **Same—Same—Damages—Case at Bar.**—T was the keeper of a restaurant in Alexandria city, which has an ordinance prohibiting the discharging of firearms in its streets. He had shut his front door for the night, but his light was burning, when D, H, and S came there

***Appeal—Evidence.**—As to the rejection of *parol* evidence of the exceptor where there is a certificate of evidence only, see *Payne v. Grant*, 81 Va. 164, and cases cited; *Hanriot v. Sherwood et al.*, 82 Va. 1; *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135; *Farley v. Tillar*, 81 Va. 275; *Danville Bank v. Wadhill's Adm'r*, 31 Gratt. 469; *Brumbaugh v. Wissler's Ex'or*, 25 Gratt. 463. Under Code of 1887, § 3484, as amended by Acts '89-'90, p. 36; Acts '91-'92, p. 962, the appellate court is required to be guided in its decision as on a demurrer to evidence. See also *Morgan v. Fleming*, 24 W. Va. 194, 195.

and demanded admittance about midnight. S went around at a side door, went in, and told T that D wanted to come in. D and H were at the front door. D said to H, "fire a salute," or something of the sort. H fired, and the ball went through the door into the leg of T, wounding him so severely as to cause amputation of the leg, and seriously to impair his health. In a suit brought by T against D and H, which was, at the instance of D, tried separately against him first, and a verdict rendered against him for \$8,000 damages and the costs, on a motion to set aside the verdict as being contrary to the law and evidence, and because the damages were excessive, it was refused by the circuit court, and on a writ of error affirmed by this court.

5. Same—Attempt to Enter Dwelling.—

Insisting on being admitted into the house of another at a late hour of the night after it is closed, and after being refused by the owner, is a trespass.

6. Firing Pistol in Street—Liability.—

The wilful firing of a pistol in the streets of a city, whether done maliciously or not, is of itself an unlawful act, and the consequences must be visited on those who commit it, or instigate it.

7. Trespass—Damages—Elements of.—

In estimating the damages, the jury should take into consideration "the bodily injury sustained by the plaintiff, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent, the expenses incidental to attempts to effect a cure, or to lessen the amount of injury, and the pecuniary loss sustained by the plaintiff through inability to attend to his business."

This was an action on the case in the circuit court of Alexandria, brought by D. C. Thompson against George W. Harrison and Reverdy J. Daingerfield, to recover damages for an injury inflicted by them upon him. The declaration contains four counts, setting out in different forms the injury which he alleged he had received. In the fourth

138 count he set out the ordinance *of the city of Alexandria, which provides that no person shall discharge any musket, fowling piece, pistol or other firearms, &c., within the limits of the city of Alexandria, unless in the execution of some law, or in the discharge of some duty imposed by law. * * * Every person offending herein shall forfeit and pay one dollar for each offence. Every person contravening this section shall be considered a disorderly person, and it shall be the duty of the policemen to apprehend such person or persons, and convey him or her or them to the station-house, to be dealt

with according to law: provided, that this section shall not be construed to extend or apply to, the troops of the United States, which may be at any time stationed or recruiting in the town, nor to persons acting under the immediate order of a commissioned officer of the militia when upon actual duty. And he further avers, that the defendants on the 5th of March, 1877, assaulted the plaintiff, to-wit: at the city of Alexandria, not acting in the execution of any law, &c., setting out the cases stated in the proviso to the ordinance, the said defendants in contravention of the ordinance aforesaid, with a certain pistol loaded with gunpowder and leaden balls, which the defendants then and there had, then and there, within the limits of the said city of Alexandria, to-wit, &c., stating the street, unlawfully discharged the said pistol, and thereby then and there with shot, struck and wounded the said plaintiff in his right foot, in so grievous a manner that the said plaintiff's right foot and leg became and was mortified, and by reason thereof, and setting out the amputation of the leg and the injury, and loss to his health and his business, and also the expenses he had been obliged to incur.

Daingerfield demurred to the declaration and each count thereof; but the court 139 overruled the demurrer. *He also pleaded "not guilty;" and, on his motion, his case was tried separately.

On the trial there was a verdict in favor of the plaintiff for \$8,000 damages; and a motion for a new trial on the grounds that the verdict was contrary to the evidence, and the damages were excessive; but the court overruled the motion, and rendered a judgment in accordance with the verdict. And Daingerfield thereupon applied to this court for a writ of error and supersedeas; which was awarded. The evidence introduced on the trial, as well as the instructions given by the court, are set out in the opinion of Judge Christian.

John W. Johnson and S. F. Beach, for the appellant.

H. O. Claughton, Charles E. Stuart, and E. Burke, for the appellee.

CHRISTIAN, J. This is a writ of error to a judgment of the circuit court of the city of Alexandria.

The action was trespass on the case, which the defendant in error (Thompson) instituted against two defendants, George W. Harrison and Reverdy J. Daingerfield, jointly, charging them, in various counts set out in the declaration, with assault and battery made upon him jointly by the said parties, by which said assault he was so wounded by a pistol shot fired by them as to cause the loss by amputation of one of his legs; and laying his damages for said injury at the sum of \$10,000.

Both the defendants being summoned to answer this action, and the defendant, Harrison, not appearing, a conditional order was confirmed in the clerk's office as to him and an inquiry of damages directed.

*Firearms.—See 12 Am. & Eng. Enc. of Law (2nd Ed.) 518.

†Damages—Question for Jury.—That the question of the amount of damages is one for the jury, see *Farish & Co. v. Reigle*, 11 Gratt. 697; *Peshine v. Shepperson*, 17 Gratt. 472; *Borland v. Barrett*, 76 Va. 128; *Benn v. Hatcher*, 81 Va. 25; *Virginia Mid. R. Co. v. White*, 84 Va. 498; *Ward v. White*, 86 Va. 212; *Bertha Zinc Co. v. Black's Adm'r*, 88 Va. 303; *N. & W. R. Co. v. Anderson*, 90 Va. 1; *Richlands Iron Co. v. Elkins*, 90 Va. 249; *Richmond Ry. & El. Co. v. Garthright*, 92 Va. 627. As to measure of damages for malicious assault, see *Borland v. Barrett*, 76 Va. 128.

The defendant, Daingerfield, appeared and demurred to the declaration and entered
 140 his plea of "not guilty." *Subsequently the defendant, Harrison, also demurred to the declaration. And afterwards, at the May term of said circuit court, 1879, both parties appeared by their attorneys, and the defendant (Daingerfield) moved the court that the cause be tried as to each of the defendants separately; which motion the court granted, and the cause was continued as to defendant Harrison, and was proceeded with as to the defendant Daingerfield, upon the issue of not guilty as to him. And upon this issue, a jury, after hearing the evidence, found a verdict for the plaintiff (the defendant in error here), against the defendant Daingerfield, and assessed his damages at the sum of \$8,000. Upon this verdict the circuit court entered its judgment for the sum of \$8,000—the damages by the jury in their verdict ascertained, with costs. To this judgment a writ of error was awarded by one of the judges of this court.

I am of opinion that the circuit court did not err in overruling the demurrer to the declaration. The summons sued out was to answer an action of trespass on the case, and the declaration charged the defendants with an assault in various forms in three distinct counts, and charging, as the effect of said assault, the wounding of the plaintiff so as to cause amputation of his leg, and adding a fourth count, setting forth an ordinance of the city of Alexandria, prohibiting the discharge of firearms in said city, and also alleging the continued sickness, and disorder, and suffering in consequence of said wound, and the expenses in medical attendance and other costs consequent on said wound, which he claimed amounted to a large sum.

The allegations of this declaration, taken to be true by the demurrer, certainly make out a case of trespass, and that action would lie at common law. And under our statute, wherever an action of trespass will
 141 lie, trespass *on the case may be maintained; for by the sixth section of chap. 145 of Code of 1873, it is provided that, section 6, "In any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." It is, therefore, conclusive, that under our statute the case set out in the declaration is one upon which an action on the case may be maintained. The demurrer, therefore, was properly overruled.

It is proper to remark that the counsel who argued the case here did not rely upon the demurrer, but the point having been raised in the court below, I have thought it proper to notice it.

I now pass to the consideration of the main questions in this case, which are raised by the instructions given by the circuit court, and upon the motion for a new trial, upon the ground that the verdict was contrary to the evidence.

It is first to be remarked that in this case there is no certificate of facts, but only a

certificate of the evidence; and the rule is well settled, that in such a case, as has been repeatedly decided by this court, the appellate court will only consider the evidence introduced by the party prevailing, and will not reverse the judgment, unless after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court below still appears to be wrong. Read's case, 22 Gratt. 924; Gimmi v. Cullen, 20 Gratt. 439, and cases there cited; Dean's case, 32 Gratt. 912; Danville Bank v. Waddill's adm'r, 31 Gratt. 469, and cases there cited.

Observing this rule, we proceed to consider the evidence certified, which is as follows: The plaintiff testified that on the night of the 5th day of March, 1877, in the city of Alexandria, Virginia, he was at his restaurant on the west of St. Asaph street, between

King and Cameron streets, when about
 142 twelve o'clock *he closed his front door, which opened on said St. Asaph street, and turned off one light therein; that there were in the room John Robey and plaintiff, and John Dixon, colored, an employee of plaintiff, was back in the kitchen, when he heard voices at his front door and persons seeking admittance and knocking on the same and cursing and swearing, and also rapping on the window. In a few moments Mr. James R. Smoot entered by a side door, which opened on the alley adjacent on the south side of the house, and said Smoot told him to open the door, Rev. (meaning thereby the defendant) was outside. He, the plaintiff, walked to open the door, and as he was putting his hand on the knob of the door opening from the restaurant into the passage on the north side of the house for the purpose of admitting the defendant, he heard the explosion of a pistol and found himself shot with the pistol ball through the right foot. He cried out that he was shot, and immediately afterwards the front door was opened and George W. Harrison and the defendant entered.

Plaintiff was then seated in a chair holding his wounded foot. Harrison came up much excited, saying, "My God, what can I do for you," and was greatly excited and alarmed. Harrison rose up and turning to defendant, said: "This would not have happened if you hadn't told me to fire a salute." To which defendant answered, "I didn't suppose you were d—d fool enough to fire into the house—I thought you'd fire into the air." Presently afterwards Smoot, Daingerfield and Harrison left, one after another, in the order named. Previous thereto Robey and the boy, Jack, had gone for the doctor, who came and dressed his wound.

On the next morning defendant, Daingerfield, came to see him, and Mr. McLean
 143 and the boy, Jack, were *present. McLean was urging plaintiff to prosecute Harrison, when defendant, Daingerfield, said, No. I would not do it if I were you—if I had not told him to do it, he would not have done it. He is not worth anything anyhow." Presently afterwards Daingerfield left, and he has had no further conversation with him

since that time. He was laid up for many months with his wound, and suffered great pain therefrom, and finally the leg was amputated just below the knee to save his life. His general health had suffered; he had become greatly emaciated, being reduced in weight from 145 to 114 pounds, including his iron leg, and his business had suffered greatly in consequence of this affair, and he had been at great expense for medical services and medicines, his physician's bill alone amounting to \$300.

The plaintiff next offered John Robey, who testified as follows:

That he was engineer on the Alexandria & Washington railroad, and brought down the special train from Washington on the night stated. He was waiting for a steam of oysters at Thompson's restaurant. Thompson asked him why he was out so late. He replied he brought special train down. Thompson then asked if there were any drunken people on board. He replied there were some drunk, but too drunk to give any trouble. Plaintiff said he had better close up, and had his front door closed and one light turned down.

Soon he heard the voices of persons on the street seeking admittance, loud knocking on the front door and window, and voices cursing and swearing. A few minutes afterwards Smoot entered by the side door from the alley, and on entering said, "Thompson, open the door; Rev. is outside." Presently afterwards heard the pistol shot, saw Thompson was wounded, and started out of the

144 side door and ran for the doctor. *Went for the doctor twice. As he was going out he heard the word salute used, but by whom does not know—Daingerfield and Harrison being in the room at the time. Harrison's position indicated that he was tipsy, but did not think that he was too drunk to know what he was doing.

Isaac Johnson (colored) was next offered, and testified as follows:

He lived opposite to plaintiff's restaurant at that time, and was standing in his door on the night of this occurrence. Saw three men in front of the restaurant. One of them presently went up the alley; the other two remained talking and knocking on the door and window. They were cursing and swearing. He recognized the two outside as defendant and Harrison. He heard Harrison say, "Shall we give him a salute?" and the other replied, "Yes, salute the damn black republican." At the time this was said Daingerfield stepped back from the door towards the curb and the pistol was fired; presently afterwards heard the pistol shot.

Frederick Stubbs was offered, and testified as follows:

That at this time he lived opposite to Thompson's restaurant, next to Johnston, and was at his window at the time of the shooting of Thompson. He spoke to the witness Johnston as he went in his door, and afterwards from his second-story window; saw the three men at the front door, but could not recognize them by sight. One went up the alley, and heard them talking; was

attracted by the loud talking and swearing and knocking on the door and window. Some one, not Harrison, said, "Let's give him a salute." or "Give him a salute," and heard Harrison, whose voice he knew, say, "I'll do it; the old republican;" and he thought 145 they were going to cheer him, *and in a moment heard the explosion of a pistol. Just before the shot, one of them stepped from the door towards the street.

The plaintiff's colored boy Jack was next offered, and testified:

That on the morning of the 6th of March, 1877, he was present at the conversation between the defendant, Thompson and McLean. McLean said that if it was him he would have Harrison arrested. Defendant said, "No, I would not do it; he is not worth anything anyhow." McLean said he did not care; he would have him arrested and punished. Defendant said he thought Harrison had fired in the street.

Drs. Lewis and Stabler testified that they amputated the limb to save Thompson's life; that he suffered great pain and anguish from the wound, and his health was seriously injured thereby, his chest having been involved, because of the nervous prostration, resulting from the wounds; that previous to the shooting, Thompson was a healthy man.

The plaintiff then offered, in evidence, an ordinance of the city of Alexandria, the substance of which is given in the statement of the case.

The defendant to maintain the issue on his part, offered himself as a witness, and testified as follows: That he, in company with James R. Smoot, took the 7 o'clock local train on the 5th of March, 1877, for Washington. At the train he saw Thompson. He and Smoot had been frequently in the habit of frequenting Thompson's saloon to get oysters and something to drink. Thompson asked them where they were going, and on being told that they were going up to see the fireworks and would be down on the late train, said, "When you come down you will want something to eat, and I will be open for you." On their return they started from the station for

146 Thompson's, *and after going a square, were joined by Harrison (whom they had not previously seen), and he, on being informed where they were going, said he would go along. They went on, down Cameron street to Columbus street, and thence down Columbus to King street, and thence down King street, which course was a square out of the direct way to Thompson's, passing by Appich's restaurant, where they halted, and might have stopped but for his being closed, and turned into St. Asaph street to Thompson's. They saw the door was closed, but the light still burning. Harrison tried the door, and Smoot turned and went up the alley. Defendant rapped on the window, and then also turned and followed Smoot to the mouth of the alley, and there stopped for a matter of relief. Whilst standing there Harrison was talking and turning the knob of the door, and presently he heard

the discharge of a pistol. Harrison said the damn thing went off accidentally in shifting it from his pocket. On the door being opened by Smoot, Harrison went in, and defendant followed him. He found Thompson seated in a chair, and shot in the foot. Harrison was very pale, and much excited, and he himself was dumfounded. Harrison exclaimed, "My God! what have I done," and repeated that the damn thing had gone off accidentally in shifting it from his pocket. He did not hear Harrison address him, as testified to by Thompson, and said nothing himself that he recollected. In a minute or two Smoot left, and almost immediately after he followed, admitting that in the former trial he testified that he remained ten minutes; that he had no knowledge that Harrison had a pistol, and that he was as much surprised at the shot as Thompson was at being shot. He did not remember the word salute being used outside or inside. He went the next morning to see how

Thompson was; saw Mr. McLean was 147 there; asked Thompson how he was, and in a minute or two left. He had no recollection of any such conversation on this occasion as was testified to by Thompson.

James R. Smoot was next called for the defendant, and testified substantially as defendant had as to their movements and conversation on the night of the 5th of March, 1877, until they got to Thompson's restaurant. On reaching it, and finding the front door closed, he turned and went up the alley, and entered by the side door, and told Thompson to open the door—Rev. was on the outside. Thompson started to open the door, and presently he heard the explosion of the pistol, and the exclamation from Thompson that he was shot. Presently the door was opened, and Harrison and Daingerfield entered. Saw that Thompson was shot, and went immediately out, as soon as the door was opened. Soon afterwards Daingerfield overtook him, about thirty yards from the door.

I have thus copied into this opinion all the evidence, because the main question we have to consider is whether the verdict is warranted by the evidence.

This being all the evidence on both sides, the court gave the following instructions, asked for by the plaintiff and defendant respectively:

The following instructions were given by the court at the instance of the plaintiff:

(1.) The court instructed the jury that every person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way, or by any means, countenances or approves the same, is, in law, assumed to be an aider and abettor, and is liable as principal.

(2.) The jury are instructed by the court, that if they believe, from the evidence, that the said defendant, Reverdy J. Daingerfield, is liable in this action under the instructions to the plaintiff, in damages, then

148 *in estimating said damages, they should take into account the bodily

injury sustained by the plaintiff, the pain undergone, the effects on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent, the expenses incidental to attempts to effect a cure or to lessen the amount of injury, and the pecuniary loss sustained by the plaintiff through inability to attend to his business.

And the defendant excepted. And then the court, on motion of defendant, over the plaintiff's objection, gave the following instruction:

The court instructs the jury that in order to make the defendant, Daingerfield, liable in this action, they must be satisfied, from the evidence, that he either actively and forcibly aided and participated in the injury done to the plaintiff, or that he was present at the commission of the injury, aiding, encouraging and inciting the same; that the burden of proof is upon the plaintiff to satisfy them that defendant, Daingerfield, was thus present, aiding, encouraging and inciting the act; but mere presence, unconnected with other proofs of guilt, at the commission of the act, will not render him liable to the plaintiff.

I am of opinion that the instructions given by the court below, correctly expound the law of the case, and that the instructions given at the instance of the defendant, were certainly very favorable to him. There being no error therefore, in the instructions given by the court, the only remaining question is, did the court err in refusing to set aside the verdict as contrary to the evidence?

This motion to set aside the verdict of the jury is based upon two grounds: First, that the evidence did not warrant the verdict against the defendant, Daingerfield, who did not actually commit the trespass, 149 *from which the plaintiff received the injury complained of; and, Second, because the damages assessed by the jury were excessive.

As to the first point, the evidence conclusively shows that Daingerfield, with Harrison, was guilty of a trespass upon the premises of Thompson. They went to his house at a late hour of the night and demanded admittance after he had closed his house. Their conduct in insisting on admittance at that late hour, was in itself a trespass on his premises. And when he refused admittance, the firing of a pistol by Harrison was another unlawful act. And in that unlawful act, Daingerfield was a prominent actor. He prompted Harrison to fire the pistol which caused the fatal result. Harrison, who was drunk, asked him, "Shall I give him a salute," and Daingerfield replied, "Yes, give the damned black republican a salute," and at the same time stepped back from between Harrison and the door. Immediately upon this, the pistol was fired by Harrison, and Thompson, who was opening the door, was wounded by the pistol shot.

Daingerfield, himself, admits that Harrison would not have fired the pistol, but for his direction, although he insists that when he told him to fire a salute, he expected him to

fire into the air; and, to use his own language, he "did not expect that he was a—d fool enough to shoot into the house."

The willful firing of a pistol in the streets of a city, whether maliciously or not, is of itself an unlawful act, and the consequence of such unlawful act must be visited upon those who commit it or instigate it. Safety and protection to society require that both the actors and instigators of unlawful acts should be held to strict accountability for the consequences of their violation of law. It is no excuse or justification of Daingerfield to say that he did not fire the pistol

150 to which *caused the injury. He was the aider and abettor and instigator of Harrison, who fired the fatal shot, and he, himself, admits that it was fired at his advice and instigation. And it is no excuse or justification to say that he simply told him to fire a salute and that he expected him (Harrison) to fire in the air. The firing of the pistol was in itself an unlawful act, and advised and instigated by him, he must take the consequences of the result.

He who commands or procures another to do an unlawful act, is as responsible as a trespasser as he who commits the trespass. *Jordan v. Wyatt*, 4 Gratt. 151. And although the act committed was done without malice, yet being unlawful, the party committing it or aiding or abating in its commission, is responsible in damages to the party injured. *Parsons v. Harper*, 16 Gratt. 64.

It is earnestly insisted, however, by the learned counsel for the plaintiff in error (Daingerfield) that the evidence against him does not sustain the charge in the declaration, and in each count thereof, of assault and battery; that while such assault is proved against Harrison, who fired the pistol, it is not proved as to Daingerfield; that he committed no assault, but simply advised and instigated an act which was in itself harmless, to-wit: "Fire a salute," and that this act was not a trespass or assault as far as Daingerfield was concerned; that he did not direct Harrison to shoot Thompson, or to fire into his house, but simply to "fire a salute," and that Harrison did another and different act from the one which was advised and instigated by Daingerfield, and that the injury resulted from Harrison's act done differently from the act directed by Daingerfield, and consequently Daingerfield cannot be held liable in this action.

151 *Now, the fatal defect in this argument is, that the firing of a pistol in the streets of a city is not a harmless act, but, on the contrary, is an unlawful and dangerous act, prohibited and made unlawful by express ordinance. And besides, the evidence abundantly shows that even before the firing of the pistol, Daingerfield and Harrison were joint trespassers upon the premises of Thompson. The firing of the pistol was an aggravation of the trespass, and being in itself an unlawful act (and that unlawful act causing the fatal injury), being instigated and prompted by Daingerfield, he is equally responsible with Harrison for its unhappy consequences, although it was not

done maliciously and not done by the hand of Daingerfield.

The law is well settled that any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way or by any means, countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal. 1 Hale P. C. 438; 3 Greenlf. §§ 40, 41; 43 Missouri R. 206, and cases there cited.

There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: that all persons who wrongfully contribute in any manner to the commission of a trespass, are responsible as principals, and each one is liable to the extent of the injury done.

The defendant, Daingerfield, being present, aiding and abetting and instigating Harrison, was equally guilty with him of an assault to the same degree as if he had fired the fatal shot himself.

I am further of opinion that the circuit court did not err in refusing to set aside the verdict on the ground that the damages were excessive.

152 *The question of what damages the plaintiff sustained, was a question for the jury to determine.

The appellate court will not interfere with such a verdict unless it appears that the verdict is plainly extravagant and excessive.

We cannot say, upon the evidence before us, that the verdict is plainly excessive. The evidence shows that the injury received by the plaintiff caused the amputation of his leg, as well as great suffering and expense and permanent injury to his health. The jury, with all the facts before them, estimated the damages at the sum of \$8,000, and we cannot say, upon the evidence certified, that the verdict is excessive under all the circumstances of the case.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, and that the same should be affirmed.

The other judges concurred in the opinion of Christian, J.

Judgment affirmed.

153 *Rose & Wife v. Sharpless & Son.

April Term, 1880, Richmond.

1. **Homestead Deed—Defrauding Creditors—Validity.**—Where a "householder or head of a family" executes a homestead deed as a part and in furtherance of a design to hinder, delay and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct.

2. **Same—Same.**—Circumstances which will vitiate a homestead deed executed and recorded by a debtor in failing circumstances, prior to the levying of attachments on his goods.

3. **Same—Unpaid For Goods—Burden of Proof.**—The Constitution and laws of Virginia

*See 2 Min. Inst. (4th Ed.) 912.

not allowing property to be claimed as exempt for debts contracted for the purchase price of such property or any part thereof—where a large portion of goods claimed as exempt has not been paid for, and are so mingled with those that have been, as to put it out of the power of the vendors to distinguish between the two, the *onus* is on the person claiming the exemption, to show which has been paid for; and he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law.

4. Same—Shifting Stock of Merchandise—Quære.—*Quære*: Can a "homestead" be claimed in a shifting stock of goods used in the way of trade.

This was an action of debt in the circuit court of the city of Richmond, brought by Sharpless & Son of Baltimore against Joseph Rose, to recover the sum of \$601.11, and costs of protest, the amount of a negotiable note dated the 29th of May, 1879, and payable in sixty days, given by Rose to Sharpless & Son for goods purchased at the time.

154 At the time of instituting *the suit the plaintiffs sued out an attachment against the effects of Rose on the ground that he was removing the effects from the Commonwealth.

Previous and subsequent to this suit five other attachments were levied on the property of Rose, which consisted entirely in the goods in his storehouse, and these suits were upon claims for the purchase of goods made in May, 1879.

The plaintiffs in this case recovered a judgment against the defendant Rose for the amount of their claim, and the only question was whether they were entitled to have the proceeds of the sale of the goods, which had been made under a consent order in the cause, applied to the satisfaction of their judgment, or whether Rose was entitled to retain them under his deed of homestead exemption, which he had executed a few days before the suits were brought against him. This deed covered all the goods in the store, and were valued in the deed at \$1,623.00. At the sale by the sheriff they brought \$2,150, though between the date of the deed and this sale he sold a part of them estimated at \$300.

The plaintiffs insisted that the deed was not valid on several grounds; and among them the following:

1. That it appears by the evidence, that said Rose fraudulently and with intent to delay, hinder and defraud these creditors, had removed a large part of his property out of the State of Virginia, and concealed the same with the like intent, prior to the recordation of the homestead deed, and that this actual fraud on the part of Rose in the concealment and removal of his said property out of this State with said intent, only leaving enough property within reach of the process of the courts of this State as to be within the amount of homestead allowed by law, is in law a bar to such claim of homestead.

155 *2. Because no part of the purchase money of said goods has been paid by

said Rose, and therefore, under section 1, of chapter 183, of the Code of 1873, he is not entitled to any homestead in the said goods or the proceeds thereof.

3. Because the claim of homestead in this case is in a shifting stock of goods owned or employed by said Rose in the way of trade, and being daily sold and converted into money, contrary to the true intent and meaning of said homestead law, and contrary to the provisions of section 7, of said 183d chapter, of the Code of 1873.

The evidence in the case is voluminous, but is sufficiently stated in opinion of the court delivered by Judge Anderson.

The cause came on to be heard on the 23d of December, 1879, when the circuit court held that the said deed of homestead was invalid, and the net proceeds of the sale of goods being sufficient to pay the attaching creditors who had recovered judgments against Rose, the plaintiffs, or their counsel, were authorized to check upon the fund for the amount of their debt and costs. And thereupon Rose and wife applied to this court for a writ of error and superseas; which was allowed.

John A. Meredith and Meredith & Cooke, for the appellants.

E. Y. Cannon and John Dunlop, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that there is not error in the judgment of the circuit court for which it should be reversed. They deem it unnecessary to consider the

156 *question which has been ably argued by the counsel on both sides, whether a householder, who has made a homestead deed, can alien or encumber his property, embraced in the homestead, by a subsequent deed in which his wife does not unite. The plaintiff in error, who claims all the goods under the homestead, upon which the attachments and executions were levied, has not aliened or encumbered them by deed. But they were in his possession when levied on, and claimed to be held by him under the homestead. The aforesaid question is not, therefore, involved in this case.

But the question does arise upon the evidence, whether the said homestead deed was executed by the plaintiff in error as a part, and in furtherance, of a design to hinder and delay and defraud his creditors in the recovery of their just debts? If so, it would be vitiated and invalidated thereby. *Gilleland v. Rhodes*, 34 Penn. St. R. 187; *Diffendaffer v. Fisher*, 3 Grant's Cases, 30; *Smith v. Emerson*, 43 Penn. St. R. 456; *Strouse, ex'or. v. Becker*, 38 Penn. St. R. 190.

In the last case, Woodward, J., said, the rule of decision which denies the benefit of the exemption law to a dishonest debtor, who shuffles and conceals his property, * * * is founded in a sound morality, and is agreeable to the spirit and intention of the exemption law. The remark is equally applicable to the homestead law.

The case is before us on a certificate of the evidence and not of the facts.

It is not our purpose to give a detailed statement of the evidence. It appears that Rose came to Richmond in August, 1878, and opened a retail store on Broad street. He brought with him a broken stock of goods, and had no other visible property. About the month of May, 1879, he went North and bought a large stock of goods, evidently on credit, as to the larger portion *of them. The debt of Sharpless & Son was for \$599.43, contracted on the 29th of May, 1879, and a negotiable note given for it at sixty days, which was protested July 31st, 1879. Claims against him were placed in the hands of John A. Coke, aggregating \$1,320.40, which fell due, it would seem, only a few days earlier. The other debts upon which suits were brought and judgments obtained, and those upon which attachments were sued out, amount to upwards of \$2,500, as well as can be ascertained from the record. The whole aggregating, perhaps, over \$4,000, which were probably contracted for the stock of goods he brought on in the month of June, 1879, from the North. One witness estimates his stock of goods in June, 1879, to be worth from \$5,000 to \$6,000. He seems to have been engaged in selling goods by retail in a small way until he made this addition to his stock in the month of June, 1879. Then, one month before the institution of the suits against him, and the levying of the attachments—one on the 26th of July, one on the 28th, and another on the 29th of July, 1879—he suddenly changed his course of business from that of retailing to wholesale and retail, without any notice to the public, as far as appears, of his purpose to make such change. He sold to merchants of Richmond; shipped large quantities of goods from the State; and pushed off his goods so rapidly that in the course of one short month, he had reduced his stock of goods, before the debts he had contracted for them fell due, from five to six thousand dollars, what his stock was estimated to be worth in June, to \$2,150, the price for which the remnant actually sold, under the order of the court. By this means he had reduced his stock low enough to cover it by a homestead deed, and shield it from his creditors; and on the 21st of July, a few days before the attachments were sued out and levied on them, he *executed such a deed, embracing all that remained of his stock, which, by an under valuation he put at \$1,623, including not only the goods which were levied upon and sold for \$2,150, but all that he had sold between the date of the homestead deed and the making of the levy. For it seems he continued to sell the goods that he had set apart as a homestead, and probably sold in that interval, according to the estimate of his daily sales by his clerk, to the amount of from \$250 to \$300. What became of the money he received, for the large sales he had made, in the rapid reduction of his stock? The price he was to give for the goods had not been paid. His attempt-

ed explanation is not satisfactory. It is evident, from the whole transaction, that it was the fraudulent contrivance of a debtor, to shield his property from the payment of his debts, under color of the homestead, as the final act, in its consummation.

But if the purchase money of the goods has not been paid, he is not entitled to hold them under the homestead law Article XI, section 1, of the Constitution; chapter 183, section 1, of the Code of 1873. It is very certain that a larger portion of his stock than that which was levied on and sold has not been paid for. These goods he so intermingled with his old stock on the shelves, that it was not in the power of the merchants from whom he purchased the new, to distinguish them from the old—those which had not been paid for, from those which had been paid for. It would seem reasonable and equitable that all should be held to be of the former class, unless shown by him not to be of that class. The onus should be on him to show, under these circumstances, that the goods which he embraced in his homestead, were not of the class that had not been paid for. It is a fact, that he had in his stock of goods a larger amount in value which he had not paid for than all

159 that he claims under the *homestead. And as he has put it out of the power of the defendants by intermingling them, to show it, it is incumbent on him to show that they are of the class of goods he has paid for. He has not shown that any part of the goods, which he claims under the homestead, has been paid for, and being mixed up by him with those which he has not paid for, so as to be undistinguishable, they will be taken to be all of the latter class, in the absence of all evidence to the contrary, and consequently are not subject to the homestead.

The question, whether a householder is entitled to have a homestead in a shifting stock of goods, used in the way of trade, ever liable to change, so that it is not the same yesterday and to-day, is a question of grave importance, but not necessary now to be decided, but no matter how it might be decided, for reasons already given, the homestead in this case could not be sustained.

Upon the whole, the court is of opinion to affirm the judgment of the circuit court.

Judgment affirmed.

160 *Cardwell v. Allan, Trustee, & als.

April Term, 1880, Richmond.

I. **Negotiable Notes—Deed of Trust Securing—Effect of Failure to Protest and Give Notice to Endorsers.**—B as maker and R and C as endorsers make two notes each for \$1,000, which are discounted at the E & A bank, and the proceeds go to the credit of B. The notes are discounted much on the faith of a deed of trust by which C and wife conveyed to A a tract of land in trust to secure to the bank the payment of the notes, with the following covenant—And it is expressly covenanted and agreed, that upon the default of payment of either of said notes, or any part thereof, the said A shall upon the request of the president or other authorized officer of the said E & A bank, after giv-

ing thirty days' notice, &c., proceed to sell at public auction the property hereby conveyed for cash, or so much as shall be necessary to defray the expenses, &c., and pay off and discharge any part of the sum of \$2,000 hereby secured to be paid then remaining unpaid; and for the remainder, &c. The notes were not paid at maturity; and were not protested, nor was there any notice to the endorsers. HELD:

1. The deed of trust with the covenant therein, bound C to the extent of the trust subject, though there was no protest or notice to the endorsers.
2. The bank was not bound to give notice to R, so as to hold him liable, in order to hold C liable.

II. ~~Same-Same-Same-Knowledge of Endorser-Presumptions.~~—In this case C repeatedly applied to officers and directors of the bank for a postponement of the sale of the land under the deed of trust, promising to pay the debt, and never objected that the note had not been protested or that notice had not been given him. HELD: He must be presumed to have known when he applied for delay of the sale, and made the promises to pay, that the notes had not been protested.

This was a suit in equity in the circuit court of Prince Edward, brought in January, 1876, by Wiltshire *Cardwell to enjoin the sale of a tract of land under a deed of trust executed by Cardwell and wife, by which they conveyed the land to Edgar Allan to secure the payment of two notes each for \$1,000, made by Benjamin S. Hooper, and endorsed by R. H. Hooper and said Cardwell, and discounted at the English and American bank at Farmville. The grounds on which the plaintiff claimed to enjoin the sale of the land was—That R. H. Hooper and himself were accommodation endorsers of the notes, that the whole proceeds had been placed to the credit of the maker Benjamin S. Hooper; that when the notes fell due and were not paid they were not protested, and no demand or notice was made upon or given to either of the endorsers.

The bank in its answer admits that no protest or demand or notice was given to either of the endorsers; but they do not admit, but require proof, that the endorsers received no part of the proceeds of the notes. But however that might be, the plaintiff by his deed of trust had bound himself at least to the extent of the trust fund, to pay the notes if they were not paid at maturity, and the provisions of the deed are referred to, to sustain this view; and it is further alleged that the notes were discounted on the faith of this security, and would not have been discounted without it.

The answer further states that the plaintiff had repeatedly applied to different directors and officers of the bank and its counsel for a postponement of the sale of the land, and promised payment of the notes. And in fact he had not only admitted his obligation to pay the said notes since they fell due, but he has entered into an arrangement with Benjamin S. Hooper to reimburse himself the amount he was bound to pay; to-wit, by buying goods at the store of said Hooper to the value of some \$1,100, and by procuring the said Hooper to pay certain monthly instalments on fifty *shares of stock

of a building fund association, amounting to near \$1,000; thus admitting his liability upon said notes.

The deed of trust after reciting that the property was conveyed to secure to the said bank the payment of the sum of two certain negotiable notes, describing them, proceeds—"And it is hereby expressly covenanted and agreed, that upon the default of payment of either of said notes, or any part thereof, the said Edgar Allan shall upon the request of the president or other authorized officer of the said English and American bank, after giving thirty days' notice of the time and place of sale, proceed to sell at public auction, the property hereby conveyed, for cash, or so much as shall be necessary to defray the expenses of executing this trust, and to pay off and discharge any part of the sum of two thousand dollars hereby secured to be paid, then remaining unpaid, and for the remainder, if any, as said Wiltshire Cardwell shall direct," &c.

The parol evidence fully sustained the answer upon the allegations, that the notes were discounted on the faith of the security of the deed of trust, and would not have been discounted without it; and that Cardwell after the notes fell due, had repeatedly applied to directors and officers of the bank for a postponement of a sale of the property under the deed of trust, and promised to pay the debts; and there was also evidence that he had made an arrangement with Benjamin S. Hooper, by which he received from Hooper enough or nearly enough to pay them. Whether the plaintiff knew when he made the promises to pay the notes that the notes had not been protested, does not appear from any evidence in the cause; he does not aver in his bill that he did not know the fact.

The cause came on to be heard on the 28th of March, 1876, when the court dissolved the injunction and dismissed the bill. And thereupon Cardwell applied to a judge of this court for an appeal; which was awarded.

Guy & Gilliam, for the appellant.

W. W. Henry, for the appellees.

STAPLES, J., delivered the opinion of the court.

In the argument of this case here several interesting questions of commercial law were discussed by counsel. But their decision is not deemed necessary in the view we have taken of the merits of the controversy. It is conceded that the notes endorsed by the appellant were not protested, and that notice was not given of their non-payment. Is this such laches in the bank, the holder of the notes, as discharges the appellant? It appears that on the 25th of July, 1873—the day upon which the notes were made by Benjamin S. Hooper, and endorsed by the appellant, the latter gave to the bank a deed of trust to secure their payment upon certain real estate owned by him; and in that deed it was expressly covenanted and agreed, that upon default made in payment of either of said notes, or any part thereof, the trustee, upon request of the proper officer of the

bank, after thirty days' notice, should sell the estate therein conveyed for cash. Nothing is said in the deed with respect to demand, protest, and notice. The right of the bank to enforce the trust was complete, upon default being made. Upon the happening of that event, the liability of the appellant became complete so far as the property was concerned.

The case of *Mory v. King*, 7 Eng. C. L. R. 57, cited by counsel for the appellee is directly in point. There the appellant pleaded that the bill when due had not been presented to the acceptor for payment,

164 and that *due notice of the dishonor had not been given. The plaintiff in reply, relied upon the bond of the defendant. Chief Justice Abbott, with whom the other justices concurred, said—"The bond is given by Tuffenel, and the defendant who were both parties to the bill. Now in that character, if no bond had been given, it is clear they would have been liable in case the formalities stated in the pleas had been complied with; and if the only object of the bond had been to give the plaintiff a security of a higher nature, and to make the party liable in case those formalities had not been complied with, I think we should have found it so expressed in the deed, and not finding it there, I therefore conclude that the parties meant to engage to pay the bill at all events, as sureties for the acceptor, in case he did not pay it." See also *Hilton v. Catherwood*, 10 Ohio St. R. 109; *Mitchell v. Clark & Hodgson*, 35 Verm. R. 104.

Here it is to be observed the action is not on the notes, but it is a proceeding under the deed. If the appellant intended to insist upon demand and notice, before liability of his property should attach, it is fair to presume he would have so provided. As he has failed to do so, the presumption is he intended to waive these formalities, and there was very good reason for his so doing. The evidence tends strongly to show, that there were unsettled matters between the appellant and the maker of the note; that the appellant had in his own hands means of indemnity against any loss growing out of his endorsement, if indeed he was not actually indebted to the maker in an amount sufficient to cover both notes.

The learned counsel for the appellant insists, however, that the testimony relied on to establish the existence of this indemnity or indebtedness is merely hearsay. The witness who testified on this point, says, 165 the *appellant referred him to the maker for confirmation upon the subject of the indebtedness, and the maker in response to the inquiries of the witness who was a director in the bank, explained the arrangements between the appellant and himself, by which the former was indemnified and protected. If this be true, it fully explains the fact that the appellant agreed that his property should be forced upon the market at a cash sale, upon thirty days' notice, to pay the whole amount of the debt. That the appellant considered himself the real debtor, and as absolutely bound, upon default made, is

proved by the further fact that after the dishonor of the notes, he not only recognized his liability for them, but he repeatedly promised payment; he asked for indulgence and entered into negotiations for a postponement of the sale of his property.

During the whole two years following the dishonor of the notes, these promises were repeatedly made, and these negotiations were going on. Not a word was said about the failure to protest the notes. The matter was never alluded to till it was suggested by counsel, retained to prevent a sale, after every effort for further indulgence had failed.

It has been said, that the appellant at the time he made those promises was not aware of the failure to protest the notes. The only testimony offered in support of the alleged ignorance, is the opinion of a witness, derived from an inquiry made by the appellant, himself. It is worthy of observation that the appellant has never said he was ignorant of the failure to protest the notes. He has made no such allegation in his bill. And although he has known from the beginning that the bank relied upon these promises, he has not attempted to avoid their effect, as he might have done by giving his own deposition, and by proving he was ignorant of the laches of the bank at the time 166 they *were made. Throughout, he has been studiously silent with respect to the matter of demand and notice.

Under such circumstances, the appellant's repeated acknowledgments of liability and promise to pay, must be held sufficient proof of an agreement to waive demand and notice. Second Daniel on Negotiable Inst., section 1147 to 1162; *Walker v. Laverty*, 6 Munf. 487; *Pate v. McCluer*, 4 Rand. 164.

It is insisted, however, and much stress is laid on this point, that although the appellant may have waived notice to himself, he did not thereby dispense with notice to the first endorser. That the bank ought to have given the latter notice of the non-payment of the notes; and having failed to do so, the first endorser is discharged, and the appellant deprived of all recourse upon him. This, however, is a misconception of the duties of the bank. Where there are several successive endorsers of a note, the holder may and ordinarily does, give notice to all, with a view to preserve his recourse upon all. But he is not bound to do so. He may, if he pleases, give notice to any one of the endorsers; and that endorser, if he desires to have recourse upon any antecedent endorser, must use due diligence in giving notice of the dishonor of the note.

The bank might in this case have given notice to the first endorser, and if it desired to hold him liable, it was necessary to give such notice. But it was under no obligation to do so for the benefit of the appellant as second endorser. Nor was it essential it should do so in order to preserve its rights against the appellant. The deed imposed no additional duty upon the bank with respect to protest and notice.

The fact is, it imposed no duty of any kind.

It is a covenant by the appellant that upon default being made in the payment of the notes, the trustee shall sell the property and apply the proceeds to their payment.

167 *There is no other condition. To say that this deed imposes upon the bank the duty of giving notice to the first endorser for the benefit of the appellant is to assert stipulations not found in the instrument, and which do not legitimately arise out of the transaction itself.

It would seem, however, that none of the parties looked to the first endorser. During the entire two years following the dishonor of the notes, no allusion was made to him. The appellant did not enquire whether he had notice, nor did he complain that the first endorser had been discharged by the laches of the bank. This may have been due to the fact that the first endorser was known to be insolvent; or it may have been that the appellant, by the execution of the trust deed, and by his arrangements with the maker, had made himself liable absolutely for the debt, and was so understood to be by all the parties. Whatever may have been the reasons, we think the appellant is not discharged by the failure of the bank to have the notes protested and to give notice of non-payment to either of the endorsers. We are therefore of opinion the decree of the circuit court is plainly right, and must be affirmed.

Decree affirmed.

168 *Webb v. City Council of Alexandria.

April Term, 1880, Richmond.

Absent Moncure, P.

Municipal Securities—Sale under Invalid Order—Rights of City.—F was the owner of \$8,700 of the certificates of stock of the city of A, which by a decree of the United States court in May, 1864, were confiscated and sold by the marshal, and \$2,000 of it purchased by W; and at his request the marshal made a transfer of the same on the books of the city. When the stock became due W received from the city of A four coupon bonds of \$500 each in exchange for his stock. In 1874 F sued the city for his stock and recovered it, the court holding that the decree of the United States court confiscating it was invalid. The city of A then sued W to recover the four bonds issued to him for the stock. **Held:** The city of A is entitled to recover the bonds.

This was a suit in equity in the corporation court of Norfolk, brought by the The City Council of Alexandria against Lewis W. Webb, to compel the said Webb to return to the plaintiff four bonds each for \$500, which had been issued by the plaintiff to Webb. There was a decree in favor of the plaintiff, and Webb obtained an appeal to this court. The case is fully stated in the opinion of the court delivered by Judge Christian.

Judge Burroughs, for the appellant.

Charles E. Stuart, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

169 *This case is before us on appeal from a decree of the corporation court of the city of Norfolk. The case is a sequel to the suit of Fairfax against the City Council of Alexandria, reported in 28 Gratt. 16.

The facts disclosed by the record, so far as they are necessary to be noticed in this opinion, are as follows: Dr. Orlando Fairfax was the owner, prior to the 4th day of May, 1864, of certain registered bonds, or certificates of stock, issued by the city of Alexandria for the sum of \$8,700.

On the 4th day of May, 1864, by a decree of the district court of the United States for the eastern district of Virginia, this stock or debt was confiscated and condemned, and a writ venditioni exponas was awarded by said court. At the sale made under that writ the appellant became the purchaser of \$2,000 of said stock, and on the 1st day of August, 1864, at his request, the United States marshal made a transfer of the same on the books of the appellee; and, thereupon, also at his request, two certificates of stock, of \$1,000 each, were issued to the appellant.

By an act of the general assembly, approved February 14th, 1872, (see Acts of 1871-2, p. 73), the city of Alexandria was authorized to call in all the evidences of indebtedness of said city in the form of stocks, bonds and certificates theretofore issued, and to issue in their place a like amount of registered coupon bonds, bearing six per cent. interest, payable semi-annually, the bonds payable thirty years after date, the coupons of which were declared to be receivable in payment of the city taxes and of any other indebtedness due to the said city.

When the certificates of stock, transferred to the appellant by order of the United States marshal under the proceedings of the confiscation sale in 1864, became due, he by letter and in person demanded their payment, and threatened suit thereon unless payment was made.

He did not, however, institute his suit, but accepted from the city council of Alexandria, in lieu of said certificates of stock for \$2,000, four coupon bonds for the sum of \$500 each, issued under the aforesaid act, bearing date 1st of July, 1872, and payable thirty years after date.

At the time of the confiscation proceedings in the district court of the United States the certificates of stock owned by Orlando Fairfax were in possession, and in February, 1874, all of them having previously fallen due, he commenced suit thereon against the city of Alexandria. The circuit court of said city gave a judgment against Fairfax and in favor of the said city. On a writ of error to that judgment this court reversed the same, and rendered a judgment against said city of Alexandria and in favor of said Fairfax for the sum of \$8,700 with interest and cost.

The case was then carried by writ of error to the supreme court of the United States, where the decision of this court was affirmed.

It is further shown by the record that immediately after the rendition of the judgment of this court the city council of Alex-

andria directed its officers not to transfer any bond held by the appellant, nor to pay, nor receive any of the interest coupons detached therefrom. And a few days after the decision of the supreme court of the United States affirming the judgment of this court, the city council of Alexandria filed their bill praying that the bonds and coupons held by the appellant and which represented the stock purchased by him at the "confiscation sale of Fairfax's property," might be delivered up for cancellation; and that the interest on said stock and bonds paid by the

appellee to the appellant might be decreed to be paid *back; and that the defendant might be restrained by injunction from selling, hypothecating, or otherwise disposing of the bonds Nos. 209, 210, 211 and 212, or the coupons annexed thereto, or detached therefrom, these being the coupon bonds issued to the appellant in lieu of the certificates of stock purchased by him at the confiscation sale.

This bill was presented to the judge of the corporation court of the city of Norfolk, who awarded an injunction in accordance with the prayer of the bill.

Upon the hearing, the injunction was perpetuated, and a decree was entered ordering the bonds and coupons in the hands of the appellant to be delivered up and cancelled, and directing that the appellant pay to the appellee the sum of \$540, with interest from the date of the institution of the suit, and costs.

From this decree an appeal was allowed by one of the judges of this court.

The court is of opinion there is no error in the decree of the said corporation court.

First. It has been definitely declared and established both by this court and the supreme court of the United States, that the decree of confiscation, entered by the district court of the United States, against Orlando Fairfax, directing a sale of the certificates of stock issued to him by the city of Alexandria was a mere nullity and absolutely void.

This court based its judgment on two grounds: First, that the district court had no jurisdiction of the case, for the reason that there was no proper seizure of the stock; and second, that by reason of a rule of that court denying to "traitors" and "rebels" (so-called by said court) the right to appear and make defence in such cases, Orlando Fairfax was in effect not a party to the proceedings.

*The supreme court of the United States based its judgment solely upon the ground that there was no proper seizure of the stock, because the process was not served upon a proper officer of the corporation as required by the statute law of Virginia. But it was adjudged by both courts, that the confiscation sale was a mere nullity, and that the purchaser acquired no title by his purchase at said sale.

There can be no doubt that the appellee issued and the appellant accepted the two certificates of \$1,000 each under the erroneous belief that by virtue of the decree of confiscation the debt due to Orlando Fairfax

had been forfeited and his title thereto extinguished, and that the appellant, as purchaser, under, the writ of venditioni exponas issued under that decree had become the rightful owner of \$2,000 thereof.

It is also equally free from doubt that the coupon bonds were given and accepted in exchange for those certificates under the same erroneous conviction. In point of fact, the coupon bonds were issued for the original claim of the appellant. There was no new contract and no new consideration.

If the appellant acquired no title by his purchase, at the confiscation sale, to the certificates of stock sold at such sale, which has been declared by this court and the supreme court of the United States void, he could acquire no better title by accepting without any new or further consideration the coupon bonds issued for the same indebtedness.

When the four coupon bonds of \$500 each were issued to the appellant under the act of 1872, the appellee was funding its whole debt of nearly a million of dollars by issuing similar bonds to all its creditors. At that time there was no controversy between the appellant and appellee as to the title to the said

certificates of stock, and there had been no adjudication of *the validity of the confiscation sale. But on the contrary the corporation found on its books this stock transferred by order of the United States marshal to the appellant at his request, and they issued to him as the apparent owner on their books, the four coupon bonds in the place of the two certificates of stock. The corporation did not know and could not know at that time that the confiscation sale was void. It was only years afterwards when Orlando Fairfax brought his suit, that they had any notice that the validity of that sale would be contested. All that the corporation knew or could know at that time, was the fact that a court of competent jurisdiction had decreed a sale of the certificates of stock due to Fairfax, and that at that sale the appellant had become the purchaser, and that at his request the marshal making the sale, had had the stock to the amount of \$2,000 transferred to the appellant. It was not for the corporation to question the validity of that sale. Its duty was to direct the payment of said stock to the real owner, and according to the decree of the district court of the United States the appellant was the owner. To him they issued the four coupon bonds in place of the stock purchased by him. It is plain that the issuance of said bonds created no new liability. They represented the same debt and for them there was no new consideration. It is clear, therefore, that if the appellant had no title to the stock he had none to the coupon bonds issued in its place.

The claim of the appellant is based upon two grounds: First, that the appellee is not entitled to relief in a court of equity, because it is estopped by its conduct from denying the defendant's title to the coupon bonds and the coupons due thereon; and second, because if the said certificates of stock were

transferred and the said coupon bonds issued in their place were so transferred and issued by mistake as to the rights of 174 the *parties, that mistake is one of law; and in equity as well as at law the maxim "Ignorantia juris neminem excusat" must prevail. We will briefly notice both of these objections.

First. Is the corporation estopped from asserting its right to have the bonds issued to the appellant cancelled, by its conduct in issuing and delivering to him these coupon bonds in the place of the certificates of stock transferred on their books (by order of the United States marshal) as purchaser of the same at the confiscation sale?

The rule upon the subject of estoppel by conduct, or, as it is sometimes called, the equitable estoppel, is thus laid down by Lord Denman, C. J., in *Pickard v. Sears*, 6 Adolph and Ell. 469: "The rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Such an estoppel, therefore, only arises when the conduct of the party estopped is fraudulent in its purpose or unjust in its result, and can only be called into life for the prevention of fraud or the redress of injury. 2 Smith's Lead. C. 642-43-47, 5 Amer. Ed.

Now in this case the appellee was not a party to the confiscation proceedings, and did nothing to induce the defendant to become a purchaser under them.

The appellee did not by words or conduct wilfully cause the appellant to believe that the decree of confiscation was valid, or induce him to act on that belief so as to alter his previous condition, nor was the conduct of the corporation in any respect fraudulent in its purpose or unjust to the appellant in its results. On the contrary the appellee being no party to the confiscation

175 *proceedings had nothing to do with the purchase made by the appellant under the sale directed therein. It was the duty of the appellant (and in nowise that of the appellee), to make enquiry as to the validity of that sale. He took all the chances of a purchaser under a judicial sale. If the decree of sale was void (as has been declared both by this court and the supreme court of the United States), he acquired no title under such sale. The rule caveat emptor applies to him. It was his duty, and not that of the appellee, to have enquired into the validity of the decree of confiscation. If he neglected this duty and in consequence he parted with his money for nought, he cannot justly impute his own negligence to the appellee.

Certainly there is no ground of estoppel to be asserted in this case.

AN that the appellee did was to issue to the appellant coupon bonds in the place of stock which appeared upon their books to have been transferred to the appellant under

a decree of a court of competent jurisdiction. Such an act on the part of the corporation, it is plain, did not estop it from asserting its claim to have the coupon bonds cancelled and delivered up upon the ground that the appellant had no title to the same, after that question had been decided, both by this court and the Supreme court of the United States.

The court is therefore of opinion that the claim of the appellee to have the coupon bonds issued to the appellant delivered up and cancelled is not defeated upon the ground of estoppel.

The court is further of opinion that the rule, invoked by the appellant, ignorantia juris non excusat, does not apply in this case.

While it is a general rule that mistake in matter of law cannot be admitted as 176 ground of relief, it is not a *rule of universal application, especially in courts of equity. It is not an absolute and inflexible rule, but has its exceptions, though such exceptions, in the language of Judge Story, are few, and generally stand upon some very urgent pressure of circumstances. If the maxim is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to its general application; but it is otherwise when the word jus is used in the sense of denoting a private right. If a man through misapprehension or mistake of the law parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if under the general circumstances of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.

It has also been held in numerous cases that where the law is confessedly doubtful and about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any of his legal rights by reason of such mistake. [See *Kerr on Fraud and Mistake*, 398-401, and cases there cited.]

Exceptions to the general rule that mistake of law furnishes no ground of relief are fully recognized by this court in the cases of *Zollman v. Moore*, 21 Gratt. 313; and *Brown v. Rice's adm'r*, 26 Gratt. 467.

Now it is to be remarked that the appellant's claim was based upon his purchase at a confiscation sale made under an act of Congress which was in itself a war measure, and not an ordinary general law, but was an extraordinary enactment for a specific purpose and amid exigencies arising out of civil war.

This act of Congress, at the time of the transfer of stock above mentioned 177 and the substitution of the *coupon bonds in their place, had not been construed by courts nor the mode of its operation and execution determined.

It would be vain to say, in such a case, that the City Council of Alexandria knew, or ought to have known, how such a law, new

and extraordinary in its nature, would be construed by the courts, and whether seizure and confiscation under it would be declared regular and valid, or irregular and invalid, according to the mode in which the process was executed, or other proceedings had thereunder.

But was the mistake here a mere mistake of law? It is true the district court of the United States had jurisdiction under the confiscation act, of this no one can be presumed to be ignorant. But in the case of confiscation of Fairfax's stock the jurisdiction of the court did not attach because the stock was not properly seized by the marshal.

The mode of seizure was prescribed by the attorney-general to the district attorney; and whilst these instructions had the force of law, they could not be regarded as constituting a part of the general law of which every man is presumed to be cognizant. And so, also, it may be said that the rule adopted by the district court of the United States, denying to rebels and traitors the right to appear and make defence in confiscation suits, so far from being a part of the general law, was against law and void. So that the two grounds upon which this court and the Supreme court of the United States based their decisions in declaring the confiscation sale to be void were founded upon questions of fact as well as questions of law.

It cannot, therefore, be said that the appellee is seeking relief upon the ground of mistake in law. But apart from all this the peculiar circumstances of this
178 *case taken in connection with the proceedings in the confiscation case above referred to and the decisions of both this court and of the supreme court of the United States in reference to the same, it is a case strongly appealing to a court of equity for relief.

The rule laid down by Mr. Kerr and for which he cites numerous authorities that "If a man through misapprehension or mistake of law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired," has peculiar application to this case.

Under the decision of this court affirmed by the supreme court of the United States, the City Council of Alexandria is compelled to pay over to Orlando Fairfax the sum of \$8,700, the stock issued to him, and if the claim of the appellant be allowed, the appellee must pay him also the sum of \$2,000 of the same stock which he acquired by purchase at a sale declared to be utterly void. And it also appears by this record that for this stock thus purchased he paid only the sum of \$400, upon which he has received in the shape of interest the sum of \$1,699.60. To hold the city of Alexandria responsible under such circumstances would be grossly inequitable and unjust.

We think it is plain upon the whole case, that the appellee is entitled in equity to the relief prayed for. And of this the appellant has no just cause for complaint, but on the contrary is most fortunate, for though a purchaser at a sale declared to be void he
179 has realized *a large sum in interest and dividends which amply reimburse him for the outlay of money which he made.

The court is therefore of opinion that there is no error in the decree of the corporation court of the city of Norfolk, and that the same must be affirmed.

Decree affirmed.

180 *Smithson v. Briggs & Wife.

April Term, 1880, Richmond.

1. **Action of Ejectment—Office Judgment—Force and Effect.**—An office judgment in an action of ejectment does not become final without the intervention of a court or jury.
2. **Same—Same—Motion to Set Aside.**—The defendant in the ejectment may, upon notice to the plaintiff, appear at the next term of the court, and move the court to set aside the judgment, and allow him to plead therein.
3. **Same—Notice Left at "Residence"—Sufficiency.**—In an action of ejectment, the officer returns upon the rule to plead—G. W. Smithson not being found at his usual place of abode, a true copy of the within rule was left with his daughter at his residence, who is over the age of 16 years, and purport explained to her, this 28th day of August, 1871. **Held:** It will be presumed that the word "residence" was used as synonymous with "his usual place of abode," and that the daughter was a member of defendant's family, and the notice was sufficient. *Anderson, J.*, dissenting.

This was an action of ejectment in the corporation court of Lynchburg, brought by London Briggs and Susan his wife against G. W. Smithson to recover a house and lot in the city, and they laid their damages for the retention of the house from them at \$2,000. The plaintiffs filed their declaration at the rules July 31st, 1871; and thereupon a day was given to the defendant until the next rules, viz: Monday the 28th of August next, to plead to said declaration. And upon this rule the following return was made: G. W. Smithson not being found at his usual place of abode, a copy of the within
181 rule was left with his daughter at *his residence, who is over the age of sixteen years, and purport explained to her, this 28th of August, 1871.

At the August rules the defendant not appearing, a judgment was entered for the plaintiffs against the defendant for the premises in the declaration mentioned and the costs, and that their damages be enquired of by a jury at the then next term.

***Ejectment.**—See 4 Min. Inst. (2nd Ed.) 648.

†**"Home."**—In *Fowler v. Mosher*, 85 Va. 423, it was held that the word "home" used in a return was synonymous with the words "his usual place of abode." See also *Home*, 15 Am. & Eng. Enc. Law (2nd Ed.) 515.

At the next term of the court the defendant not having appeared the office judgment was confirmed as of the last day of the term, and judgment rendered in favor of the plaintiffs for the premises sued for; and on their motion the assessment of their damages was continued until the next term, the judgment on the title in the office having become final.

At the September term 1873, Smithson on notice to Briggs and wife, moved the court to reverse and set aside the judgment by default in the clerk's office of the court and allow him to plead to the action, upon the grounds: First, that the judgment was erroneous and was of no validity, having been without the intervention of a court or jury; and second, that the return of the officer on the rule to plead does not show upon its face that it was served on a member of the defendant's family, or otherwise served according to law.

The motion to reverse and set aside the office judgment came on to be heard on the 7th of April, 1875, when the court overruled it, with costs to the defendants in the motion. And thereupon Smithson applied to a judge of this court for a writ of error and supersedeas; which was awarded.

John W. Daniel, for the appellant.

E. P. Coggin, for the appellees.

182 *ANDERSON, J. One of the questions raised by the record in this case, and upon which its decision turns, is, does an office judgment in ejectment, become a final judgment of the succeeding term of the court, by mere operation of law, without the intervention of a court, or a jury? The precise question was decided by this court in the case of the James River and Kanawha Co. v. Lee, 16 Gratt. 424. That case was analagous to this, and if it differed at all, it was only in one particular. (which will be hereafter noticed), which did not affect this question. The statutes bearing on the subject were thoroughly examined and carefully construed, and the cases reviewed, and the court held "that an office judgment in an action of ejectment does not become final, without the intervention of the court, or a jury." In that case, as in this, the declaration was filed at rules, and a rule given the defendants to plead at the next rule day; at which day the defendants having failed to appear and plead, though duly served with a copy of said rule, (in which respect alone, is there a question of difference between that case and this), their default was entered, and judgment given against them. After the 15th day of the next term of the court, the defendants appeared and moved the court for leave to plead to issue, and set aside the office judgment. But the court being of opinion that the office judgment became final on the 15th day of the term, not having been previously set aside, overruled the motion.

In like manner, in this case, at a subsequent term of the corporation court, after that at which the clerk entered the judgment, as a judgment by operation of law, without the intervention of the court or a jury, the

defendant petitioned and moved the court to allow him to plead and set aside said judgment as invalid, and erroneous, being without the intervention of the court, or a jury.

But the court overruled the motion. **183** *and gave judgment for the defendants to the motion for their costs. In that case this court reversed the decision, and remanded the cause to the circuit court.

In this case the same ground of error exists for which the judgment in that case was reversed; and an additional ground of error is assigned by the plaintiff in error, that he was not served with notice of the rule to plead, as the statute requires, which if sustained, would of itself be a fatal error in the proceeding to judgment.

The following is the return of the sheriff, which the plaintiff in error contends was not a legal service, to-wit: "G. W. Smithson not being found at his usual place of abode a true copy of the within rule was left with his daughter at his residence, who is over the age of sixteen years, and purport explained to her, this 28th day of August, 1871." In such case the statute authorizes the service of the rule, by delivering a copy thereof in writing to the party in person; or if he be not found at his usual place of abode, by delivering such copy, and giving information of its purport to his wife, or any white person found there who is a member of his family, and above the age of sixteen years."

When the notice has not been served in person, in order to hold the party bound by a constructive notice, I think the return should show that every material requirement of the statute has been strictly complied with. It is material if the copy is delivered to his wife, or any white person, that it should be delivered to such person at his usual place of abode. If it is delivered to the party in person, it may be delivered to him at his home or abroad. But if delivered to his wife or other person, the service will not be good, unless it is delivered at his usual place of abode; and if not delivered to his wife, the person to whom it is delivered must not only be over sixteen years of age.

184 *but must be a member of his family. The latter, it seems to me, is just as material, and as important as the other. It will not meet the requirement of the statute to deliver it to a person who may be casually at his usual place of abode. Though it may be delivered there to a daughter who is over sixteen years of age, she must not only be over that age, but she must be a member of his family. It does not follow that she is a member of his family, because she is his daughter. She may be a member of another man's family—her husband's. To say that it was delivered to a daughter is not equivalent to saying that it was delivered to one who was a member of his family. As the name of the daughter is not given, it was not in the power of the defendant below to prove that she to whom it was delivered was a married daughter, and was not a member of his family. It should appear from the return that she was a member of his family.

And to say in the return that the party not

being found at his usual place of abode, a copy of the rule was delivered to a person at his residence, it seems to me is not tantamount to saying that it was delivered at his usual place of abode. For it is not unusual for a man to have a residence which is not his usual place of abode, at the time of the service of the process. And this is well illustrated by the case of *Gadsden v. Johnson*, 1 Nott & McCord 89, cited by counsel for plaintiff in error. It seems to me that it would be establishing an unsafe precedent, to hold a party bound by a constructive notice, when it does not appear from the return of the officer, that all the requirements of the statute have been met with greater certainty than it does by this return. But in this view I am overruled by a majority of the court who think it may be presumed that the word residence was used by the officer as synonymous with "his usual place of abode;"

185 *and that it may be presumed that the daughter to whom the copy of the rule was delivered, was a member of the family of the plaintiff in error. But upon the former ground the court is unanimously of opinion, that the judgment of the hustings court must be reversed with costs, and the cause remanded.

The other judges concurred in the opinion of Anderson, J., on the first point, but thought the notice sufficient.

Judgment reversed.

186 *Coles v. Withers & als.

April Term, 1880, Richmond.

In 1852 C sold to M a tract of land for \$3,564, for which she took his bond, and reserved a lien on the face of the deed given M, which was duly recorded. Between the sale in 1852 and December, 1855, there were other transactions between C and M, by which the latter became indebted to the former (inclusive of the purchase money for the land) \$10,630.50 and for which he executed his bond, with two personal sureties, and the bond for \$3,564 was surrendered. M died in 1856, leaving his whole property to his wife L, who was a sister of C. L, the widow, soon married W, and in 1863 W and wife conveyed the land purchased of C, with other lands, to H, made him a deed and put him in possession. On the 19th of October, 1866, the balance due on the \$10,630.50 bond was \$4,123, for which W, who was then the representative, and had married the widow of M, gave his bond, got possession of the \$10,630.50 bond, and confessed a judgment for the \$4,123 in favor of C, which he, W, alleges was in lieu of the bond which he got possession of. W soon went into bankruptcy, and but a small portion of the judgment was paid. C denies the statement of W about his possession of the bond, and there is nothing in the record certainly to show affirmatively that she ever intended to release the lien reserved in the deed to M. H denies all knowledge of the reserved lien at the time of the purchase, and until a long time thereafter. There was nothing done by C to induce H to believe that she had waived her lien, or to influence his conduct in any way. On a bill filed by C against H and W and wife, in 1871, to enforce the lien for

the purchase money then due on the land sold by C to M and afterwards by W and wife to H. *Held:*

1. **Lien Reserved—Surrender of—Burden of Proof.***—The question of whether a lien reserved is surrendered is one of intention, on the part of the vendor under the circumstances of each case; and there being nothing in

187 *this case to show such intention, the lien is not surrendered, and must be recognized as still existing. The lien was a security not for the bond but for the debt, and therefore the cancellation or surrender of the bond cannot extinguish the debt and the lien given for its payment, without a manifest intention to do so by the vendor, and the burden is on the purchaser to show such intention.

2. **Novation—Change of Securities.**†—A mere change of securities of equal dignity is not a novation of a debt, unless plainly so intended by the parties.

3. **Application of Payments.**‡—As to the payments made on the bond for \$10,630.50, H insisted that they should be first applied to extinguish the purchase money bond of \$3,564, and that was therefore extinguished. *Held:* H not being one of the original parties to the bond, has no right to insist on how the payments shall be appropriated, that being a right existing only between those parties; and whilst as a rule, where there are two debts, one secured and the other not, the courts will apply the payments to the unsecured debt, yet, as no general rule, applicable to every case, can be adopted without the greatest hardship, if neither party has made the application, the court will exercise a sound discretion, and make the application according to what it deems right and proper in each case; and in this case, the payment should be applied *pro rata* to all of the debts due to C.

4. **Limitation of Actions—Sales of Real Estate—Vendor's Rights.**§—Although an action at law on a note given for the purchase

***Lien Reserved—Surrender of.**—As to first headnote of principal case, see *Shultz v. Hanabrough*, 33 Gratt. 567; 2 Min. Inst. (4th Ed.) 374 and cases cited; *Bansimer v. Fell*, 39 W. Va. 454; *James v. Burridge*, 33 W. Va. 276; *Jameson v. Rixey*, 94 Va. 344.

Mortgages—Presumption of Payment.—In *Frazier v. Hendren*, 80 Va. 265, the court said: "It is undoubtedly true that a court of equity will never compel a vendor to part with the legal title until the purchase money has been paid, or the lien therefor has been waived or extinguished. It has been said to be a natural equity, that when land is sold it should stand charged with the unpaid purchase money, and that a court of equity considers a debt as never discharged until it is paid to the proper person and by the proper person. 2 Min. Inst., 190; *Watts v. Kinney*, 3 Leigh 272; *Knisely v. Williams*, 3 Gratt. 265; *Yancey v. Mauck*, 15 Id. 300; *Coles v. Withers*, 33 Id. 186." See also *Stimpson v. Bishop*, 82 Va. 190; 2 Min. Inst. (4th Ed.) 373, and cases cited. See also *Kane v. Mann*, 93 Va. 248; *Jameson v. Rixey*, 94 Va. 344; *Hull v. Hull*, 35 W. Va. 164.

†**Novation.**—As sustaining the second headnote of the principal case, see *Gibert v. W. C.*, etc., R. Co., 33 Gratt. 586; *Moore v. Johnson*, 34 W. Va. 679.

‡**Application of Payments.**—The third headnote is followed in *Pope v. Transparent Ice Co.*, 91 Va. 83.

§**Limitation of Actions—Sales of Real Estate—Rights of Vendor.**—As supporting the doctrine set out in the fourth headnote of the prin-

money of land may be barred by the statute of limitations, the right of the vendor to resort to the land for payment is not affected by any lapse of time short of that sufficient to raise a presumption of payment. *Hanna v. Wilson*, 3 Gratt. 232.

5. **Witnesses — Competency — Quære.** — *Quære*: M being dead, was C a competent witness to any fact with reference to the debt of \$3,564, or the lien reserved to secure it?

This was a suit in equity in the circuit court of Pittsylvania brought in August, 1871, by Elizabeth D. Coles against Edward D. Withers and Louisa P. his wife in their own right and as executrix and administrator de bonis with the will annexed of John Rice

188 *Miller, the former husband of Mrs. Withers, and John W. Holland, to enforce the vendor's lien for the purchase money upon a tract of two hundred and ninety-seven acres of land which Miss Coles had sold and conveyed to John Rice Miller in 1852, and which Withers and wife had sold and conveyed to John W. Holland in 1862.

Holland in his answer averred, that at the time of his purchase he had no knowledge or suspicion of the lien claimed by the plaintiff, and never heard of any such lien or claim until several years after the close of the war. He does not admit that any part of the purchase money of the land is due, and he has been informed and believes that said purchase money has all been paid to the plaintiff, and the alleged lien waived and extinguished; and he denies that the land in his possession or any part thereof, is liable to the complainant in any manner or to any extent; and he refers to the answer of his co-defendant Withers and relies upon the facts therein stated in his defence to this suit.

Withers answered the bill setting out facts, on which he relied to show that the lien on the land had been waived by the plaintiff, and that she had in 1866 accepted his bond and a confession of judgment thereon in satisfaction of her debt.

The undisputed facts are, that in September, 1852, the plaintiff Elizabeth D. Coles sold to John Rice Miller the land in the bill mentioned, at the price of \$3,564, and took his bond for this amount payable in September,

1857, with interest payable annually from the 1st of January, 1853. By deed of the 12th of March, 1853, she conveyed the land to Miller, the amount of the purchase money being stated in the deed; and reserved a vendor's lien in the following terms: The said Elizabeth D. Coles hereby expressly agrees with the said John Rice Miller, that she reserves a lien on said land *for the payment of the purchase money thereof, and that may thereon accrue, and the said Miller hereby agrees that the said land be bound for the same.

Miller made other purchases from Miss Coles, and a short time before his death which occurred in 1856, he had a settlement with her, when it was ascertained that including the purchase money of the land and interest upon it, he owed to her \$10,630.50, for which he executed to her his bond, with Isaac H. Carrington and N. C. Miller as his sureties. By his will he gave his whole estate to his widow, Louisa P., who was the sister of Miss Coles, and appointed her his executrix. In 1859 Mrs. Miller married Dr. Edward D. Withers; and in 1862 they sold and conveyed to Holland a large tract of land, of which the two hundred and ninety-seven acres was a part, for \$45,000.

Payments seem to have been made upon the bond of \$10,630.50 up to January, 1861, reducing it to \$5,242.51; and in 1866, Dr. Withers seems to have had another settlement with Miss Coles, reducing the amount to \$4,123, for which he executed his bond to Miss Coles, and confessed a judgment thereon; and at this time she delivered to him the bond for \$10,630.50. The circumstances attending the delivery of this bond of \$10,630.50 are doubtful, Miss Coles who gave her testimony in the cause, and Dr. Withers differ in relation to it. Her evidence was excepted to by the defendants, and was not considered by this court. That of Dr. Withers is sufficiently stated by Judge Staples in his opinion.

The cause came on to be heard on the 18th of September, 1874, when the court dismissed the bill with costs. And thereupon Miss Coles applied to a judge of this court for an appeal; which was awarded.

Whilst the foregoing case was pending, Holland filed his bill against the infant children of John Rice Miller 189 *and their trustee, to subject certain real estate which had belonged to Miller, and had been conveyed by Mrs. Miller before her marriage with Dr. Withers, to a trustee for them, in the event that his land should be held liable for the claim of Elizabeth D. Coles. This cause came on to be heard with the first case, and it being held that the land of Holland was not liable for that claim, Holland's bill was also dismissed.

Ould & Carrington, for the appellant.

R. Robertson, for the appellees.

STAPLES, J. These two cases were heard together in the court below, and the bill in each case dismissed. A decision in one of them, however, will settle the main points of

copied case, see *Smith's Ex'x v. W. C.*, etc., R. Co., 33 Gratt. 617; *Bowie v. Poor School Society*, etc., 75 Va. 304; *Massie's Adm'r v. Heiskell's Tr.*, 80 Va. 789; *Stimpson v. Bishop*, 82 Va. 190; *Tunstall's Adm'r v. Withers*, 86 Va. 892; *Ellison v. Torpin*, 44 W. Va. 448; *Evans v. Thompson*, 39 W. Va. 308; *Hall v. Hall*, 35 W. Va. 165; *Criss v. Criss*, 28 W. Va. 396, 400. See also *Woff v. Violett's Adm'r*, 78 Va. 57.

But under Va. Code 1887, ch. 139, § 2935, it is provided that the obligation of a mortgage, deed of trust, or vendor's lien shall be limited by twenty years from the time when the right to enforce it accrued, save in the case of a deed of trust or mortgage executed by a corporation. See 2 Min. Inst. (4th Ed.) 371.

Notice—Presumption of.—In *Effinger v. Hall*, 81 Va. 94, the principal case was cited to sustain the proposition that means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself. See also *Miller v. Holland*, 84 Va. 652; *Davies v. Hughes*, 86 Va. 909; *Moorehead v. Horner*, 30 W. Va. 552.

controversy; I shall therefore confine myself exclusively to the matters involved in that case. Preliminary, however, to the main question it is necessary to inquire what are the equities of the parties litigant—Miss Coles on the one hand, and Holland, the purchaser, on the other. The latter, in his answer, avers that at the time of his purchase he had no knowledge or suspicion of the lien, and that he never heard of it until several years after the close of the war. At what precise period he obtained this information he does not tell us. Upon this point he is vague and unsatisfactory. It is, however, not very material, because the lien of Miss Coles being secured on the face of the deed under which Holland claimed, constituted notice to him. That deed was matter of record, which he might have examined. It was gross negligence in him not to do so. The object of the statute in requiring the lien to be reserved on the face of the deed, was to make it matter of record, and thus furnish

to all persons dealing with the property
 191 the necessary *information of all liens and incumbrances thereon. *Patton v. Hoge*, 22 Gratt. 443. It is the duty of the party to examine the records, say the authorities, and whether he does so or not, he will be affected with notice of every fact, the knowledge of which might there have been obtained. When a person cannot obtain a title but by a deed which leads to another fact, whether by description, recital or otherwise, he will be deemed cognizant of such fact, for it is crassa negligentia that he sought not after it. And for the same reason, if the purchaser has notice of a deed, he is presumed to have notice of the entire contents of the deed.

These are familiar principles, fully recognized in every State where the registry laws prevail, and no where more firmly than in Virginia. *Sugden on Vendors* 1056; *Adams' Equity* 326.

The learned counsel tells us that Holland knew that the Miller bond had been surrendered and cancelled, and that seven thousand dollars had been paid Miss Coles by the representative of the Miller estate. But Holland himself does not say that he knew these facts, or that he had been informed of them. He says nothing like it; the fact is, he is reticent throughout.

There is nothing in the record to show he had any knowledge of the Miller bond at all, or of its delivery by Miss Coles to Dr. Withers, or of the payment of any part of it. The presumption is, that if his conduct had been in the least influenced by these transactions, he would have said so explicitly. His astute and vigilant counsel would not fail to perceive the advantage of such a position. It is observable throughout that Holland nowhere alleges that he was induced to part with his purchase money, or that he failed to take any measures for his indemnity and protection,

or that he was in any manner misled
 192 to his own prejudice *by anything said or done by Miss Coles, or by any of the transactions now claimed as a waiver of the vendor's lien. As against Miss Coles then

Holland stands on no higher ground than Miller, the original purchaser. The case is, therefore, free from all embarrassment, or complication, growing out of any supposed equitable estoppels.

I come, then, to the question whether Miss Coles has relinquished her lien for the purchase money secured upon the face of the conveyance executed by her to John Rice Miller.

Before entering into an examination of the transactions relied on, to show the relinquishment, it will be proper to look a little into the principles of law which apply to the case. In the first place, it has long been settled that the vendor of real estate, notwithstanding he has conveyed the legal title, has a lien on such estate for the unpaid purchase money, while it remains in the hands of the vendee, or volunteers, or purchasers with notice. *Prima facie*, the lien exists in any case, and the burden is upon those who deny its existence to show it has been waived. Whether the lien has been waived, is, as has been universally conceded, a matter of intention. The great difficulty with the courts has always been to determine what is sufficient evidence of such intention. And although the taking a distinct security, according to the weight of modern authority, has been regarded as proof of a waiver, in the absence of an express lien, it has been denied by able and distinguished judges. Lord Eldon seemed to think that whether a distinct security constituted a waiver, depended entirely upon the circumstances of each case, and that no rule can be laid down universally on the subject; and, therefore, it was impossible for any purchaser to know, without the judgment of

a court, in what cases a lien would arise
 193 and in what cases it *would not exist.

Nairn v. Prowse, 6 Vesey 752; *Macquerth v. Symmons*, 15 Vesey 329. This uncertainty in the state of the law, and the perplexing litigation growing out of it, led to the statute passed by our legislature, which provides, that when a conveyance is made, the vendor should not thereby have a lien for the unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance. Upon this subject I refer to the able and exhaustive opinion of Judge Allen in *Yancy v. Mauck*, 15 Gratt. 300.

What has been said thus far applies only to cases of implied lien, where there has been a conveyance of the legal title to the purchaser; and, it will be observed, the statute just cited, by its express terms, is confined to that class of cases. Where, however, no deed has been executed by the vendor, very different considerations govern. In such cases the question of implied waiver does not arise. No distinct personal or collateral security will operate as a waiver. By retaining the title the vendor has manifested, in the most unmistakable manner, his purpose of looking to the land as security for his debt. Besides a court of equity will never compel him to part with the title until he has actually received the consideration. As was said in *Chapman v. Tanner*, 1 Ver. R. 267, "There is a natural equity that the land shall

stand charged with so much of the purchase money as may not be paid." *Hatcher's adm'rs v. Hatcher's ex'rs*, 1 Rand. 53.

In *Knisely v. Williams*, 3 Gratt. 253, it appeared that the vendor retained the title and took a bond for the purchase money. He afterwards accepted an order on a third person for the purchase money and surrendered the bonds. It was held, that the order being unpaid, the vendor was entitled to enforce his security against the land. In *Yancey v. Mauck*, already cited, it appeared

that before the bonds for the purchase money became *due, an arrangement was made by which the vendee, with his vendor, executed three bonds to a creditor of the vendor for the amount of the purchase money, for which amount the creditors gave the vendor credit, and the vendee's bonds were surrendered to him. It was held that this land was subject to the lien of the purchase money, even in the hands of a bona fide purchaser. Judge Allen said these arrangements did not change the character of the debt. It still consisted of the purchase money due for the land. *Lewis v. Caperton's ex'or*, 8 Gratt. 148. These decisions of the Virginia court are fully sustained by the current of authorities in other States.

Let us now enquire whether there is any substantial distinction between the case of a vendor who retains the title as security for the unpaid purchase money, and the case of a vendor who, conveying the title, retains in his deed an express lien for its payment. Upon principle, there ought to be no solid grounds of difference. In both cases parties dealing with the purchaser have notice of the rights of the vendor. In the one case, the record shows the title retained as security for the purchase money. In the other, a lien reserved for the same purpose. If in the one case the character of the debt is not changed, by a change of securities, neither can it be in the other upon the same facts and circumstances. In both cases the land stands charged with the purchase money, according to the intention of the parties, and is, upon natural principles of equity, the necessary fund for its payment. A lien secured by contract on the face of the deed, stands upon much higher ground than the implied lien, which was a mere creation of a court of equity. In *Armentrout's ex'or v. Gibbons*, 30 Gratt. 632, this court held, that such a lien constituted a 195 specific charge upon the *land as valid and effectual as a deed of trust or mortgage.

In *Patton v. Hoge*, 22 Gratt. 443, it was held that the lien being set forth in the very first link of the vendee's claim of title, purchasers from him had just as much notice of it as they would have had of a lien on the land, by deed of trust or mortgage. The same view has been taken in other States; in some cases, placing the lien reserved in the deed upon the same ground as the reservation of the title; in other cases treating it as a mortgage to secure the payment of the purchase money. *Hines v. Perkins' trustee*, 2 Heiskell 395; *Anthony v. Smith*, 9

Humph. 508; *Graham v. McCampbell*, Meigs R. 52. Upon this subject see *Herman on Mortgages*, and numerous cases there cited, for a full discussion of the whole subject. Sections 211, 212, 213, 214.

Indeed it may be a question whether a reserved lien is not of a higher nature than a mere mortgage security. In many cases the mortgage is treated as a mere incident to the debt, whereas the lien reserved is an express charge inherent in its nature upon the land, which, in equity, is the natural primary fund for its payment. However that may be, a vendor who reserves a lien upon the land, and takes also the bond of the vendee for the purchase money, has two securities, to either of which he may resort at his pleasure.

The lien is a security, not for the bond, but for the debt. Clearly, therefore, the mere cancellation, or surrender of the bond, cannot extinguish the debt, and the lien given for its payment, unless the transaction manifestly and plainly was so intended. So long as the debt exists, the courts will never presume the chief security taken for its payment has been surrendered, without satisfaction, unless upon the clearest and most convincing testimony. The Vir-

196 ginia cases already cited sustain *this position, and the authorities elsewhere sustain it. The rule laid down in 1 *Hilliard on Mortgages*, 448, 451, 453, is, that nothing short of payment or express release will have that effect.

This distinction between the mere personal obligation of the debtor and security furnished by a reserved lien, or mortgage, has been recognized in numerous cases. In *Hanna v. Wilson*, 3 Gratt. 232, this court decided that although an action at law, on the note given for the purchase money, might be barred by the statute of limitations, the right of the vendor to resort to the land for payment, is not affected by any lapse of time short of a period sufficient to raise a presumption of payment. The decision in *Baldwin v. Norton*, 2 Conn. R. 161, proceeded upon the same grounds. Chief Justice Swift, in the course of his opinion, used the following language: "It is said the giving up the note for which the land was mortgaged as collateral security, discharges the lien upon the land. But this is no more than adjusting the claim between the first mortgagee and the man who has the ultimate equity of redemption. It is only relinquishing a legal remedy on the note. It is no payment of it, and the discharge of a right of action at law on the note, will not discharge the land pledged to secure it, without actual payment. There must be a payment of the debt by something besides the thing pledged to secure it. Otherwise there is no satisfaction of the mortgage. The cases of *Magruder v. Peter*, 11 Gill and John 217; *Thayer v. Mann*, 19 Pick. 535; *Bank of Metropolis v. Gutschlick*, 14 Peters' R. 19, sustain the same view. The learned counsel for the appellee has cited a single case upon the point, *Borst v. Corey*, 15 New York R. 505, which, so far from being in conflict with these au-

thorities, recognizes, to the fullest extent, the same doctrine. There is an opinion of Chancellor Bland in *Moreton v. Harrison*, 1 Bland R. 491, 493, which expresses so clearly and lucidly this same view, that I will make a citation from it. After speaking of the lien of the vendor, and the lien by mortgage, as being substantially the same, he proceeds to say, "These securities should not be confounded with mere personal securities, or obligations for the payment of money of any class or grade whatever. A bond, promissory note, or simple contract, for the payment of money in any shape or form, is a personal contract, which surely cannot, at law or in equity, be assimilated to, or governed by the principles applicable to a mortgage of any description. The plaintiffs do not ask to have their specialty or simple contract enforced as a means of obtaining payment from their debtors. They are here as vendors against the defendant as their vendee, and they claim the benefit of the lien they hold as an incident of that relationship."

Applying these principles to the case in hand, let us look at the deed from Miss Coles to John Rice Miller, and the transactions and conduct of the parties subsequent to the execution of that deed. The provision relating to the purchase money is as follows: "The said Elizabeth D. Coles, hereby expressly agrees with the said John Rice Miller, that she reserves a lien on said land for securing the payment of the purchase money, and the interest that may thereon accrue; and the said Miller hereby agrees that the land shall be bound for the same." Here we have not merely the reservation of the vendor, but a specific charge upon the estate created by the strongest language, and agreed to by the purchaser in terms equally explicit. The object was so to provide for the lien, that there could never be any misunderstanding or mistake with respect to the intention and meaning of the parties. If this

lien has been abandoned and the property released, it *has been brought about by a most equivocal transaction, sustained by very equivocal testimony. I do not propose to consume time and labor in discussing the effect of the bond given by John R. Miller to Miss Coles, with C. R. Miller and Isaac H. Carrington as his sureties. Whatever may be said about that bond, can be better said in connection with the question of its surrender to Dr. Edward Withers. That gentleman is the cousin of Miss Coles, the husband of her sister, and the principal witness in behalf of the appellee. It is not my purpose to impeach his veracity, or to reflect upon his integrity. It is very apparent, however, that his feelings are enlisted strongly against his kinswoman, and that he is utterly at fault in his recollection of several very important facts.

He is a party defendant to this suit, and has filed his answer. In that answer he tells us that at the time of these transactions his affairs were in an embarrassed condition. The fact is he was then utterly insolvent; and yet he declares it was believed by all

parties, that a judgment confessed by him in Miss Coles' favor, afforded as ample security for a debt of \$4,123 as a bond upon the estate of John Rice Miller, endorsed by two unexceptionable securities.

He further says, the distinct object of the arrangements, distinctly understood by Miss Coles, was, to discharge the estate of John R. Miller, and his sureties aforesaid, from all liability upon the Miller bond, and in lieu thereof to take the security of her judgment against this respondent, upon his individual bond.

Dr. Withers has also given three depositions in the case. Neither of them sustains the most material statements in his answer. In his first deposition he produces the impression that the sole object of the arrangement with Miss Coles was to furnish

her with *additional security by a confessed judgment in her behalf. He makes no reference whatever to a release of the Miller debt, or any understanding by which the Miller bond was to be surrendered, and his bond taken in place of it. The fact is, so far as we have any information on the subject, no one asked for the release of the Miller estate from all liability. The sureties on the bond did not ask for it. Mr. Whittle did not suggest it, and Dr. Withers himself does not pretend that he requested or desired it. According to his own version, nothing was said about the surrender of the Miller bond until after the whole transaction with Miss Coles was concluded.

In Dr. Withers' second deposition, given two years after the first, he varies his statement considerably. He states that Mr. Whittle, in his letter, urged that he, Withers, should secure Miss Coles' debt by confessing judgment upon a bond which he might execute in lieu of one which she held against John R. Miller and his sureties. At the time Dr. Withers filed his answer, and at the time he gave both these depositions, it was supposed Mr. Whittle's letter had been lost. Fortunately, it has since been found, and is a part of the record. There is not the slightest allusion in the letter to the Miller bond, or the execution of another bond in lieu of it. The fact is, Mr. Whittle knew nothing about the Miller bond, he did not even know that Miss Coles held a claim against that estate. He had been informed that Dr. Withers owed her a debt, which was in danger of being lost by his insolvency, and his sole object in writing the letter was to suggest a confession of judgment in her behalf, with a view to its ultimate security. And yet this letter is made the sole basis for the pretense that the distinct object of the arrangement was to release the Miller estate from liability,

and in lieu thereof, take the bond of Dr. Withers, *with a confession of judgment, as sole security. So far as the lien on the land for the purchase money is concerned, it is not pretended that anything was said about it. No allusion has been made to it in any of the interviews between Miss Coles and Dr. Withers. It is very probable that Miss Coles did not think of it, or even remember that she had retained

it. If the lien has been released, it has been done without being so intended by anybody. I know of no case in which the waiver has been held to exist, except upon the expressed or presumed intention of the parties. According to all the authorities, the burden is upon the purchaser to show that in the particular case, the lien has been intentionally displaced or waived by consent. Story Eq., § 1224.

But, even if Miss Coles had not reserved a lien on the land, if she had no other security than the Miller bond, it may be a grave question whether the alleged arrangement with Dr. Withers operated as a novation of the debt. A mere change of securities of equal dignity is not a novation, unless plainly so intended by the parties. *Pattison v. His Creditors*, 9 Louisiana Annual R. 228; and cases cited. In *Lobby v. Geldant*, 3 Leventz R. 56, repeatedly recognized as authority, it was held that an obligation by an executor, in satisfaction of an obligation of his testator, is no release, although one binds *de bonis testatoris*, and the other *de bonis propriis*. Here Dr. Withers was administrator, with the will annexed of John Rice Miller's estate, and his wife was the sole devisee of that estate. As personal representative he was bound for the debt, and he was also bound for it individually, by reason of assets received through his wife. So far, then, as the immediate parties were concerned, the result was precisely the same, whether Miss Coles held John Rice Miller's bond, or Dr. Withers' bond in its place.

201 *Whether the debt was paid by Dr. Withers out of his own private means, if any he had, or out of the Miller estate.

It often happens that an executor gives his own individual obligation for a debt of the testator; and, although the effect may be to render him personally liable, no one supposes that he thereby waives all claim against the estate. I do not deem it necessary, however, to go into a discussion of the common law doctrine on the subject of accord and satisfaction, novation or conditional payment. Upon that subject, I refer to the noted case of *Cumber v. Wane*, 1 Strange R. 425, and the notes and cases cited in *Smith's L. Cases*, Vol. 1, Part 1, 595; 5 Rob. Pr. 740; and especially to the case of *Weakly v. Bell and Sterling*, 9 Watts R. 273.

Whatever may be the doctrine of the common law courts on the subject, a court of equity looks to substance and not to the form of the transaction; and, in this connection, I shall content myself with quoting what has been said in this court on former occasions. "Will the vendee (says Judge Allen) be heard to say, that by shifting the securities the purchase money is satisfied, although he has never paid, and his vendor has never received a cent? Would he not be told, in the language of the president of this court, in *Watts v. Kinney*, 3 Leigh 293, that a court of equity looks to the substance, not the form; that it looks to the debt (here the purchase money) which is to be paid, not to the hand which may happen to hold it; that the fund (here the land), charged with its

payment, shall be so applied, whoever the person entitled, and that it considers a debt never discharged until it is discharged by payment to the proper person."

Before concluding my opinion on this branch of the case, I will state, that I have not considered at all the testimony of Miss

202 Coles, because it has been executed *to, and there may be a question as to her competency. I am inclined to think,

that under the amended statute she is competent to testify as to any transaction between her and Dr. Withers. Code of 1873, ch. 172, § 22. Upon this point, however, my brethren do not wish to be understood as expressing any opinion. If her testimony is legal, it removes every difficulty of the case. But, without it, I am satisfied that no decision can be safely based on Dr. Withers' testimony. I do not intend to impeach his veracity. I have no doubt he conscientiously intended to represent the facts fairly; but it is apparent that his version of the transaction is utterly unreliable and erroneous. Upon the whole case, I am satisfied that the lien of the appellant has not been waived, and must be respected by the courts.

Another question is, however, presented, as to the proper application of the payments made. It appears that a settlement took place between Miss Coles and John R. Miller, just before the death of the latter, for the purpose of ascertaining the precise amount due. That result showed a balance of \$10,630 due Miss Coles, including the purchase money of the land, for which Miller executed his bond. After the death of the latter, payments were made by his representatives amounting to \$6,000, which were endorsed on the bond. The question now arises, how are these payments to be applied by the court? The learned judge of the circuit court was of opinion they ought to be appropriated first to the satisfaction of the purchase money for the land, the result of which is that Miss Coles is as effectually deprived of her security as if she had actually waived it. I do not deem it necessary to enter into a discussion of the reasons which led the learned judge to this conclusion. They do not seem to me convincing or satisfactory. One of the

203 grounds, however, and the main one on which his *decision rests, is the supposed equity of Holland, the purchaser, to have this application made for his benefit. It has been already shown, in the first part of this opinion, that Miss Coles' equity to the payment of the purchase money, out of the land, is as strong as that of Holland to hold the land discharged of it. That the very deed under which he claimed title showed that the purchase money was unpaid, that the land was held bound for it, that it was his own folly he did not inform himself; and, that neither in the pleadings, nor in the proofs, was there any pretense or claim that Holland had been in any manner misled or prejudiced by any thing Miss Coles had said or done. I do not understand, however, upon what principle it is that Holland can interfere in this matter; unless, indeed, he can show some peculiar equity in his favor, growing out of

the conduct of Miss Coles toward him, operating by way of estoppel. Holland is not a surety for the debt, but a purchaser of the land, standing in the shoes of Miller, his vendor. The general rule is subject to but few exceptions, and this is not one of them, that the court cannot go outside of the case, or see how third persons may be affected by the application. In *Gordon v. Hobart*, 2 Story R. 243, Judge Story said, that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor, where neither the debtor or the creditor had made or required it. See upon this subject cases cited, ch. 9, p. 75, et sequitur, in *Munger on the Application of Payments*.

In most of the cases the great contention is, whether the court will apply the credits most beneficially for the creditor or the debtor. The general rule, subject, however, to exceptions, is, that where there are two debts,

the one secured and the other not, the court will *apply the payment to the debt for which there is no security.

And the reason is, that without such application, the creditor will lose part of the debt. This rule is sustained by a uniform current of authorities all over the country. See cases cited in *Munger*, on the Application of Payments, 134; 1 American Leading Cases 352-356. It has not been, however, always followed in this State, nor has it been expressly or impliedly repudiated. This court has repeatedly held, that no general rule applicable to every case, could be adopted and adhered to without producing great hardships. If neither party has made the application, the court will exercise a sound discretion, and make the application according to its own notions of what may be right and proper in the particular case. *Smith v. Loyd*, 11 Leigh 512, and this rule is abundantly supported by authority. *Munger* 81, 99.

It must be admitted that this is a very loose and indefinite way of expressing a principle of law, but it has been declared by very eminent judges. In the present case, it seems to me the only proper solution of the difficulty is in applying the credits pro rata to all the debts. I cannot see upon what principle the payments are to be appropriated, exclusively to the purchase money, and thus in effect to deprive Miss Coles of all security upon her debt, and every part of it, in favor of Holland, to whom she owes no duty. Nor can I see any just ground for applying them exclusively to the other debts, for all are included in one bond, and the payments are endorsed thereon generally. The parties in some measure have themselves made the application to all the debts. There are numerous cases which sustain the pro rata application, especially where there are several claims secured by one instrument or judgment. See

Greenleaf on Evi., § 535. In *Blackstone* 205 *Bank v. Hill*, 10 Pick. R. *128, it was said by the supreme court of Massachusetts, "All the debts owed by the plaintiffs having been consolidated into one by the judgment, and that one having been par-

tially discharged, all the notes embraced in it must be taken to be satisfied proportionately. See also *White v. Trumbull*, 3 Green N. J. R. 314; *Shaw v. Picton*, 10 Eng. C. L. R. 443. In the present case there is nothing to preclude us from adopting the same rule. Indeed, it is difficult to see how any other can be adopted, inasmuch as the parties themselves have applied the credits generally upon this bond. This would give Miss Coles a sum about equal to the principal of her debt. Practically, it can make no great difference as this is all, perhaps, that could now be realized by a sale of the land.

For these reasons stated, my opinion is, that the decree of the circuit court must be reversed, and a decree entered in conformity with the views herein expressed.

CHRISTIAN, ANDERSON and BURKS, Js., concurred in the opinion of Staples, J.

MONCURE, P., concurred in the results.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the lien for unpaid purchase money reserved by the appellant Elizabeth Coles, in her deed of the 12th March, 1853, to John Rice Miller has not been waived or extinguished, but is still a subsisting lien, and may properly be *enforced against the land conveyed by said deed and now in the possession of the appellee Holland.

This court is further of opinion that the payments made by the representatives of said Miller, upon the bond executed by said Miller to the said Elizabeth Coles, with Isaac H. Carrington and N. C. Miller as sureties, on the 7th December, 1855, ought not to be applied exclusively to the purchase money for which said lien was reserved as aforesaid, but are properly applicable, pro rata to all the debts included in said bond, including said purchase money; and the said circuit court erred in failing to decree accordingly.

It is therefore ordered and decreed that the decree of said circuit court dismissing said appellant's bill, is erroneous, and the same is hereby reversed and annulled; and it is ordered and decreed that the appellee John W. Holland do pay to the appellant her costs, by her expended, in the prosecution of her appeal aforesaid here.

And this court proceeding to enter such decree as the said circuit court ought to have entered, it is decreed and ordered that the lien of the appellant aforesaid be held valid and subsisting; that an account be taken of the payments aforesaid, that the same be applied pro rata to all the debts included in said bond, and the balance of unpaid purchase money due the appellant thus ascertained, be decreed to her, and in default of the payment thereof, a decree be entered subjecting said land, or so much thereof, as may be necessary to satisfy said unpaid purchase money; said sale to be at such

time and place and upon such credit as may seem to said circuit court just and proper, conformably to law and the rules of practice and proceedings.

And this court with now undertaking to pass upon any of the questions arising

207 upon the bill filed *by the said J. W. Holland against Nathaniel C. Miller trustee, Louisa C. Miller and Catharine R. Miller and others, doth further order and decree, that the decree of the said circuit court dismissing said bill, be reversed and annulled, and that the appellees in that cause other than the said Elizabeth Coles do pay to the said Holland his costs by him expended here.

And these causes are remanded to the said circuit court for further proceedings to be had therein in accordance with the foregoing opinion and decree.

Decree reversed.

208 *Smith v. The City Council of Alexandria.

April Term, 1880, Richmond.

Municipal Corporations—Grading Streets—Liability for Damages.—If a municipal corporation in improving its streets, fills up a street and does it in such way that the water which before had been carried off by gutters, is thrown back upon an adjoining lot, the corporation will be liable for the damage to the lot, if by proper care and means it might have been prevented.

This was an action on the case in the corporation court of Alexandria, brought by Michael Smith against the City Council of Alexandria, to recover damages for injury done to a lot owned by the plaintiff, by the filling up a street of the city. The declaration is as follows:

Michael Smith complains of the City Council of Alexandria, a body politic and corporate under the laws of Virginia, defendant, who has been duly summoned to answer the plaintiff of a plea of trespass on the case. For that, whereas, the plaintiff, on the 1st day of September, 1875, was and is now possessed of a certain lot of ground on the northeast corner of the intersection of Queen and Patrick streets, fronting on Patrick street fifty feet and on Queen street — feet, in the city of Alexandria, aforesaid, the said

***Municipal Corporations.**—Approved in *Kehrer v. Richmond City*, 81 Va. 745, which held the city not liable where it acted within the scope of its powers and with reasonable care and skill; and in dissenting opinion by Lewis, P., in *W. U. Tel. Co. v. Williams*, 86 Va. at p. 712. See 1 Min. Inst. (4th Ed.) 631; *Home Building Co. v. Roanoke*, 91 Va. 59; *Terry v. Richmond*, 94 Va. 544; *Norfolk & Western R. Co. v. Carter*, 91 Va. 589; *Powell v. Wytheville*, 90 Va. 75, 2 Dill Mun. Corp. (4th Ed.) §§ 987-990, 1039-41; notes, 2 Mun. Corp. Cas. 556 et seq.; notes, 1 Mun. Corp. Cas. 73 et seq.

In *Town of Suffolk v. Parker*, 79 Va. 660, the principal case was cited to support the proposition that a municipal corporation is liable for so using and conducting a market house, which it had been authorized to erect, as to render it a nuisance to abutting owners.

lot of ground then and now being enclosed by a plank fence, a part thereof occupied by buildings and used by the plaintiff for a coal and wood-yard and for other purposes; and the plaintiff avers that up to the time of the act, or acts, of the defendant, its officers and agents, *herein complained of, there was a ditch, or gutter, on the north side of Queen street, in front of said lot and also on the east side of Patrick street in front of the lot aforesaid, which said ditches or gutters conveyed all the water that flowed by, from and over the lot aforesaid, to the intersection of the streets aforesaid and thence, by means of other ditches and gutters, it passed on and into the proper channel and was carried off. And the plaintiff further avers that the defendant, its officers and agents, on the day and year aforesaid, negligently, carelessly, wrongfully and injuriously filled up the ditches aforesaid and filled in the said streets with dirt and earth, &c., and thereby elevated the grade thereof several feet, to-wit: three feet in front of the said lot, without cutting a ditch, constructing a drain, or leaving an opening in the embankment of the said streets, thus made, for the water to flow on and escape, as it had hitherto done; and because of the filling up of said ditches and streets as aforesaid, all the water was stopped and thrown back on the plaintiff's lot aforesaid, and that by reason and in consequence thereof, from the 4th day of November, 1875, until the institution of this suit, the lot aforesaid was covered with water to the depth of eight inches, the plaintiff was deprived of the use and enjoyment thereof, the plaintiff's business, for which it was used, was interrupted and injured, and the plaintiff, to save his property thereon, was put to great labor and expense, and in doing so, the health of the plaintiff was greatly prejudiced.

Wherefore the said plaintiff saith that he is injured, and has sustained damage to the amount of \$500, and therefore he brings suit.

The defendant demurred to the declaration; and the court sustained the 210 demurrer. And thereupon Smith *applied to this court for a writ of error; which was allowed.

John W. Johnson, for the appellant.

C. E. Stuart, for the appellee.

BURKS, J., delivered the opinion of the court.

A writ of error to the judgment below sustaining a demurrer of the defendants to the plaintiff's declaration, presents the only question for decision here, to-wit, whether, the material allegations being admitted by the demurrer to be true, the declaration states a good cause of action.

The suit was brought to recover compensation for damage by water to the plaintiff's lot in the city of Alexandria, occasioned, as alleged, by the grading of certain streets in the city by the defendants, the City Council.

Among the powers expressly conferred by the charter upon the City Council is the

power "to pave, make and repair the streets and highways, * * * whenever they shall deem it proper, * * * to open, extend, regulate, pave and improve the streets within the limits of the city;" and they are required "to make to the person or persons who may be injured by such opening or extension just and adequate compensation out of the funds of the corporation." Acts of 1870-71, ch. 73, § 14. No compensation is provided for any persons sustaining damage by the exercise of the powers granted, except the persons just mentioned, for whom provision was necessary under our Constitution, which forbids the passage of any law by the general assembly, "whereby private property shall be *taken for public uses without just compensation." Con. of Va., Art. 5, § 14.

The validity of this legislative act, similar to the charters of most of our cities and towns in respect to streets, has not been and cannot be questioned, and the City Council having full discretionary power thereunder to improve the streets of the city by grading them, the due exercise of the power cannot, in the nature of things, be wrongful, in a legal point of view; and hence, although it may be attended or followed by damage, as a necessary incident, to the owners of adjacent lots, such damage is what is known at the law as *dammum absque injuria*, and imposes no legal liability.

A distinguished jurist, who has given special attention to the law of municipal corporations, in his valuable treatise expresses the principle thus: "In view of the nature of streets (explained in a former chapter), and of that control over them which of right belongs to the State, and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets), shall be found expedient, it results, we think, that adjoining property owners are not entitled, of legal right, without statutory aid, to compensation for damages which result as an incident or consequence of the exercise of this power by the State or the municipality by delegation from the State."

"Accordingly," he says, "the courts by numerous decisions in most of the States, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level and improve streets, if

212 they exercise reasonable *care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability." 2 Dillon on Mun. Corp., §§ 782, 783.

The numerous decisions referred to by the learned author in the note to § 783, show that

the doctrine stated in the text prevails in the Federal courts and in almost all the States of the Union. We think it has its foundation in the principles of the common law and must prevail here as elsewhere, unless and until it shall be modified or abrogated by legislation.

The following, among the multitude of cases cited, are selected as in point: *Callender v. Marsh* (opinion by Chief Justice Parker), 1 Pick. R. 418; *Radcliff's ex'ors v. Mayor of Brooklyn* (opinion by Chief Justice Bronson), 4 Coms. R. 195; *Wilson v. Mayor and City of New York*, 1 Denio. R. 595; *Smith v. Corp. of Washington*, 20 How. (U. S. R.) 135; *Mills & others v. City of Brooklyn*, 32 New Y. R. 489; *Carr & others v. Northern Liberties*, 35 Penn. St. R. 324; *O'Conner v. Pittsburgh*, 18 Penn. St. R. (opinion by Chief Justice Gibson) 187; *City of Delphi v. Evans*, 36 Ind. R. 90; *City of Madison v. Ross*, 3 Ind. R. 236; *Lee v. City of Minneapolis*, 22 Minn. R. 13; *Cheever v. Shedd*, 13 Blatch. C. C. R. 258; *City of St. Louis v. Gurno*, 12 Mo. R. 414; *Hoffman v. City of St. Louis*, 15 Mo. R. 651; *Keasy v. Louisville*, 4 Dana (Ky.) R. 154 (opinion by Chief Justice Robertson); *Mayor & Council of Rome v. Omberg*, 28 Ga. R. 46; *White & wife v. Yazoo City*, 27 Miss. R. 357; *Simmons v. City of Camden*, 26 Ark. R. 276; *Humes v. Mayor & Aldermen of Knoxville*, 1 Humph. R. 403; *Dorman v. City of Jacksonville*, 13 Fla. R. 538.

213 *Robertson, C. J., in *Keasy v. Louisville*, supra, while admitting the general rule to be that the law gives no damages where there has been neither trespass nor nuisance, seemed to think that there might be extreme cases, where the deprivation of the use of property not touched might entitle the owner to compensation from the public. See also *Ashley v. Port Huron* (decided in 1877, opinion by Cooley, C. J.), 35 Mich. R. 296; *Inman v. Tripp*, 11 Rhode Is. R. 520; *Pumpelly v. Greenbay Company*, 13 Wall. U. S. R. 166; *Eaton v. B. C. M. R. Co.*, 51 New H. R. 504.

The cases agree, that the exemption from liability for consequential damages depends upon or rather implies the due exercise of the power delegated—the observance of reasonable care and skill in the execution of the work undertaken; for, as has been correctly said, the principal is a general one, that while there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet if the work thus authorized be not executed in a proper and skillful manner, there will arise a common law liability for all damages not necessarily incident to the work, and which are chargeable to the unskillful or improper manner of executing it. 2 Dill. on Mun. Corp. (2d Ed.), § 802, and cases cited.

In the case of *Perry & another v. City of Worcester*, 6 Gray's R. 544, Chief Justice Shaw, after stating the rule of exemption from liability in an action, as for a tort, for damage necessarily done to the property of another in the execution of a work autho-

alized by public authority for public use, observes, that "this presupposes that the public work thus authorized will be executed in a reasonably proper and skillful manner, with a just regard to the rights of private owners of estates. If done otherwise, the damage is not necessarily *incident to the accomplishment of the public object, but to the improper and unskillful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." The same principal as reaffirmed by the same eminent judge in *Sprague v. City of Worcester*, 13 Gray's R. 193.

And Mr. Justice Blackburn in *Mersey Docks v. Gibbs and Same v. Pierce*, 11 Ho. of Lords Cas. 686, 713. (marg. p.), remarks, "that though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them, from the obligation to use reasonable care that in making them no unnecessary damage be done;" and he refers to *Brine v. The Great Western Railway Company*, 2 Best & Smith's R. 402, 411, where Mr. Justice Compton says, that "the distinction is now clearly established between damages from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains. The distinction is as applicable to works executed for one purpose as another." The cases of *Creal v. City of Keokuk*, 4 G. Greene R. 47; *The City of McGregor v. Boyle*, 34 Iowa R. 268, and *Ellis v. Iowa City*, 29 Iowa R. 229, are apposite illustrations of the principle when applied to the grading of streets and other municipal improvements. See also opinion of Judge Pearson in *Meares v. Comm'rs of Wilmington*, 9 Iredell (Law) R. 73.

It remains to test the sufficiency of the declaration in question by the principles of law which have been stated.

At the first view, it might seem, that the plaintiff was seeking to recover for damages necessarily *occasioned by the mere elevation of the streets above their former grade. If this were the proper construction of the declaration, no cause of action would be shown. A careful examination, however, satisfies us, that the gravamen of the complaint is not that the streets were elevated by the grading whereby, and whereby only, damage was done to the plaintiff's premises, but that the work was not executed with care, and was done so negligently and improperly as to cause the damage for which compensation is sought.

The case stated is substantially this:

The plaintiff is the owner of a corner lot, at the intersection of two streets in the city of Alexandria, which lot was enclosed, occupied and used by him as a coal and wood-yard and for other purposes. There was a

ditch or gutter in front of the lot on each side, which conveyed all the surface water that flowed by, from, and over the lot to the intersection of the said streets, and thence, by the means of other ditches and gutters, it passed on and into the proper channel and was carried off. The City Council in grading these streets elevated them three feet in front of the plaintiff's lot, filled up the ditches and gutters, and did not cut others or provide other means for the water to flow on and escape as formerly: and thus the water was stopped and thrown back on the plaintiff's lot, causing the damage specified in the declaration, for which compensation is demanded.

These acts of the City Council are all charged to have been done "negligently, carelessly," &c.; for the terms, "negligently, carelessly," &c., as used in the declaration, should be taken, we think, as applied and intended to be applied not only to the elevation of the streets, but also to the filling up of the then existing ditches and gutters and the omission to cut others or supply other means for the escape of

the water. *The complaint is not of the mere grading of the streets, a work which the Council was authorized by law to do, but of the negligent and improper manner in which the work was done, causing damage. Whether in grading, it was necessary to fill up the ditches and gutters, and if necessary, whether it was practicable to substitute other sufficient ditches and gutters to take the water off, are matters of fact to be considered on the trial, in connection with the other circumstances of the case, in determining the question of negligence in the execution of the work.

Our opinion is, that the judgment of the corporation court of the city of Alexandria should be reversed, the demurrer to the declaration overruled, and the cause remanded for further proceedings.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous; therefore, it is considered, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his writ of error aforesaid here; and this court now proceeding to render such judgment as the said corporation court should have rendered; it is further considered, that the demurrer of the defendant's to the plaintiff's declaration be overruled; and this cause is remanded to the said corporation court for further proceedings therein in order to final judgment: which is ordered to be certified to the said corporation court of the city of Alexandria.

Judgment reversed.

217 *Stroud v. Connelly & als.

April Term, 1880, Richmond.

Husband and Wife—Conveyance by Husband to Trustee for Wife—Effect.*—A husband who has no interest in his wife's real estate, except a life estate in a part of it for their joint lives, there having been no issue of the marriage, conveys her estate to a trustee for the benefit of the wife. **Held:** The deed of the husband conveyed no separate estate in any part of the property which did not terminate at her death; and she therefore could not dispose of it by will during her coverture.

This was an action of ejectment in the circuit court of Dinwiddie county, brought by George A. Connelly and Martha F. his wife, formerly Martha F. Walker, William Walker and Robert Walker against John B. Stroud, to recover a tract of land in said county then in the possession of Stroud. Stroud was the surviving husband of Betsy Stroud, who was before her marriage Betsy Crawford, and claimed under her will. The plaintiffs were her heirs at law. There was no dispute about the facts, and the court instructed the jury in favor of the plaintiffs, and there was a verdict and judgment accordingly, and exception by the defendant; and he applied to a judge of this court for a writ of error and supersedeas; which was awarded. The case is stated by Judge Christain in his opinion.

Epes & Keeler, for the appellant.

Robert H. Jones, Jr., and George S. Bernard, for the appellees.

218 *CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the county of Dinwiddie.

The action was ejectment brought by the defendants in error against the plaintiff in error for the recovery of a tract of land in the possession of the latter.

Upon the facts, there is no controversy, there being no conflict in the evidence.

The case presents a single question and that is a question of law.

That question is—Did Mrs. Elizabeth Stroud, under the will of her father Moses Crawford, and the deed executed by her husband John B. Stroud to James P. Boisseau, trustee, acquire a separate estate which she had the power to dispose of by will. If a separate estate was conferred upon Mrs. Stroud, by the will and deed before mentioned, she had a right to dispose of the same by will, and the defendants in error had no title to the land in controversy, she having devised the same for the use of her husband, the plaintiff in error, who is in possession of the land. If, on the other hand, the estate she attempted to dispose of by will, was not her separate estate, then the land in controversy descended to her heirs at law, the defendants in error, and they are entitled to recover possession of the same.

The two clauses of the will of Moses

Crawford devising the lands in controversy are as follows:

"1st. I lend the use of my land and plantation to my friend Sarah Cross, during her single life, and at her death or marriage, I give and bequeath unto my reputed natural son Norman Crawford, one hundred and nineteen acres of land, including the houses and plantation whereon I now live, to him and his heirs; but provided he shall die without leaving a lawful heir

219 *begotten of his body, then and in that case it is my will and desire that the said one hundred and nineteen acres of land shall revert to my reputed natural daughter Betsy Crawford, and her heirs forever. 2nd. I give and bequeath unto my said reputed daughter Betsy Crawford, sixty acres of land, to be taken off in a manner so as to be equitable to both parties; also, one feather bed and furniture, one cow, and four hogs, to her and her heirs forever."

Betsy Crawford intermarried with John B. Stroud, and is the same person known in the record as Elizabeth Stroud. After their marriage, to-wit: on the 2d day of May, 1865, the said John B. Stroud by a deed which recited that he was desirous of making provision for his wife, the said Elizabeth Stroud, conveyed to James P. Boisseau in trust for the benefit of said wife, the following real estate: "A tract of land containing sixty acres, adjoining the land of Norman Crawford and others; one other tract containing 119 acres on which Norman Crawford resides and in which said Crawford has a life estate." This deed was signed by John B. Stroud, the grantor, and James P. Boisseau, the trustee. Mrs. Stroud did not unite in this deed.

The question is, what title or interest was conveyed by the grantor to the trustee for the use of Mrs. Stroud. Plainly this deed conveyed to the trustee only the interest, no more, and no less, which the grantor had acquired in the real estate conveyed. What was that interest?

Now under the will of Moses Crawford Mrs. Stroud (Betsy Crawford) took a fee simple estate in the sixty acres of land devised to her, and also took an estate in remainder in the 119 acres devised to Norman Crawford and in the event he died without issue to the said Betsy Crawford, now

220 Mrs. Stroud. At the time of the execution of the deed by John Stroud, Norman Crawford was living and in possession of the 119 acres, in which Mrs. Stroud had an estate in remainder only. In that tract of land John Stroud, the husband, had no interest by virtue of his marital rights at the time of the execution of the deed, for Norman Crawford was then living. So that as to the 119 acres it is plain that John Stroud, the husband, having no interest in or title to the same, conveyed nothing by his deed. Now what interest did he convey in the sixty acre tract? In that tract Mrs. Stroud took a fee simple title as devisee under the will of Crawford.

There being no issue of the marriage the husband took an estate in this land for life

*See *Garland v. Pamplin et al.*, 32 Gratt 305, and *note*.

during the joint lives of himself and wife. The death of the wife or the death of the husband ended this estate. It was therefore clearly only the husband's life estate for the joint lives of husband and wife which Stroud conveyed to the trustee for the use of Mrs. Stroud.

In other words, Stroud having no interest whatever in the one hundred and nineteen acres of land conveyed none to the trustee; and having only a life estate during their joint lives in the sixty acre tract his deed conveyed that life interest to the trustee and nothing more. Mr. Stroud survived his wife who died without issue and never had issue leaving a will in these words:

"In the name of God, Amen: I, Elizabeth Stroud, of the county of Dinwiddie, and state of Virginia, do make, publish, and declare this to be my last will and testament, with the entire consent of my husband, John B. Stroud, viz: Item 1st. I give to my two friends, Thos. G. Haddon and J. F. Haddon, the whole of my estate, (of which I may die possessed), of every description, real, personal and mixed, in trust for the only support and maintenance of my husband, John B. Stroud.

Item 2nd. It is my will and desire, that
 221 *the hereby conveyed interest is not to be liable in any manner whatever for any debt my husband may owe or hereafter contract. Item 3d. I give my trustees full power to make any change in the property hereby conveyed they may think for the best. Item 4th. At the death of my husband, Jno. B. Stroud, I give him power to dispose of the property to whom he may think proper."

At the time of the execution of this will Mrs. Stroud was a married woman and under disabilities of coverture, and could not of course dispose of any property by will, except such as was her separate estate. She had no separate estate in the lands in controversy, unless it was conferred upon her by the deed executed by her husband to Boisseau, trustee, for her benefit. Under this deed as already held in the one tract of land (119 acres) he had no interest whatever to convey, and in the other but a life estate during their joint lives. The will of Mrs. Stroud therefore conferred no title to this property upon her husband, and all his interest and estate in the same having terminated at the death of his wife, the lands descended to her heirs at law, who are the defendants in error here.

We are of opinion therefore the instructions given by the circuit court correctly expound the law, and the verdict of the jury is in accordance with the facts proved. We deem it necessary in maintenance of the views herein expressed to refer only to the case of *Garland v. Pamphlin & als.*, very recently decided by this court and reported in the February number of the *Law Journal*, February, 1880, (32 Gratt. 305), and the authorities there cited in the opinion of Judge Burks.

The court is therefore of opinion that there is no error in the judgment of the circuit court of Dinwiddie and that the same be affirmed.

Judgment affirmed.

222 *Norvell & als. v. Lessueur & als.

April Term, 1880, Richmond.

1. *Wills—Probate—Effect.*—It is a settled rule of law in Virginia, that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue *deviseavit et non* within the time and in the mode prescribed by the statute.

2. *Same—Same—Same.*—A case in which a will good as a will of personalty, but not good as a will of realty though admitted to probate generally, held, upon the action of the same court, between the same parties, on the same day, treating the probate as of only a will of personalty, and this acted on for forty years, that the order admitting the will to probate, will be considered as only a probate of a will of personalty.

This was a suit in equity in the circuit court of Buckingham county, brought in January, 1870, by L. B. Lessueur and William H. Bumpass against John M. Norvell and others. The object of the suit was to recover possession of a tract of land which the plaintiffs claimed passed to themselves and the other grandchildren of Charles Perrow, Sr., under the provisions of his will, which was admitted to probate in the county court of Buckingham on the 13th of October, 1834. The defendants who derived their title under successive purchases commencing with the purchase from commissioners under a decree of the county court of Buckingham in a suit brought by the children of Charles Perrow, Sr., as his heirs at law, claim that he died intestate as to his real estate. The question turned

223 *not upon the will itself but upon the order of the court admitting it to probate, and the action of the court at the same term in the suit brought by the children of Charles Perrow, Sr. The facts are stated by Judge Staples in his opinion.

The cause came on to be heard on the 27th of April, 1876, when there was a decree in favor of the plaintiffs, and those in the same interest; from which on the petition of the defendants, an appeal was allowed.

William B. Pettit, for the appellants.

F. D. Irving and Guy & Gilliam, for the appellees.

STAPLES, J. This is an appeal from a decree of the circuit court of Buckingham county.

A brief statement of the facts is essential to a proper understanding of the matters in controversy. Charles Perrow, Sr., died in the year 1834, having first made and published his last will and testament which was admitted to probate in the county court of

*See 4 Min. Inst. (2nd Ed.) 93; *Burnley v. Duke*, 2 Rob. (Va.) 102; *Fisher v. Bassett*, 9 Leigh (Va.) 119; *Ex parte Poovall*, 3 Leigh (Va.) 816; *Parker v. Brown*, 6 Gratt. 554; *Connolly v. Connolly*, 32 Gratt. 657; *Schultz v. Schultz*, 10 Gratt. 358; *Wills v. Spraggins*, 3 Gratt. 555; *Dillard v. Dillard*, 78 Va. 208; *Thrasher v. Ballard*, 33 W. Va. 290; *Smith v. Henning*, 10 W. Va. 596.

Buckingham on the 13th day of October of that year.

There were no subscribing witnesses to the will, nor was it in the handwriting of the deceased. It was proved, however, that the signature to the will was in his handwriting, and upon that testimony the paper was admitted to probate generally.

It was conceded in the argument here, certainly it was not seriously controverted, that upon the evidence before the county court, the will, although valid as a will of personalty, was not so with respect to the realty.

It was insisted, however, that the admission of the paper to probate generally is conclusive evidence, of the validity and due execution of the instrument, with respect to

both real and personal estate, and that
 294 it can *never be called in question except in the mode pointed out by the statute, upon an issue of *devisavit vel non*; and this not having been done, the probate is binding upon all persons and in all courts.

This proposition, as involving a general rule of law, is sustained by an uniform current of Virginia decisions, and is not seriously disputed by the opposing counsel. *Robertson's v. Allen*, 11 Gratt. 787, and cases there cited. But it is said that this case is taken out of the influence of the general rule by the facts and circumstances attending it, now to be stated. It appears that on the 13th of October, 1834, the day on which the will was admitted to probate, in the county court, a bill was filed in that court, by the children and heirs of the testator, or rather by those who were his heirs if his will was invalid as a will of real estate, in which it was stated that the decedent had died intestate, as to his real estate; that it was subject to distribution among his heirs; and that a certain Edward W. Sims, had qualified as administrator with the will annexed; and among other things, asking for partition among those entitled. An infant grandchild of the decedent, and the administrator with the will annexed, were made parties defendant, both of whom answered, the infant grandchild by guardian, and the administrator in person, expressly admitting all the allegations of the bill, and agreeing to the partition of the property. On the same day, the 13th of October, a decree was entered by consent, before the same justices who admitted the will to probate, appointing commissioners to make partition of the real estate among the heirs. And although the decree does not aver in so many words, the decedent's intestacy as to his real estate, it refers directly to the bill and answer in which that admission is made, and its proceeds to dispose of the realty, precisely as in a case of intestacy.

225 *The commissioners subsequently made a report showing they had made partition of all the lands of the decedent, except a tract containing what was then known as the State, or Big "Quarry," which they recommended should be reserved for the use of the heirs. This report was confirmed at the October term, 1835. It further appears

that the "Quarry" was operated by the heirs on joint account for a short time; but not proving profitable, it was sold under a decree of the same court, when a certain George M. Payne became the purchaser; and he selling to Edward Sims, the conveyance was made to the latter, by the commissioner, under the sanction of the court. It further appears that Sims continued in the use and possession of the property till 1841, when he conveyed it in trust for the benefit of his creditors. A suit was afterwards instituted in the circuit court of Buckingham to enforce the lien of the trust deed. A sale was made when the appellants and W. T. Scruggs became the purchasers. A conveyance was made to them under the decree of the court, and they have ever since remained in possession of the property.

It thus appears that for a period of more than forty years, the property in controversy has been held by title derived from the heirs of Charles Perrow, sold and conveyed for valuable considerations, to successive purchasers under decrees of courts, without a suspicion of any informality in the title until the suit was brought by the appellees claiming as devisees in remainder under the will of Charles Perrow.

That will as has been seen was not executed as a will of lands. It was so understood by every body at the time. The suit for partition was brought under that idea. The decree of the court entered on the same day immediately after the order of probate, proceeded on the same ground. George W. Payne, one
 296 of the *witnesses to prove the handwriting of Mr. Perrow, was the counsel of the heirs in the suit for partition, and was himself a purchaser of the land, as was also the administrator with the will annexed. It is therefore perfectly clear, that all concerned—parties, counsel, court, and witnesses understood that the will was valid, only as a will of personal estate, and to that extent only was the probate operative and effectual.

The question therefore is whether under such circumstances, consistent with the rules of law, and the decisions already cited there is any mode of avoiding what is manifestly a misprision of the clerk.

It will be observed, the certificate or order of the court does not state in express terms, that the will was admitted to probate, as a will of real estate, but merely that "it is admitted to record." The words although broad enough to include a will of both real and personal property according to all the decisions of this court, may be satisfied by treating the paper as a will of personalty. The question is as to the meaning of order. It is one, purely of construction.

In the exposition of deeds, any and all cotemporaneous writings of the parties relating to the same subject, may be looked to for the purpose of ascertaining the meaning and proper interpretation of the instrument, which is the subject of controversy. And this rule is not confined to cases of doubt and ambiguity, but is applied whenever the proper construction of a writing is involved.

I cannot see why the same principle ought

not to be applied to a record, which may be modified, changed, annulled or explained, at any time during the term of the court. One part of a record is of equal verity and effect, with every other part, and the whole must be looked to, for a right understanding of all the parts. Suppose the court on the

227 same day, or any subsequent *day during the term, had entered an order declaring that the sentence was to be construed as relating to the personal estate only? It will hardly be insisted the courts could refuse to give effect to such a modification. Here we have a decree entered by the same court on the same day, and no doubt within a few minutes afterwards, explaining, qualifying the order of probate as completely and effectually as the most positive and direct order could have done. According to the English practice the decree recites the bill, answer and pleadings. With us the practice is different. The decree simply refers to the pleadings. But this court has held that the bill and answer are parts of the record, and may be looked to to explain the decree. Walker's ex'or v. Page, 21 Gratt. 636. In this case, whether we look to the bill and answer, or to the decree only, in connection with the order of probate, we see at once the will was admitted to record simply as a will of personal estate, and was so designed to be. It has been said, however, that the decree was entered by consent, and was probably never seen by the justices. It is equally probable, they never saw the sentence of probate, and did not pay the slightest attention to its language.

The question is not, however, what the individual justices may have seen or understood, but what is the language of the record? Each and every part of it, is of absolute verity, and must be presumed to express the actual decision and opinion of the court.

It has been further said, and much stress has been laid on this point, that the decree was rendered in a collateral proceeding, having no sort of connection with the sentence of probate. In answer to this, it is sufficient to say, that the parties who set on

228 foot the probate of the will, were the very same who asked for *the decree.

Both proceedings were before the same justices, and obviously the one immediately succeeded the other.

The bill while stating the intestacy as to the real estate, states at the same time the admission of the will to probate, and as has been seen, the person who qualified as administrator with the will annexed, and in whom the legal title to the land, and the control of the rents and profits were vested by the will, filed his answer, agreeing to the partition, and plainly showing his understanding of the sentence of probate.

The decree therefore was not in a collateral proceeding, and if it were, it would not necessarily effect the result, unless there was some suggestion of fraud, surprise, or mistake.

There is another important fact, not yet adverted to, which ought to be considered in

this connection. At the time of these transactions, the law required whenever the real estate, or the rents and profits were placed under the control of the executor, the executor's bond should contain a provision securing the proper administration of the fund. In the case before us the order of probate states, that the administrator entered into and acknowledged a bond, with security conditioned as the law directs. The bond of the administrator with the will annexed, makes no sort of reference to the real estate. It binds him only to administer the goods, chattels, and credits, which may come to his hands, and to pay all the legacies specified in the will, as far as the said goods and chattels and credits were concerned.

Bearing all these facts and circumstances in mind, we are led irresistibly to the conclusion that the sentence of probate was understood and intended to apply to the will of personal estate exclusively, and is to be so construed if we are permitted to look 229 at the whole *record, instead of a part.

If two decrees, entered in the same court, the same day, between the same parties, in relation to the same subject matter may be looked into to explain the meaning and effect of either, it is difficult to see why an order of probate, and a decree entered under the same circumstances may not be looked to for the purpose of ascertaining and determining the operation and effect of each. The appellees have no just cause of complaint in all this for it has long been settled.

A sentence of total rejection by a court of probate fairly obtained on the merits of a paper propounded as a will, is conclusively binding upon the legatee, notwithstanding he was an infant at the time it was pronounced, and was no party to the proceedings, and the paper thus rejected cannot again be propounded as a will. Schultz v. Schultz, ex'or, 10 Gratt. 358; Connally v. Connally, 32 Gratt. 657.

The appellees are not defrauded nor injured. Their claim is based upon the assumption that this is a valid will of real estate, which as we have seen, is without any foundation. Their own parents who are the children and heirs of the decedent, upon the supposition of an intestacy received the property in controversy, sold it for a valuable consideration, and it is now in the possession of bona fide purchasers, and has so been held for more than forty years. What has become of the other real estate, partitioned among the heirs, does not appear. In all probability, it has long since passed into the hands of bona fide alienees. If at this day the will is to be established as a will of real estate, the effect may be to disturb their titles also, and to bring mischief and irretrievable loss to numerous other parties. Under such circumstances, if any case ever justified it, the court should be astute to uphold and maintain what has been done, and not to

230 break down and *destroy. While on the one hand the mere hardship of a particular case can never justify a court in disregarding a positive principle of law, it is equally true, the court should never become

the instrument of gross injustice and injury, if such a result can be avoided consistent with established rules and precedents.

My opinion is therefore the decree of the circuit court must be reversed, and the bill dismissed.

MONCURE, P., and CHHRISTIAN and ANDERSON, Js., concurred in the opinion of Staples, J.

BURKS, J. I have been inclined to affirm the decree in this case. I have had doubts, whether the sentence of probate could be affected or construed by resort to the action of the county court in the chancery proceedings, which were distinct from the probate proceeding. The case however is one of extreme hardship on the appellants, and under the very peculiar circumstances of the case, I will not dissent, but will acquiesce in the conclusion reached by my brethren.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in rendering the decree of the said 27th day of April, 1876, being the decree appealed from; that instead of rendering said decree the said circuit court ought to have dismissed the plaintiff's bill, and have given to the defendants a decree for their costs. It is therefore decreed and ordered that the said decree appealed from be reversed and annulled, and that the appellees L. B. Lessueur and W. H. Bumpass (the plaintiffs in the court below) pay to the
231 appellants their costs by them *expended in the prosecution of their appeal aforesaid here.

And this court proceeding to render such decree as the said circuit court ought to have rendered, it is decreed and ordered, that the bill of the plaintiffs be dismissed, and that they pay to the defendants, their costs by them about their defence in the said circuit court expended. Which is ordered to be certified, &c.

Decree reversed.

232 *Fisher, ex parte.

Fitzgerald, ex parte.

April Term, 1880, Richmond.

Judges—Election—Term of Office.*—Manchester was incorporated as a city in 1874, and having more than five thousand inhabitants was entitled to have a judge of its hustings court. In March, 1874, C was elected and qualified as judge of said court. **HELD:** That this being the first judge of this court, under the Constitution C's term of office commenced on the 1st of January, 1875, and would continue until the 31st of December, 1880; and he was under the Constitution authorized to act as judge from the time of his qualification to the commencement of his term.

***Judges—Election—Term of Office.**—In re Broadus, 32 Gratt. 779. See generally Meredith, *ex parte*, 33 Gratt. 119 and *note*. See also McCraw v. Williams, 33 Gratt. 510.

The case is stated by Christian, J., in his opinion.

William C. & B. F. Crump, for Fisher.
 B. A. Hancock, for Fitzgerald.

CHRISTIAN, J., delivered the opinion of the court.

This is an application to this court for writs of habeas corpus in two cases. The petitioners are, however, merely nominal parties.

The real controversy, (which is amicably conducted), is in fact between the Hon. William I. Clopton on the one hand, and the Hon. S. Bassett French on the other, each claiming to be judge of the corporation court of the city of Manchester.

233 *The sole question we have to determine arises upon the facts agreed filed with the record. And that question is, at what period under the facts agreed, and under the Constitution of the State, the term of office of the said William I. Clopton expires, and when the term of office of the said S. Bassett French commences.

The facts agreed are as follows: In the year 1874 on the 20th day of March the general assembly of Virginia incorporated the town of Manchester as a city. (See Session Acts 1874, p. 108), and under the Constitution of the State, the city of Manchester having more than five thousand inhabitants, was entitled to a corporation court, and there was no corporation court in said city before that time. That on the 28th day of March, 1874, the said William I. Clopton was duly elected by the legislature, judge of said corporation court; that he was commissioned on the 30th day of March, 1874, and qualified on the 31st day of March, 1874, and has since that time been discharging the duties of his office as judge of said corporation court. That on the 23rd day of January, 1880, S. Bassett French was duly elected by the legislature judge of the corporation court of the city of Manchester as the successor of William I. Clopton. was commissioned on the 31st day of January, 1880, and qualified on the 21st day of February, 1880.

Upon these facts agreed the sole question we have to determine is, when does the term of office of the Hon. William I. Clopton expire and when does that of the Hon. S. Bassett French begin?

The solution of this question depends upon the construction of the provisions of the Constitution applicable to the subject.

Section 14, Article VI, provides as follows:

"For each city or town in the State,
234 containing a population *of five thousand, there shall be elected, on the joint vote of the two houses of the general assembly, one city judge who shall hold a corporation or hustings court of said city, or town, as often, and as many days in each month, as prescribed by law, with similar jurisdiction which may be given by law to the circuit courts of this State, and who shall hold his office for a term of six years."

Section 22 of the same article provides as follows: "All the judges shall be commis-

not to be applied to a record, which may be modified, changed, annulled or explained, at any time during the term of the court. One part of a record is of equal verity and effect, with every other part, and the whole must be looked to, for a right understanding of all the parts. Suppose the court on the

227 same day, or any subsequent *day during the term, had entered an order declaring that the sentence was to be construed as relating to the personal estate only? It will hardly be insisted the courts could refuse to give effect to such a modification. Here we have a decree entered by the same court on the same day, and no doubt within a few minutes afterwards, explaining, qualifying the order of probate as completely and effectually as the most positive and direct order could have done. According to the English practice the decree recites the bill, answer and pleadings. With us the practice is different. The decree simply refers to the pleadings. But this court has held that the bill and answer are parts of the record, and may be looked to to explain the decree. *Walker's ex'or v. Page*, 21 Gratt. 636. In this case, whether we look to the bill and answer, or to the decree only, in connection with the order of probate, we see at once the will was admitted to record simply as a will of personal estate, and was so designed to be. It has been said, however, that the decree was entered by consent, and was probably never seen by the justices. It is equally probable, they never saw the sentence of probate, and did not pay the slightest attention to its language.

The question is not, however, what the individual justices may have seen or understood, but what is the language of the record? Each and every part of it, is of absolute verity, and must be presumed to express the actual decision and opinion of the court.

It has been further said, and much stress has been laid on this point, that the decree was rendered in a collateral proceeding, having no sort of connection with the sentence of probate. In answer to this, it is sufficient to say, that the parties who set on

228 foot the probate of the will, were the very same who asked for *the decree.

Both proceedings were before the same justices, and obviously the one immediately succeeded the other.

The bill while stating the intestacy as to the real estate, states at the same time the admission of the will to probate, and as has been seen, the person who qualified as administrator with the will annexed, and in whom the legal title to the land, and the control of the rents and profits were vested by the will, filed his answer, agreeing to the partition, and plainly showing his understanding of the sentence of probate.

The decree therefore was not in a collateral proceeding, and if it were, it would not necessarily effect the result, unless there was some suggestion of fraud, surprise, or mistake.

There is another important fact, not yet adverted to, which ought to be considered in

this connection. At the time of these transactions, the law required whenever the real estate, or the rents and profits were placed under the control of the executor, the executor's bond should contain a provision securing the proper administration of the fund. In the case before us the order of probate states, that the administrator entered into and acknowledged a bond, with security conditioned as the law directs. The bond of the administrator with the will annexed makes no sort of reference to the real estate. It binds him only to administer the goods, chattels, and credits, which may come to his hands, and to pay all the legacies specified in the will, as far as the said goods and chattels and credits were concerned.

Bearing all these facts and circumstances in mind, we are led irresistibly to the conclusion that the sentence of probate was understood and intended to apply to the will of personal estate exclusively, and is to be so construed if we are permitted to look

229 at the whole *record, instead of a part. If two decrees, entered in the same court, the same day, between the same parties, in relation to the same subject matter may be looked into to explain the meaning and effect of either, it is difficult to see why an order of probate, and a decree entered under the same circumstances may not be looked to for the purpose of ascertaining and determining the operation and effect of each. The appellees have no just cause of complaint in all this for it has long been settled.

A sentence of total rejection by a court of probate fairly obtained on the merits of a paper propounded as a will, is conclusively binding upon the legatee, notwithstanding he was an infant at the time it was pronounced, and was no party to the proceedings, and the paper thus rejected cannot again be propounded as a will. *Schultz v. Schultz, ex'or*, 10 Gratt. 358; *Connally v. Connally*, 32 Gratt. 657.

The appellees are not defrauded nor injured. Their claim is based upon the assumption that this is a valid will of real estate, which as we have seen, is without any foundation. Their own parents who are the children and heirs of the decedent, upon the supposition of an intestacy received the property in controversy, sold it for a valuable consideration, and it is now in the possession of bona fide purchasers, and has so been held for more than forty years. What has become of the other real estate, partitioned among the heirs, does not appear. In all probability, it has long since passed into the hands of bona fide alienees. If at this day the will is to be established as a will of real estate, the effect may be to disturb their titles also, and to bring mischief and irretrievable loss to numerous other parties. Under such circumstances, if any case ever justified it, the court should be astute to uphold and maintain what has been done, and not to

230 break down and *destroy. While on the one hand the mere hardship of a particular case can never justify a court in disregarding a positive principle of law, it is equally true, the court should never become

the instrument of gross injustice and injury, if such a result can be avoided consistent with established rules and precedents.

My opinion is therefore the decree of the circuit court must be reversed, and the bill dismissed.

MONCURE, P., and CHRISTIAN and ANDERSON, Js., concurred in the opinion of Staples, J.

BURKS, J. I have been inclined to affirm the decree in this case. I have had doubts, whether the sentence of probate could be affected or construed by resort to the action of the county court in the chancery proceedings, which were distinct from the probate proceeding. The case however is one of extreme hardship on the appellants, and under the very peculiar circumstances of the case, I will not dissent, but will acquiesce in the conclusion reached by my brethren.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in rendering the decree of the said 27th day of April, 1876, being the decree appealed from; that instead of rendering said decree the said circuit court ought to have dismissed the plaintiff's bill, and have given to the defendants a decree for their costs. It is therefore decreed and ordered that the said decree appealed from be reversed and annulled, and that the appellees L. B. Lessueur and W. H. Bumpass (the plaintiffs in the court below) pay to the
231 appellants their costs by them *expended in the prosecution of their appeal aforesaid here.

And this court proceeding to render such decree as the said circuit court ought to have rendered, it is decreed and ordered, that the bill of the plaintiffs be dismissed, and that they pay to the defendants, their costs by them about their defence in the said circuit court expended. Which is ordered to be certified, &c.

Decree reversed.

232 *Fisher, ex parte.

Fitzgerald, ex parte.

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Section 22 of the same article provides as follows: "All the judges shall be commis-

sioned by the governor, and shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Their terms of office shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this Constitution until their terms begin."

Now it must be conceded that the framers of the Constitution had the unquestioned right, not only to fix the terms of all officers elected under it, but also to declare at what time the terms of such offices should begin. This the Constitution has declared in respect to judges in plain and unequivocal terms, using this emphatic language: "Their terms of office shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this Constitution until their terms begin."

There can be no mistake or difference of opinion as to the construction of these plain words of the Constitution. Judge Clopton having been elected and qualified as judge of the corporation court of the city of Manchester in March, 1874, his term of office **235** commenced, *by the express terms of the Constitution, on the first day of January next following his appointment, to-wit: on the first day of January, 1875; and his term of office fixed by the Constitution being six years, it expires on the 31st day of December, 1880.

The period from March, 1874, to the 1st of January, 1875, is no part of his term of six years, but for that period, under the provision of the 22d section, he was required to discharge the duties of the office to which he was elected, until his term commenced, which did not commence until the first day of January, 1875, the period fixed by the constitution as the commencement of his term.

This construction of the Constitution is in entire harmony with the case recently decided by this court in which the title to the office of judge of Henrico county, between Judge Waddill and Judge Minor, was determined.

In that case, in the opinion of the majority of the court then sitting (three judges), the question turned to a certain extent upon the construction of the words "their first appointment and qualification under this Constitution." But in the case before us, no such question can arise; for, upon the facts agreed the Hon. William I. Clopton was in fact the first judge elected as judge of the corporation court of the city of Manchester under the Constitution, and the express terms of the 22d section apply to, and must govern, his case.

Under the plain provisions of that section it is clear that his term of office commenced on the first day of January, 1875, and will terminate on the 31st day of December, 1880, and not till then.

The result therefore of this opinion is that the petitioner, F. W. Fitzgerald, who was committed for contempt for refusing to

236 obey the orders of the Hon. S. *Bassett French, must be discharged, and that the petition of Thomas H. Fisher (who was committed for contempt by order of the Hon. William I. Clopton) for a writ of habeas corpus be denied.

Fitzgerald discharged. The petition of Fisher denied.

237 *Williamson v. Massey, Auditor.

April Term, 1880, Richmond.

Absent Moncure, P.*

1. Statutes—Exemption from Taxation—Constitutionality.†—The act of March 28, 1879, in relation to the settlement of the State debt, which provides that all obligations created under this act shall be forever exempt from all taxation, direct or indirect by the State, is not in violation of article 10, § 1, of the Constitution of Virginia.

2. Delinquent Taxes—Coupons of State Bonds Receivable for.—The overdue coupons upon bonds issued under said act of March 28, 1879, are receivable for all taxes levied by the State, including the capitation tax; and the auditor is bound to receive them, when offered in payment of taxes returned delinquent to his office.

This was an application to this court by William Williamson for a mandamus to John E. Massey, auditor of public accounts of the State of Virginia, requiring him to receive in payment for certain taxes due from Williamson to the State, past due coupons taken from the bonds of the State issued under the act of March 28, 1879. Williamson had been returned delinquent for State taxes of 1878, on real estate \$4.90 and the interest and redemption fee, made the amount due on these taxes \$6; and for capitation tax \$1 on which was twelve cents costs; the whole amount of taxes, interest and redemption fee making \$7.12. To pay this sum he tendered

*He considered himself interested in the question.
†**Taxation—Exemptions—Constitutionality.**—Constitutionality of exemption from taxation affirmed in *Town of Danville v. Shelton et al.*, 70 Va. 325.

"Whether the effect of the provision of the constitution quoted (Art. x. sec. 3) when fairly construed, is a limitation on the power of the legislature in respect to the exemption of the property from taxation, or whether its power over the subject is limited, as was held by two of the judges in *Williamson v. The Auditor*, 33 Gratt. 237, and as to which Judge Burks, who concurred in the judgment, expressed no opinion, is a question which need not be decided in the present case. It is sufficient to say that we think the grant of power to exempt all property used for the purposes enumerated carries with it the power to exempt property the proceeds of which are devoted to any of those purposes." *City of Petersburg v. Petersburg Ben. Mech. Ass'n*, 78 Va. 431. But see *Chesapeake, &c., R. Co. v. Miller*, 19 W. Va. 423.

‡**Same—Coupons—Legal Tender.**—The leading case was distinguished in reference to the second headnote in *Greenhow, Treas. v. Vashon*, 81 Va. at p. 350. See *Antoni v. Wright*, 22 Gratt. 833 and note.

Action against Public Officer.—*Chesapeake, &c., R. Co. v. Miller*, 19 W. Va. 408.

to the auditor four coupons of \$1.50 each and \$1.12 in money. The auditor refused
 238 *to receive coupons in payment of the capitation, and one-fifth of the property tax; and he also refused to receive said coupons without retaining ten cents on each coupon, as a tax assessed thereon. The grounds on which he based his refusal to receive the coupons, and insisted on taxing them, are set out in his answer to the rule nisi, made upon him; and they are fully stated in the opinion of Judge Anderson.

Johnston, Williams & Boulware, for the petitioner.

The Attorney-General, for the auditor.

ANDERSON, J. By the act of the general assembly of Virginia, to provide a plan of settlement of the public debt, approved March 28, 1879, it was enacted § 1, "That to provide for funding the debt of the State, the governor is hereby authorized to create bonds of the state, registered and coupon, dated the 1st day of January, 1879, the principal payable forty years thereafter, bearing interest at the rate of three per cent. per annum for ten years, and at the rate of four per centum per annum for twenty years, and at the rate of five per centum per annum for ten years, payable in the cities of Richmond, New York or London, as hereinafter provided, on the 1st days of July, and January of each year, until the principal is redeemed." "The coupons on said bonds shall be receivable at and after maturity for all taxes, debts, dues and demands due the State, and this shall be expressed on their face. The holder of any registered bond shall be entitled to receive from the treasurer of the State a certificate for any interest thereon, due and unpaid, and such certificate shall be receivable for all taxes, dues and demands due the State, and this shall be expressed on the face of the registered bonds, and on the
 239 face of such certificate. *All obligations created under this act shall be forever exempt from all taxation, direct or indirect by the State or by any county or corporation therein, and this shall be expressed on the face of the bonds." "The bonds hereby authorized shall be issued only in exchange for the outstanding debt of the State, as hereinafter provided." Bonds were issued under this act and in conformity with its requirements.

The auditor in his answer to plaintiff's petition, admits that the said William Williamson is indebted to the State of Virginia for taxes for the year 1878, as follows: for capitation tax, the sum of \$1, and for tax on property, the sum of \$5.40, amounting with interest to \$7.12 as shown by the tax bill filed with the petition, and that the said petitioner was returned delinquent for the nonpayment of said taxes, on the — day of —, 1878. And he also admits that the said William Williamson tendered to him as auditor aforesaid, on the 20th day of April, 1880, six dollars in coupons past due, taken from bonds issued under the act of 28th March, 1879, aforesaid, and \$1.12 in money, in full pay-

ment of the taxes aforesaid, and demanded of him a receipt for the same; and that he refused to receive and receipt for the said coupons and money in full discharge of said taxes. And he assigns the following reasons for his refusal:

"First. Because, under the law of the State, the bonds from which said coupons were taken are liable to taxation under the laws and Constitution of the State, and this respondent is required to deduct the amount of said tax from said coupons, when received by him, which tax the aforesaid petitioner refused to pay or allow to be deducted from said coupons.

"Secondly. Because the Constitution of the State and the laws of the State, dedicate the aforesaid capitation tax of \$1, and
 240 one-fifth of the property tax *aforesaid, amounting to \$1.08, to public schools, and must be collected in money; otherwise, the provision of the Constitution respecting the school fund will be defeated."

In support of his first reason, he relies on § 1, Art. X. of the Virginia Constitution; which is in the following words: "Taxation, except as hereinafter provided, whether imposed by the State, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

The right to exempt from taxation is a right which is incident to the legislative prerogative. It is essential to the welfare of the State that the power of exemption should be vested in the government, and it is as inherent in the legislative department as the power of taxation, and may be exercised by the legislature at its discretion, except where it is clearly forbidden by the organic law. Judge Cooley, a distinguished jurist, and one of the soundest, and most eminent writers on constitutional limitations, and other branches of the law, says, "The general right to make exemptions, is involved in the right to apportion taxes, and must be understood to exist wherever it is not forbidden," and cites numerous authorities in support of the doctrine.

And the same doctrine was held by this court, in the City of Richmond v. The Richmond & Danville Railroad Company, 21 Gratt. 604, with even greater strength of expression. Judge Staples, delivering the opinion of the court, said, "The power of exemption, as well as the power of taxation, is one of the essential elements of sovereignty. The right of the legislature to
 241 surrender *the power of taxation in specific cases, has been the subject of one of the ablest and most exhaustive judicial discussions ever known in the supreme court of the United States, and is now regarded as established upon the most solid foundations of public policy and expediency."

Is it forbidden by the above clause in the Virginia Constitution? In State v. North,

27 Mo. R. 464, it was held "that the provision in the Constitution of that State, which declares that all property subject to taxation shall be taxed in proportion to its value (substantially the same that is contained in the clause of the Virginia Constitution above cited), does not require that all property in the State shall be taxed; but that when any species of property is selected for taxation, it shall be taxed in proportion to its value."

And such we think is the meaning of the clause in the Virginia Constitution above cited. It was not intended to require the legislature to tax all the property in the State, and forbid its exercising its inherent power, when necessary for the public interest, and promotive of a sound public policy, to exempt certain property from taxation, but only to prescribe a rule by which the legislature should be guided, in apportioning taxation, that all property taxed should be taxed in proportion to its value. That it does not mean to take from the legislature its important inherent power of exercising a discretion, when in its wisdom it may be deemed beneficial to the public, of exempting certain property from taxation, is more apparent when read in connection with the first clause in the sentence, which declares that taxation "shall be equal and uniform;" and then follows the clause in question, separated from it only by a comma, "and all property" not only personal property, or only

242 real and personal, shall be taxed *in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Giving to the language of this section its proper signification, and to each member of the sentence, and to each sentence, their just influence and bearing in conveying the meaning of the whole, it was the intention to require that taxation should be on the ad valorem principle, and that it should be equal and uniform; and it was no purpose of the framers, of the Constitution, by this section, to restrict the legislature in the selection of the subjects of taxation, or to divest it of an important element of sovereignty, by an inflexible inhibition of exempting, in any case, property from taxation. The same rule of taxation prescribed for the State, is by this section prescribed for county or corporate bodies. City councils, for the promotion of the growth and welfare of the city, regard it as important to introduce certain manufacturing, or other industrial enterprises, within the limits of the city; and to encourage their introduction, stipulate on behalf of the city, that the property of those who engage in the enterprise within the limits of the city shall not be liable to taxation for a series of years. Would such an exemption, whilst it tends to increase the sources of revenue to the State, and to build up our cities, and to advance the prosperity of the rural districts by furnishing them marts for the productions of the soil, be forbidden by the Constitution? Again, for the

growth and prosperity of our cities, and the extension of their trade and commerce, capital is required, and to obtain it, it is necessary to issue their bonds, and offer them in the markets, and in order to increase the value of their bonds, and render them more saleable, would it be contended that it is forbidden by this section of *the Constitution, to make, by a city ordinance, such bonds exempt from municipal taxation?

The Constitution of 1850 contains the same provision, except as to county and corporate bodies, and other matters, which do not affect this question. The language is: "Taxation shall be equal and uniform throughout the Commonwealth, and all property other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law."

Under that Constitution exemptions of property from taxation were frequently made, and I am not aware that the constitutionality of those exemptions have ever been even questioned, and they were sustained by judicial construction before that provision of the Constitution of 1850 was copied into the present Constitution of the State, and must be held to have been adopted by the farmers of the present Constitution, as it had been understood by the unquestioned legislative construction and action, and the usage of the country, and by judicial construction, before it was engrafted into the present Constitution. The legislature by the act of—, 1856, exempted the property of the Alexandria and Orange railroad company in the city of Alexandria from taxation, and in Alexandria & Orange R. R. Co. v. City of Alexandria, 17 Gratt. 176, this court held, that distinguished jurist Judge Joynes delivering the opinion, that whilst the property of the railroad company was exempt from taxation by the State, it was not exempt from taxation by the city corporation, the court construing the exemption by the act of the general assembly, as limited to taxation by the State. Our conclusion is that the inherent power of the legislature, which is an important element of sovereignty, to exempt property from taxation, when in the wise discretion of the legislature such

244 *exemption is deemed to be for the benefit of the state, is not taken away, or its exercise forbidden by the section of the Constitution under consideration. Nor is it taken away or forbidden by §3 of the same article of the Constitution. That article does not forbid, but authorizes exemptions by the legislature in certain specified cases, without forbidding it in others. The language is, "The legislature may exempt all property used exclusively for state, county, municipal, benevolent and charitable purposes." If it had intended to forbid its exempting other property, it would have been easy to add the words, "but no other;" and we think if its purpose had been to deprive the legislature of a power, the exercise of which in cases that might arise, might be so beneficial to the State, and

the inhibition of which might be so hurtful, the above words, or their equivalent, would have been added.

It was contended by the plaintiff, that the exemption of the State bonds in this case from taxation, as those bonds were issued by the state, the principal payable in forty years, bearing interest for ten years at the rate three per cent. for twenty years, at the rate of four per cent. interest, and for the remaining ten years at five per cent interest, in exchange for six per cent. bonds of the State then outstanding which would be a saving of millions of dollars to the State, was exclusively for the benefit of the State, and is therefore within the express authority given by this third section to exempt. Whilst that may be so, and there is much reason for it, the court deems it unnecessary to put it on that ground. The Constitution nowhere, I believe, expressly confers on the legislature the power of taxation, because the power is inherent in the legislature, and is not dependent on any express power from the Constitution. In like manner the general power of exempting property from taxation, is inherent in the legislature, *be-

245 ing incident to the taxing power, and may be exercised without any express power from the Constitution, if not forbidden. Therefore the giving power to the legislature, in certain cases, to exempt from taxation, cannot take from it its inherent power of exemption in other cases, which is not forbidden by the Constitution.

In this case the exemption is of a tax on the bonds of the State, which were issued under a contract with its creditors, upon an adjustment of an antecedent debt, by which the State is remitted one-half the interest accruing for ten years, one-third for twenty years, and one-fifth for ten years, in consideration of which the State agreed, that the bonds which she issued, with that abatement of interest, should be non-taxable. The exemption is by virtue of a contract made by the State with her creditors, which was deemed by the legislature to be very beneficial to the State. Whatever difference of opinion might exist with regard to the general principles already enunciated, and we think there can hardly be any, it would seem to be plainly competent for the legislature to have made such a contract with the creditors of the State, they voluntarily assenting thereto, for the adjustment of the liabilities of the State, and reducing them within the limit of its ability to pay.

But there is no law which imposes a tax on those bonds. On the contrary, they are expressly exempted by law from taxation. But if they were not exempted, there is no law imposing a tax on them, and it would seem to follow, that the auditor had no authority to collect a tax upon them from the holder of the coupons, unless it is competent for a mere ministerial officer, not only to disobey the law, but to make law, and levy taxes when the legislature has imposed no tax; a proposition which hardly any one would venture to make.

*The court is therefore of opinion,

that the provision in the act of March 28, 1879, which exempted the State bonds from taxation, which were issued by authority of that act, was not in excess of the power and authority of the legislature, and is therefore not unconstitutional, and that there was no law imposing the tax, which the respondent required the plaintiff to deduct from his coupons, and consequently that respondent's first reason for refusing the coupons and money in payment of his State taxes is unsustained and untenable.

With regard to the second reason of respondent for his said refusal, the court is of opinion, that all the questions raised thereby have been repeatedly decided by this court, and that his refusal to receive the coupons in question, upon that ground, was in conflict with, and in disregard of the decisions of the highest judicial tribunal of the State, which is clothed with power by the Constitution of the State, under which he professes to have acted, to interpret the Constitution, and to decide questions arising under it, and whose decisions are final, and binding upon the people of the State, and all the departments of the State government, and its ministerial officers. These questions were raised, argued and decided in the well considered case of *Antoni v. Wright, sheriff*, 22 Gratt. 833, both on the first hearing and on the motion for rehearing. It is true, I believe, the coupons in those cases were not tendered in payment of the capitation tax. But it was argued that the law was unconstitutional, because by its terms, it made the coupons receivable in payment of capitation taxes. But the court decided that it was not unconstitutional on that ground. The same question is raised by respondent in this case, and he justifies his refusal to obey the law, upon the ground that one dollar of the taxes against the plaintiff, was

247 a capitation *tax, which he could not receive coupons in payment of. Yet there was actually tendered in money \$1.12, which exceeded the amount of the capitation tax. But in the case of *Antoni v. Wright*, the coupons were tendered in payment of a property tax, and it was contended that one-fifth of the property tax was dedicated to the support of the public schools, and that the requirement that coupons should be receivable in payment of so much of the property tax, as was dedicated to the public schools, was unconstitutional. So that question was directly in issue, and it was decided by this court, that the coupons were receivable in payment of the property tax, and that the act of 1871 was not unconstitutional on that ground. The respondent in this case raises precisely the same question, and justifies his refusal to receive the coupons on the ground that the act of the 28th March, 1879, was unconstitutional, in making the coupons receivable in payment of such taxes, in which he virtually undertakes to reverse the decision of the court, to whom the power and duty is assigned by the Constitution, to adjudge the case, and finally to settle and determine, whether the law is constitutional or not.

Some years after the decision of *Antoni v. Wright* reference was made to that case, in the case of *Wise Brothers* and the case of *Maury*, 24 Gratt. 169, when the correctness of that decision was recognized. Again, in the recent case of *Clarke v. Tyler*, sergeant, 30 Gratt. 134, the same constitutional question was again raised, as to the receivability of coupons in payment of fines, which it was argued were appropriated by the Constitution to the public free schools, and that the act of 1871, in making coupons receivable in payment of fines, was a violation of the Constitution; and this court again reaffirmed its decision in *Antoni v. Wright*, both upon the hearing, and on the motion for a rehear-

248 ing. *We are of opinion therefore, that the question raised by respondent's second reason, is no longer an open question. It is a res adjudicata, and there is nothing in the answer of the respondent, or in the argument of his counsel, that has created in the minds of the court, even a doubt, as to the correctness, of its former repeated and well considered decisions of the same questions which respondent has thought proper to raise in his second reason, in justification of his refusal to obey the law, and to receive the coupons, and the money tendered by plaintiff in payment of his taxes.

I deem it unnecessary to reiterate the reasons which sustain us in this decision, they are fully set out in the opinions delivered on the trial of *Antoni v. Wright*, and on the motion for a hearing, to which I beg to refer; and also to the opinion of Judge Christian, and also to my opinion in *Clarke v. Tyler*, sergeant, supra. Those opinions fully vindicate the decisions of this court in *Antoni v. Wright*, sheriff, and were concurred in by a majority of all the judges elected to the court, which is necessary under § 2, Art. VI of the Constitution, "to declare any law null and void, by reason of its repugnance to the Federal Constitution, or the Constitution of this State;" and consequently these decisions, by three out of the five judges elected to the court, do establish the constitutionality of the act which makes coupons for the interest accruing on the bonds of the State, at and after their maturity, receivable in payment of taxes, debts, dues and demands due the State, and only one of the judges out of the five elected to the court, holding as conscientiously, as his brethren held to the contrary, that the said act in that respect, is repugnant to the Constitution of the State, cannot declare said act to be null and void by reason thereof. And a majority of all

249 the judges elected to the court, *deciding that the act of 7th of March, 1872, which virtually prohibited the officers who had charge of the collection of the revenues of the State, to receive coupons in payment of taxes, was null and void by reason of its repugnance to the Federal Constitution, and the Constitution of the State, notwithstanding the opinion of only one of the five judges elected to the court, to the contrary, is a constitutional avoidance and annulment of said act, so far as it was so declared to be unconstitutional, null and void. I beg to

refer to my opinion in *Clarke v. Tyler*, sergeant,*which was concurred in by Judges Christian and Burks, though that does not appear from the report of the case. for the reasons, which need not be reiterated here. which I think fully sustains the decision of the court, especially upon the question again raised by respondent, in this case, and shows the fallacy of all the objections urged to the constitutionality of the law upon that ground, and which fortifies the reasoning of Judge Christian, in his able opinion in the same case, attaining the same result, to which I beg also to refer.

Upon the whole the court is of opinion that the rule nisi must be made absolute, and that a mandamus be issued against the said John E. Massey, auditor, commanding him to receive the coupons, and the money tendered by William Williamson, in payment of his taxes hereinbefore mentioned, and that upon receipt of said coupons and money, he execute to him a receipt in full discharge of said taxes.

BURKS, J. I concur with Judge Anderson in opinion, that the coupons were receivable for the taxes on account of which they were tendered in payment by the relator. I regard this question as settled by the previous decisions of this court.

250 *I am also of opinion, that these coupons are exempt from taxation under the act of 1879—that the exemption is not forbidden by the Constitution and is valid and binding on the State. The power to exempt the obligations of the State from taxation is incidental to the power to contract, adjust and provide for the payment of such obligations. I am not prepared, however, to say, whether or not the power of exemption under the Constitution is without limitation, and extends to property generally, within the uncontrolled discretion of the legislature. The question is a very grave one, and, in the view I take, need not be decided in the present case. I wish therefore to be understood as not expressing any opinion upon it.

I concur in awarding a peremptory mandamus.

CHRISTIAN, J., concurred fully in the opinion of Anderson, J.

STAPLES, J., dissented.
Mandamus ordered.

251 *Tanner v. Bennett's Adm'r.

April Term, 1880, Richmond.

Administrators—Negligence—Failure to Collect Debt.—T died in 1863, and his estate was committed to B, sheriff of P, as administrator

***Personal Representatives—Liability for Failure to Collect Debt.**—In *McConnico v. Curzen*, 2 Call 358, it was held that the executors would not be liable for failure to collect outstanding debts unless there was gross negligence. See also *Estill v. McClintic*, 11 W. Va. 399. Nor is an administrator or executor bound to sue for the recovery

with the will annexed. Among the assets was a bond of F, who lived in P E county, to T for \$1,785.19, executed November 2, 1857. In 1863 B sent this bond to H a lawyer living in P E county for collection by suit or otherwise. F had in possession a considerable estate real and personal, but he was largely indebted, and H, as well as other counsel who had claims against F, apprehended that if he was sued he would convey his estate to secure preferred creditors; and therefore H did not bring suit upon the bond until 1866. Several suits were brought against F in January, 1866, and he sold and conveyed his land in payment of debts mentioned in the deed, and soon after went into bankruptcy paying nothing. **Held:** Neither B nor his counsel was guilty of negligence; and B's estate is not responsible for the debt.

This was a suit in equity in the circuit court of Pittsylvania, brought in July, 1873, by Elizabeth Tanner, widow of Floyd Tanner, deceased, against the administrator of Coleman D. Bennett for a settlement of the accounts of said Bennett as sheriff administrator with the will annexed of Floyd Tanner, deceased.

Floyd Tanner died in 1863, leaving a will, which was duly admitted to probate, and the named executors refusing to qualify, the estate was committed to Bennett, the then sheriff of Pittsylvania county.

Bennett in his life time had once settled his accounts as administrator of Tanner, and his administrator had settled themselves since **252** his death. The only question of *any importance, and the only one considered by this court, was whether Bennett's estate was liable for the loss of a debt due by bond for \$1,785.19, with interest upon it from the 2d of November, 1857 (its date) executed by B. F. Terry, of the county of Prince Edward, to Floyd Tanner. The circuit court held Bennett's estate was not liable for it, and Mrs. Tanner obtained an appeal. The facts are stated by Judge Staples in his opinion.

Charles E. Dabney, for the appellant.

William M. Tredway, Jr., for the appellee.

STAPLES, J., delivered the opinion of the court.

Floyd Tanner died in the county of Pittsylvania in the year 1863, possessed of considerable real and personal property. Administration upon his estate with the will annexed was committed to C. D. Bennett, then sheriff of the county. Among the assets or choses in action which came to the

of a debt due the estate, where it is apparent the debtor is not able to pay it. *Mitchell's Adm'r v. Trotter*, 7 Gratt. 136; *Lovett v. Thomas' Adm'r*, 81 Va. 245; *Nelsons' Ex'or v. Page, et al.* 7 Gratt. 160. Likewise the executor will not be held liable where it appears that the loss of a part of a debt was incurred rather from the depreciation in value of the property by which it was secured than from any culpable neglect on his part. *Nelson's Ex'or v. Page et al.*, 7 Gratt. 160. See also on this question, *Miller v. Jeffress*, 4 Gratt. 472; *Chapman's Adm'r v. Shepherd's Adm'r*, 24 Gratt. 377; *Watkins v. Stewart*, 78 Va. 111; *Sterling v. Wilkinson*, 83 Va. 791, 11 Am. & Eng. Enc. of Law (2nd Ed.) 1002.

hands of Bennett as such administrator, was a bond of \$1,785.19 executed to the testator by Dr. B. F. Terry, of Prince Edward county in the year 1857. No part of the money due upon this bond was ever collected by Bennett; but the whole of it was ultimately lost to the estate of Tanner, by the insolvency of Terry. The present controversy grows out of an attempt of the appellant to fix upon Bennett a devastavit in failing to institute suit and obtained judgment upon this bond. It is conceded that Bennett placed the bond in the hands of H. F. Parrish, an attorney at law residing in Prince Edward, for collection, by suit or otherwise. The appellant insists this was not done, however, until the year 1867, after Terry's failure, and after he had executed a deed conveying his

253 *real estate for the benefit of certain Cheshire, 2 Iredell Eq. R. 569, 573.

Parrish is produced bearing date 12th August, 1867, in which it is stated that he had received of Bennett Terry's bond for collection; and this would seem to sustain appellant's theory of the transaction. On the other hand Mr. Parrish, whose deposition was taken by the appellee, states very positively, that he received the bond from Bennett in the year 1863. At the time this deposition was taken the receipt was in the possession of Tanner's representatives, their counsel might have cross-examined the witness and called for an explanation of the apparent conflict between his statement and the date of the receipt. It was due to the witness that such an opportunity should be afforded him before any unfavorable inference could be drawn against the truth of his testimony. Nothing however was said about the receipt until it was filed as an exhibit with the commissioner who was directed to take the account.

The receipt does not necessarily prove that Mr. Parrish is mistaken with regard to the time the bond was placed in his hands. It is probable that the bond may have been sent to him during the war and the receipt given on the day of its date. One thing would seem to be clear, if Mr. Parrish is to be believed at all, the bond was in his possession long before Terry made any conveyances of his property, and before judgments were recovered against him. Mr. Parrish says that he as well as other attorneys having claims against Terry for collection, were deterred from bringing suit upon them, because they were afraid that so soon as these suits were commenced Terry would at once give a preferred deed. As Mr. Parrish's deposition is very brief, and covers the entire ground of defence, I will give his statement in his own words. He says in answer to a question:

254 "Not long after October, 1863, I received from Col. C. D. Bennett, of Pittsylvania, a bond (the one referred to in the question and in the proceedings in this suit) for collection by suit or otherwise; I enquired into the pecuniary condition of Dr. Terry, the defendant, and became convinced that it would be inexpedient and injudicious to bring suit on it, and did not do so for some time. I was induced to believe from

enquiries that if suit was brought Dr. Terry would be likely to make a deed, and after consultation with a number of lawyers in active practice in Prince Edward county, and especially with the late John W. Wilson, a lawyer of distinction and well known as a good collector, and who, also, had a claim against said Terry, I became convinced that it was best to pursue the course above indicated; but I finally did bring a suit in order to place my client in as good a position as other creditors who were seeking judgments."

In these statements he is corroborated by the testimony of other witnesses. Judge Dickenson whose deposition is filed in the record, says—"I am unable to say what would have been the effect upon Dr. Terry or his creditors of a suit in 1863, except from what occurred in the winter of 1865-6. Suits were brought against him by several creditors to the January rules, 1866; and he sold and conveyed his land prior to the court at which judgments were rendered, so that no liens were obtained on the land, and the judgments were unavailing. Perkinson's bond had been in my hands for some time. I deemed it best to seek a judgment, but my client was dissatisfied at my having subjected him to the costs of what he regarded an unnecessary suit."

It appears indeed that other creditors brought suit in January, 1866, and that Terry very soon thereafter in anticipation of the judgments against him, made the

255 *sale and conveyance of his real estate already referred to for the benefit of certain preferred creditors, and not long afterwards went into bankruptcy. None of his creditors ever realized a dollar of their claims, except those included in the deed; so that if Bennett's counsel had instituted suit at the earliest period, other creditors would have done the same; and if he had succeeded in obtaining judgment it is almost certain it would have availed nothing.

Bennett seems to have done all it was incumbent upon him to do in the exercise of a reasonable diligence. He was at the time sheriff of the county of Pittsylvania, and would scarcely be expected to give personal attention to the collection of claims due his testator from debtors residing in distant counties. The country was then in a state of war. The currency in circulation was greatly depreciated, and down to the year 1866, it was almost impracticable even to obtain judgments where the debtor chose to interpose objections. It seems to me therefore very clear that neither Bennett nor his counsel were guilty of any such negligence with respect to the bond in question as would convict Bennett of a devastavit in the administration of Tanner's estate. This view renders unnecessary any decision of the interesting question so ably discussed by the appellant's counsel; and that is, whether a personal representative having placed a claim in the hands of a discreet and reliable lawyer can be held responsible for the debt, if the lawyer should fail to prosecute a suit with proper diligence.

There are several other questions presented in the petition for an appeal, but they involve very trivial sums, and do not require any special consideration. They were correctly decided by the circuit court; and for the reasons already stated the decree is affirmed.

Decree affirmed.

256 *Brown & als. v. Lambert's Adm'r & als.

April Term, 1880, Richmond.

On the 15th of January, 1828, E, by deed, recorded the same day, in consideration of "love and affection," conveyed to B, trustee, all of his property, including therein several slaves, in trust, for the use of himself and wife for their lives, and at the death of both of them, for their surviving children; and in case of the death of any of the children before E and his wife, for the children of the deceased children, in such portions as his children would have taken had they survived him and his wife. B, the trustee, died in 1832, and the property was without any regularly appointed trustee until 1862, when E, the grantor, instituted proceedings and had himself appointed trustee by the court. E died in 1872 and his wife in 1874. No child survived both, and the appellants—the grandchildren—were entitled to the trust estate. From the date of the deed to the death of E, the latter continued in possession of the trust property, using it as his own; and between 1832 and 1862, sold several of the slaves, received the proceeds, appropriated them to his own use, and never accounted for them to any one. In a creditor's suit brought for a settlement of E's estate, the grandchildren claimed the proceeds of the slaves sold by E, and that the debt was a fiduciary one, and as such entitled to priority. **Held:**

1. Trustees De Facto—Liability for Breach of Trust Where Trust Subject Destroyed before Claimants' Rights Vested.—E was a trustee *de facto* at the time of the sale, and although the property in the slaves had been destroyed by their emancipation before the rights of the claimants vested; yet, as E was a trustee at the time, and the sale was a breach of trust, he, or his estate, are liable to the *cestuis que trust* for the proceeds. Where a trustee acts within the line of his duty, he will be responsible for no unavoidable loss; but where he commits a breach of trust, he must account for the property in all events.

*Reviewed and distinguished in Pannill's Adm'r v. Calloway's Comm., 78 Va. 387.

Trustees—Breach of Trust—Liability.—As affirming the decision stated in the first headnote of the leading case that the emancipation of slaves was immaterial as affecting the liability of a trustee who had, prior thereto, sold slaves committed to him in trust, see *Loving v. Ashlin's Adm'r*, 76 Va. 907.

Same—Sale of Trust Subject—Right of Beneficiary.—The doctrine stated in the leading case as to the right of the beneficiary where the trustee commits a breach of trust by a sale of the trust subject is approved in *Loving v. Ashlin's Adm'r*, 76 Va. 907; *Pettyjohn's Ex'or v. Woodrooff's Ex'or*, 77 Va. 507; 2 Min. Inst. (4th Ed.) 244.

2. Same—Breach of Trust—Liability.*—

Where one assumes to act in relation to trust property without just authority, however bona fide may be his conduct, *he will be held responsible for the capital and income, to the same extent as if he had been de jure trustee.

3. Same—Same—Priority of Claim for.—

The debt is entitled to priority as a fiduciary one, in the distribution of the assets of the decedent.

4. Trustees—Code Construed.†—

The term "trustee," as used in the Code, ch. 126, § 25, must be understood in the restricted sense of an express trustee, as distinguished from trustee in a general sense, by construction or implication of law; and E, by qualifying as trustee in 1862, became such express trustee, and liable as such for the amount which he owed whilst acting as trustee de facto, and should have paid to himself.

5. Limitation of Actions—Case at Bar.—

The claim is not barred by the statute of limitations.

This was a creditor's bill in the circuit court of Lunenburg county brought by J. W. Ellis, sheriff of said county and as such administrator with the will annexed of Constance Lambert, deceased, against the administrator of Upton Edmondson, deceased, and the three grandchildren of said Upton Edmondson as his distributees and heirs, to subject the estate real and personal to the payment of a debt of \$3,000 due from said Edmondson to the plaintiff's testatrix.

These grandchildren were Upton Brown, Carrie, who had married E. N. Gills, and Fanny the wife of W. W. Phillips. These parties answered, claiming that under a deed executed in 1828, by Upton Edmondson and his wife, certain real estate and a number of slaves had been conveyed in trust for the grantors during their lives, and remainder to their children, and the descendants of such of their children as should die in the life time of the grantors; that the trustee died in 1832, and that Upton Edmondson who had held the said slaves in his possession after the death of the trustee sold several of them, and had applied the purchase money of two of them, to pay for the building of a mill of which he held a one-third interest, and had

*appropriated the purchase money of the other slaves to his own use. That by a decree of the county court of Lunenburg made in 1862 said Upton Edmondson was appointed trustee in said deed. They claim that they are entitled to have his mill property as having been paid for by the proceeds of the sale of two of these slaves, and that for the purchase money of the other slaves sold they are fiduciary creditors and entitled to rank as such in the distribution of his estate among his creditors.

***Trustees De Facto—Liability.**—Doctrine of second headnote approved in Pannill's Adm'r v. Calloway's Comm., 78 Va. 387. See also Allen's Ex'r v. Shriver's Adm'r, 81 Va. 174.

†Same—Code Provision Construed.—As to the fourth headnote, see 2 Min. Inst. (4th Ed.) 244, 245.

Trustees—Indebtedness to Trust Fund.—The rule stated as to the duty and liability of a trustee who is indebted to the trust fund is cited with approval in Caskie's Ex'ors v. Harrison et al., 76 Va. 85; Thurston's Adm'r v. Sinclair, 79 Va. 112.

There was a decree for an account of the debts of Edmondson and their priorities, and also of his estate real and personal. And the commissioner in his report, stated the claims of the fiduciaries under the deed of 1828, for the purchase money of five of the slaves, stated upon the evidence at \$5,000, as a preferred debt; and he reported Edmondson's title to one-third of twenty-five acres of land including the mill which he estimated \$1,033.33. To the report as to the debt for \$5,000, the plaintiff excepted: 1st. Because it was barred by the statute of limitations. 2d. If not so barred the commissioner erred in treating it as a fiduciary debt entitled to priority in the administration of Edmondson's estate. 3d. That there was no sufficient evidence that he sold any greater interest in the slaves than he and his wife were entitled to under the deed. 4th. That the commissioner erred in reporting that the proceeds of the two slaves were invested by Edmondson in the mill property, there being no sufficient evidence of the fact.

The cause came on to be heard on the 18th of May, 1876, when the court sustained the first, second and fourth exceptions of the plaintiff, and overruled the third; and held that the debt of the defendants Upton Brown, &c., was not a fiduciary debt against the estate of Edmondson and entitled to priority over other debts, *and further that it was barred by the statute of limitations. And thereupon Upton Brown, Phillips and wife and Gills and wife applied to a judge of this court for an appeal; which was awarded. The facts are stated by Judge Burks in his opinion.

Jones & Bouldin and F. W. Christian, for the appellants.

S. D. Davies and F. D. Irving, for the appellees.

BURKS, J., delivered the opinion of the court.

Upton Edmondson, by deed of date January 15, 1828, and recorded the same day, in consideration, as therein expressed, of the love and affection which he entertained for his wife and child and in order to secure a support for them, conveyed all of his property, real and personal, among the latter a number of slaves, to William Bagley, in trust as follows: "The said William Bagley and his heirs shall permit the profits of all the property hereby conveyed to go to the support and maintenance of the said Upton Edmondson and Frances his wife and his child now living and the children which the said Upton may hereafter have, so long as the said Upton and Frances his wife, or either of them, shall live, and after their death, the said Wm. Bagley shall convey the aforesaid property to the said Upton Edmondson's children then living; and if any of said children shall have died before the death of both the said Upton and his wife,—living child or children shall take the portion which its or their father or mother (as the case may be) would have been entitled to if then living."

enquiries that if suit was brought Dr. Terry would be likely to make a deed, and after consultation with a number of lawyers in active practice in Prince Edward county, and especially with the late John W. Wilson, a lawyer of distinction and well known as a good collector, and who, also, had a claim against said Terry, I became convinced that it was best to pursue the course above indicated; but I finally did bring a suit in order to place my client in as good a position as other creditors who were seeking judgments."

In these statements he is corroborated by the testimony of other witnesses. Judge Dickenson whose deposition is filed in the record, says—"I am unable to say what would have been the effect upon Dr. Terry or his creditors of a suit in 1863, except from what occurred in the winter of 1865-6. Suits were brought against him by several creditors to the January rules, 1866; and he sold and conveyed his land prior to the court at which judgments were rendered, so that no liens were obtained on the land, and the judgments were unavailing. Perkinson's bond had been in my hands for some time. I deemed it best to seek a judgment, but my client was dissatisfied at my having subjected him to the costs of what he regarded an unnecessary suit."

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Bennett seems to have done all it was incumbent upon him to do in the exercise of a reasonable diligence. He was at the time sheriff of the county of Pittsylvania, and would scarcely be expected to give personal attention to the collection of claims due his testator from debtors residing in distant counties. The country was then in a state of war. The currency in circulation was greatly depreciated, and down to the year 1866, it was almost impracticable even to obtain judgments where the debtor chose to interpose objections. It seems to me therefore very clear that neither Bennett nor his counsel were guilty of any such negligence with respect to the bond in question as would convict Bennett of a devastavit in the administration of Tanner's estate. This view renders unnecessary any decision of the interesting question so ably discussed by the appellee's counsel; and that is, whether a personal representative having placed a claim in the hands of a discreet and reliable lawyer can be held responsible for the debt, if the lawyer should fail to prosecute a suit with proper diligence.

There are several other questions presented in the petition for an appeal, but they involve very trivial sums, and do not require any special consideration. They were correctly decided by the circuit court; and for the reasons already stated the decree is affirmed.

Decree affirmed.

256 *Brown & als. v. Lambert's Adm'r & als.

April Term, 1880, Richmond.

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1. **Trustees De Facto—Liability for Breach of Trust Where Trust Subject Destroyed before Claimants' Rights Vested.**—E was a trustee *de facto* at the time of the sale, and although the property in the slaves had been destroyed by their emancipation before the rights of the claimants vested; yet, as E was a trustee at the time, and the sale was a breach of trust, he, or his estate, are liable to the *cestuis que trust* for the proceeds. Where a trustee acts within the line of his duty, he will be responsible for no unavoidable loss; but where he commits a breach of trust, he must account for the property in all events.

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Where one assumes to act in relation to trust property without just authority, however *bona fide* may be his conduct, *he will be held responsible for the capital and income, to the same extent as if he had been *de jure* trustee.

3. Same—Same—Priority of Claim for.—

The debt is entitled to priority as a fiduciary one, in the distribution of the assets of the decedent.

4. Trustees—Code Construed.†—

The term "trustee," as used in the Code, ch. 126, § 25, must be understood in the restricted sense of an *express* trustee, as distinguished from trustee in a general sense, by construction or implication of law; and E, by qualifying as trustee in 1862, became such *express* trustee, and liable as such for the amount which he owed whilst acting as trustee *de facto*, and should have paid to himself.

5. Limitation of Actions—Case at Bar.—

The claim is not barred by the statute of limitations.

This was a creditor's bill in the circuit court of Lunenburg county brought by J. W. Ellis, sheriff of said county and as such administrator with the will annexed of Constance Lambert, deceased, against the administrator of Upton Edmondson, deceased, and the three grandchildren of said Upton Edmondson as his distributees and heirs, to subject the estate real and personal to the payment of a debt of \$3,000 due from said Edmondson to the plaintiff's testatrix.

These grandchildren were Upton Brown, Carrie, who had married E. N. Gills, and Fanny the wife of W. W. Phillips. These parties answered, claiming that under a deed executed in 1828, by Upton Edmondson and his wife, certain real estate and a number of slaves had been conveyed in trust for the grantors during their lives, and remainder to their children, and the descendants of such of their children as should die in the life time of the grantors; that the trustee died in 1832, and that Upton Edmondson who had held the said slaves in his possession after the death of the trustee sold several of them, and had applied the purchase money of two of them, to pay for the building of a mill of which he held a one-third interest, and had **258** *appropriated the purchase money of the other slaves to his own use. That by a decree of the county court of Lunenburg made in 1862 said Upton Edmondson was appointed trustee in said deed. They claim that they are entitled to have his mill property as having been paid for by the proceeds of the sale of two of these slaves, and that for the purchase money of the other slaves sold they are fiduciary creditors and entitled to rank as such in the distribution of his estate among his creditors.

***Trustees De Facto—Liability.**—Doctrine of second headnote approved in Pannill's Adm'r v. Calloway's Comm., 78 Va. 387. See also Allen's Ex'r v. Shriver's Adm'r, 81 Va. 174.

†**Same—Code Provision Construed.**—As to the fourth headnote, see 2 Min. Inst. (4th Ed.) 244, 245.

Trustees—Indebtedness to Trust Fund.—The rule stated as to the duty and liability of a trustee who is indebted to the trust fund is cited with approval in Caskie's Ex'ors v. Harrison et al., 76 Va. 85; Thurston's Adm'r v. Sinclair, 79 Va. 112.

There was a decree for an account of the debts of Edmondson and their priorities, and also of his estate real and personal. And the commissioner in his report, stated the claims of the fiduciaries under the deed of 1828, for the purchase money of five of the slaves, stated upon the evidence at \$5,000, as a preferred debt; and he reported Edmondson's title to one-third of twenty-five acres of land including the mill which he estimated \$1,033.33. To the report as to the debt for \$5,000, the plaintiff excepted: 1st. Because it was barred by the statute of limitations. 2d. If not so barred the commissioner erred in treating it as a fiduciary debt entitled to priority in the administration of Edmondson's estate. 3d. That there was no sufficient evidence that he sold any greater interest in the slaves than he and his wife were entitled to under the deed. 4th. That the commissioner erred in reporting that the proceeds of the two slaves were invested by Edmondson in the mill property, there being no sufficient evidence of the fact.

The cause came on to be heard on the 18th of May, 1876, when the court sustained the first, second and fourth exceptions of the plaintiff, and overruled the third; and held that the debt of the defendants Upton Brown, &c., was not a fiduciary debt against the estate of Edmondson and entitled **259** to priority over other debts, *and further that it was barred by the statute of limitations. And thereupon Upton Brown, Phillips and wife and Gills and wife applied to a judge of this court for an appeal; which was awarded. The facts are stated by Judge Burks in his opinion.

Jones & Bouldin and F. W. Christian, for the appellants.

S. D. Davies and F. D. Irving, for the appellees.

BURKS, J., delivered the opinion of the court.

Upton Edmondson, by deed of date January 15, 1828, and recorded the same day, in consideration, as therein expressed, of the love and affection which he entertained for his wife and child and in order to secure a support for them, conveyed all of his property, real and personal, among the latter a number of slaves, to William Bagley, in trust as follows: "The said William Bagley and his heirs shall permit the profits of all the property hereby conveyed to go to the support and maintenance of the said Upton Edmondson and Frances his wife and his child now living and the children which the said Upton may hereafter have, so long as the said Upton and Frances his wife, or either of them, shall live, and after their death, the said Wm. Bagley shall convey the aforesaid property to the said Upton Edmondson's children then living; and if any of said children shall have died before the death of both the said Upton and his wife,—living child or children shall take the portion which its or their father or mother (as the case may be) would have been entitled to if then living."

The deed contains this further provision: "And it is hereby understood that it is not the design of this deed to defraud any one of the creditors of said Upton of any just and legal claims they may now have against him, but said William Bagley and his heirs shall have the property hereby conveyed for the uses aforesaid, free from and not subject to the control, contracts or debts which the said Upton may hereafter enter into or incur."

Bagley (the trustee) died in 1832. The estate was without any regularly appointed trustee from that time until 1862, when Upton Edmondson was appointed trustee by the county court of Lunenburg county in proceedings had on a bill in chancery filed by him in the names of himself and his wife against his grandchildren, who are appellants here. He died in 1872. His wife survived him and died in 1874. The grandchildren aforesaid, who survived her, it is admitted, are alone entitled to the trust property, or what remains of it, under the limitations of the deed of 1828.

From the death of Bagley in 1832 until the death of Upton Edmondson in 1872, and probably from the date of the deed (1828), a period of forty years, the latter continued in the possession of the trust property, managing, controlling and using it pretty much as if he had the absolute ownership; and in the interval between 1832 and 1862 he sold several of the trust slaves, received the proceeds, appropriated them to his own use, and never accounted for the same or any part thereof to the appellants or to any other person.

The claim of the appellants is, that the estate of Upton Edmondson is liable to them for these proceeds; that they constituted a trust fund in his hands; that a portion (the price of two of the slaves) was invested by him in certain mill property in the proceedings mentioned, which, at their option, shall be treated as trust property; and that as to the residue of said proceeds (the price obtained for three other slaves),

and *indeed as to the whole proceeds, if no portion was invested as aforesaid, the liability of the decedent's estate is for a debt due by him as "trustee for persons under disabilities," and that such debt is entitled, in the application of the assets of the decedent to the satisfaction of the demands against him, to the priority accorded to fiduciary debts by our statute regulating the order in which debts of a decedent shall be paid by his personal representative. See Code of 1873, ch. 126, § 25; Acts of 1869-70, p. 428.

Upon exceptions taken to the commissioner's report made under orders directing accounts, the circuit court, while of opinion that Upton Edmondson sold the absolute estate in the slaves was yet further of opinion, that no portion of the proceeds of sale was invested in the mill property, that the claim of the appellants was not a fiduciary debt entitled to priority in the administration of the assets of said decedent, and, moreover, that the claim was barred

by the act of limitations. The decree of the court, the same appealed from, was in conformity with this opinion.

By recurring to the extract from the deed, it will be seen, that the remainder in the trust property is limited to the children of the grantor who may be living at the death of the survivor of himself and his wife, and to the descendants of such of them as shall have theretofore died. The limitation therefore is contingent as to the persons to take the remainder, and at the time the estate vested in Upton Edmondson's grandchildren, all property in the slaves covered by the deed had perished by the results of the late war. How far and in what manner, if at all, the rights of the appellants in the present case might be effected by this state of facts was a question suggested to the minds of some of the judges by reading the record after the cause had been submitted,

and as that question had not been argued before the court, counsel were invited to present their views upon it, which they have done in notes giving us much aid in our investigations. We shall dispose of that question first.

It is argued for the appellee, that if Upton Edmondson had not sold the slaves the property in them would have been inevitably destroyed by the cause which effected their emancipation before the rights of the appellants vested, and therefore they were not injured by the sale and conversion, although Edmondson may have been benefited thereby, and not being injured, they are entitled to no relief.

To this it is replied for the appellants, that their claim is not for damages as for a trespass, where the recovery is measured by the extent of the injury done, but that their claim rests on equitable principles peculiar to trust estates; that the slaves when sold were trust property; that Edmondson was a trustee; that the sale was a breach of trust; that the appellants are cestui que trust, and have the right to treat the proceeds of sale as trust funds, although the original trust property would have inevitably perished if it had not been converted. We think this is the correct view of the case.

The doctrine is elementary, that where a trustee commits a breach of trust by a sale of the trust subject without authority, the cestui que trust (beneficiary) may, at his option, disaffirm the sale and pursue the property in the hands of a volunteer or a purchaser for value with notice of the trust, or he may affirm the sale and resort to the proceeds in the hands of the trustee, if they can be identified, or if they have been invested or converted into other property held by the trustee, or a volunteer, or purchaser with notice, and can be distinctly traced, he may, if he elect to do so, take such property in lieu of the proceeds so invested or converted, or if he elect not to do that, he may have his remedy personally against the trustee.

The option in such case, says Judge Story is exclusively given to the cestui que trust, and is given to him for the wisest purposes

and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. *Oliver & others v. Piatt*, 3 How. (U. S. R.) 333, 401. "The rule in equity," says the same eminent authority, "is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go the cestui que trust, and all the losses shall be borne by the trustee himself." *Ibid*.

And if there is a breach of trust and an inevitable calamity destroys the property, the trustee must account for it. 2 Perry on Trusts, § 847, and cases cited. If he acts strictly within the line of his duty, he will be responsible for no loss; but if he varies from his duty, he must account for the property in all events. *Ibid.*, § 847.

Was, then, Upton Edmondson a trustee at the time he sold the slaves in question, is the first inquiry. He had not been regularly appointed such, but he had a direct equitable interest for life in the subject and was in possession. He was not wrongfully in possession. He was not a trespasser.

In *Tabb's curator v. Cabell & others*, 17 Gratt. 160, 172, Judge Joynes, in his opinion concurred in by Judge Moncure (only two judges sitting), said, that "in the view of a court of equity, Mrs. Cabell as tenant for life of the slaves bequeathed to her for life, remainder to her children, was regarded a trustee;" citing as authorities for this proposition, *Fearne on Rem.* 414; 1 *McCord's Ch. R.* 227. *Swann v. Ligan*; 1 *Georgia Decisions* 109, *Martin v. Greer*. See also *Cheshire v. Cheshire*, 2 *Iredell Eq.* 569, 573.

264 *If this proposition be correct in relation to a legal estate, it would seem to apply with at least equal force to the life tenant, in possession, of an equitable estate.

But there is another principle which seems applicable to this case, and that is, that if a person assumes to act as trustee, he shall be treated in equity as trustee, whether he has been duly appointed such or not. "There is no rule of equity law applicable to trusts," says Judge Story, "which is more uniformly acted upon by the courts than that one who assumes to act in relation to trust property, without just authority, however bona fide may be his conduct, shall be held responsible both for the capital and income, to the same extent as if he had been de jure trustee." 2 *Story's Eq. Juris.*, § 261c. See also 2 *Perry on Trusts*, § 846, and authorities there cited.

Now, in the case before us, the trustee appointed by the deed was dead. Upton Edmondson, one of the immediate beneficiaries, was in possession of the trust property. On a bill filed for the purpose, he might have had himself or another appointed trustee at once. He neglected or did not choose to do so. For thirty years before his appointment he held possession of the property and was all the time, to all intents and purposes, trustee de facto. While it was his right to receive the profits and income for the use of himself and his family, it was at the same time plainly his duty to take care of and preserve the corpus of the estate for the remaindermen,

especially when, from the limitation under the deed and their relation to the subject, they had no very adequate means, if any at all, of protecting their own interest. He certainly had no right to make sale of the property. If such sale were necessary or proper, a court of equity, its aid being invoked, would have ordered it and secured or directed the application of the proceeds.

265 Indeed, it would seem, that *he had no interest in the property which could be aliened by him. The trust, as to the immediate beneficiaries, was a blended one, such as is occasionally created in family settlements. He had no separate distinct interest or estate which he could dispose of. *Nickell & Miller v. Handley*, 10 Gratt. 336; *Markham v. Guerrant & Watkins*, 4 *Leigh* 279.

The sale by him was of the absolute estate in the slaves. This is shown by the prices obtained and other circumstances. It was therefore a palpable breach of trust, and, upon the principles already enunciated, he was accountable therefor to the remaindermen, who stood in relation to him as cestuis que trust. The proceeds of sale in his hands were subject to the trusts under the deed, at the option of the cestui que trust. They had the right to follow those proceeds into any property in his hands in which they had been invested or into which they had been converted, or, at their option, to proceed against him personally, or against his estate in the hands of his representatives, for the value of such proceeds. They were all under the disability of infancy and two of them were also *femes covert*. They asserted their rights within a very short time after their estates became vested. They could not do so before; at least with any certain benefit. Perhaps, though contingent remaindermen, they may have had the right to file a bill quia timet for the protection of the property or security of the proceeds. 2 *Perry on Trusts*, § 816, citing *Clarke v. Devereaux*, 1 *S. C.* 172; 2 *Story's Eq. Juris.*, §§ 827, 843. If so, however, their failure to resort to such precautionary or preventive remedy would not exonerate the trustee from liability for the consequences of his breach of trust.

We are therefore of opinion, that the claim of the appellants is not effected by the general emancipation *of slaves which occurred as one of the results of the late war.

266 An examination of *Davis v. Johns*, 2 *Rob. R.* 729, and *Moorman v. Smoot & wife & others*, 28 Gratt. 80, will show that the decisions in those cases are not in conflict or at all inconsistent with the principles on which the question just discussed has been disposed of.

We proceed to the consideration of the remaining questions in the case:

1. As to the claim to the mill property on the ground that the proceeds of sale of two of the slaves were invested in said property. The evidence on this point is very unsatisfactory, and the preponderance would seem to be against the validity of the claim. Several witnesses give declarations of Upton Edmondson, which they profess to have

heard more than twenty years before they testified, to the effect that the purchase money obtained for the negro Jane was applied or intended to be applied towards the building of the mill, and one of the witnesses (R. H. Allen) says he recollects distinctly that Upton Edmondson sold two negroes, he does not know when, one of whom (Jane) was sold to Harris Edmondson for \$1,300, and the other to one Cunningham for about \$800; and he further says, that Upton Edmondson told him that the proceeds of sale of both of these negroes were paid for the building of the mill. These alleged declarations and statements seem to be inconsistent with the other evidence in the cause. It is very clearly proved, that the building of the mill was commenced in the fall of the year 1852 and completed in the spring of 1853, and was paid for wholly by Jones, who seems to have been interested in the property. It does not appear, that a dollar was paid by Upton Edmondson. The account was discharged in part by payments

in money made in January, May, and 267 December, 1853, *and the residue, except a small amount, was satisfied by the bond of a third party in December, 1854. It is proved by Cunningham, that he was the purchaser of Jane at the price of \$750, and that he bought and paid for her in the fall of the year 1856, which was several years after the building of the mill had been completed and paid for. If his statements are true, it is impossible that the testimony of William C. Snead as to what he saw and heard in regard to the payment of \$1,300, the proceeds of the sale of Jane, can be true. Without further comment on the evidence, it is sufficient to say, that it does not prove to our satisfaction that any of the proceeds of the sales of any of the negroes went into the mill property. Whether this was so or not, however, is perhaps of little practical importance, in the view we take of the next question to be considered.

2. And that is, whether the claim of the appellants is entitled to priority, as a fiduciary debt, in the administration of the assets of the decedent, Upton Edmondson. If the claim rested solely on the ground of a constructive or implied trust, we are of opinion, that it would not be within the letter or spirit of the statute. Code of 1873. ch. 126, § 25. The terms there employed have a definite legal import—"personal representative" (defined Code of 1873, ch. 15, § 9)—"guardian"—"committee"—"trustee for persons under disabilities." The term "trustee," used to designate one in the class of fiduciaries mentioned, must be understood in the restricted sense of express trustee as distinguished from trustees, in a general sense, by construction or implication of law. If the latter class were intended to be embraced, the language employed is not appropriate; and, moreover, to include every debt, arising out of the vast multitude and variety of constructive and implied trusts, would not

268 only bring about great confusion, *delay, and vexatious litigation in the administration of decedents' estates, but

such an enlargement of the class of preferred debts would well nigh destroy the utility of any preference among the creditors. See *Price's ex'or v. Harrison, ex'or.* 31 Gratt. 114.

But the claim of the appellants is not based merely on the ground of a constructive trust. Upton Edmondson was regularly appointed trustee by decree of court in 1862, with full power to execute the trusts under the deed of 1828. Thenceforth he was an express trustee, charged with all the duties and subject to all the responsibilities of such a trustee. He became invested with the legal title clothed with the trusts declared by the deed. He was charged by indentment of law with the whole trust fund then in his hands, and also with any portion thereof which he had theretofore used or misapplied. For this latter he was debtor, and he was bound to account for and pay over the same to himself as trustee under the deed by virtue of his appointment by the decree, and to invest it so as to secure the principal for the benefit of the remaindermen. *Harvey's adm'r v. Steptoe's adm'r & others*, 17 Gratt. 289. It certainly would have been his duty as trustee, if at the time of his appointment the fund had been in the hands of or owing by some third person, to collect it, if practicable, and securely invest it, and if he had failed to do so, he would have been liable for it, in case of loss. His duty and liability are not changed by the circumstance, that he was the debtor. He was also the creditor. He could not have been expected to sue himself to compel payment, but he could have charged himself as trustee with the trust fund for which he was debtor. Whether he so charged himself or not, the law charged him, and the charge constitutes a debt due by him as "trustee for persons under disabilities," within the meaning of the statute.

269 ute. He was trustee *for the remaindermen. They were all "persons under disabilities" continuously to the time of the assertion of their rights in this case. This sufficiently appears from the record. No distinct testimony was taken in the court below to establish the fact, doubtless because it was not disputed. It is repeatedly alleged in the pleadings and nowhere denied. It is clearly and expressly declared in the record of the case of *Brown &c., v. Blackwell &c.*, a copy of which was filed as an exhibit with the answer of the appellants to the appellee's bill and used as evidence in the cause without objection or exception by any party.

3. The remaining question is, whether the claim of the appellants is barred by the act of limitations?

Clearly, it is not so barred. They could not be required, under penalty of being barred, to prefer their claim until their estate in remainder vested and their right to possession fell in by the determination of the particular estate. That did not take place till the death of Upton Edmondson's wife in 1874, and they preferred their claim in this suit in 1875. Moreover, as before stated, they were all the time under disabilities. *Rowe v. Bentley & others*, 29 Gratt. 736, and *Justis v. English & others*, 30 Gratt. 565, are

the only authorities which need be cited on this point.

It appears, that Upton Edmondson, by deed November 24, 1826, duly recorded, conveyed five negroes, to-wit: Sally and her four children, Pat, Squire, Loretta, and Henry, and their future increase, to Robert Bagley in trust to secure to Anderson Bagley the payment of a bond for \$451.71. These negroes, by the same names and description, were included in the subsequent deed (1828). Two of them (for they were of the same names with those mentioned in the two deeds), to-wit: Sally and Patsy, were afterwards sold by Upton Edmondson, the former in the year 1840 and the latter

270 *in 1845, in the lifetime of Anderson Bagley. It does not appear what was their value, at what price they were sold, or what became of the proceeds. It is possible, that the proceeds were applied to the payment of the debt to Anderson Bagley. However that may be, it is distinctly proved, that Anderson Bagley died in 1846, and his administrator found among the papers of his intestate no such bond as that secured by the deed of 1826. The only claim against Upton Edmondson found among the papers was a bond for thirty dollars not then due, and which was afterwards paid by Edmondson to the administrator. The appellants set up no claim to the proceeds of the sale of these two negroes. Their claim is confined to the proceeds of sale of five other negroes, which the commissioner in his last report puts down at \$5,000, his estimate being based, no doubt, on the deposition of Dupriest, who states, that he knew that Edmondson sold five negroes, whose names he gives and all of whom he knew well; that all of these negroes were young, likely, and valuable, were sold when negroes were selling well, and that Edmondson must have gotten at least \$5,000 for them. These negroes were doubtless of those or increase of those conveyed by the deed of 1828. They were so considered in the court below and so treated by the commissioner in his report, and there was no specific exception to the report on that account.

We are of opinion, that the appellants are entitled to the said sum of \$5,000 as a preferred fiduciary debt against Upton Edmondson's estate, with interest thereon from the date fixed by the commissioner's report, and that the decree of the circuit court rejecting said debt is erroneous.

The decree will therefore be reversed and the cause remanded for further proceedings to be had therein in conformity with the views herein expressed.

271 *The decree was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous: therefore, it is decreed and ordered, that the said decree be reversed and annulled, and that the appellants recover against the appellee J. W. Ellis, sheriff of Lunenburg county, and as such

administrator of Constance Lambert, deceased, their costs by them expended in the prosecution of their appeal aforesaid here, to be levied on the goods and chattels of the said decedent in the hands of the said administrator to be administered; and this court now proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered, that the first, second, and third exceptions of the complainant to the report of Commissioner Jackson, made pursuant to the decree of the November term, 1875, and filed May 2, 1876, be overruled, and that the fourth exception of the complainant to said report, except so much of the said exception as relates to and relies upon the statute of limitations as a bar to the claim therein mentioned, which is hereby overruled, be sustained; and, in order to make the said report conform to the opinion of this court upon said exceptions, it is further decreed and ordered, that said report be modified by rejecting so much thereof as finds and reports that the proceeds of the sale of the slaves Jane and John were invested in the mill reported in account No. 2 of said report, and be further modified by substituting for the "1st class," in account No. 1, of debts against Upton Edmondson, deceased, the statement marked "U E," made out, approved and adopted by this court and

272 *annexed to this decree as a part thereof, and by further substituting the figures \$15,650.99 for and in place of the figures "\$12,275.89," stated in said report as the aggregate amount of the debts of Upton Edmondson, deceased, and that the said report, as so modified, be confirmed; and this cause is remanded to the said circuit court with instructions to take such further steps in the cause and make such further orders and decrees as may be proper to subject the estate of the said Upton Edmondson to the payment of the debts stated in the report aforesaid of the commissioner as modified and confirmed as aforesaid, observing, as between the creditors now parties to the cause, the priority stated in said report as confirmed, and take such further proceedings as may be proper, in order to a final decree, in conformity with the opinion and principles herein declared and the established practice of courts of equity; which is ordered to be certified to the said circuit court of Lunenburg county.

Statement U E referred to in foregoing decree. No. 1, 1st class.

An account of debts against the estate of Upton Edmondson, deceased.

To Upton Brown, W. W. Phillips and Fanny his wife, who, before her marriage with said Phillips, was Fanny Brown; W. N. Gills and Carrie his wife, who, before her marriage, was Carrie Brown; the value of five negro slaves conveyed by deed of trust to Wm. Bagley, trustee, January

15, 1828.....\$5,000 00
Interest from March 9, 1874, till
May, 15, 1876..... 655 00

\$5,655 00

Decree reversed.

273 *Barrett & Wife v. Morriss' Ex'ors, & als.

April Term, 1880, Richmond.

Wills — Advancements — Interest on.* — M died in 1867, having made large though unequal advancements to his four children. By his will he gave an annuity of \$2,000 to his wife, secured on all his estate, and directed his real estate should not be sold during her life; and gave some small legacies. He then says—What shall remain of my estate, after funeral charges, expenses of administration and debts and bequests shall have been paid and satisfied, I direct to be so divided as that there shall be four shares. Whereof the first, together with \$31,000, he gives to C; and in the same manner to each of the other three children, stating the advancement made to each; and concludes—shall severally and respectively be equal to one another. Mrs. M died in 1872, but owing to suits for large debts of uncertain amount sued for and not ascertained until December, 1875, the estate was not ready for division until that time. **HELD:** Interest on the excess of advancements to the children is to be charged from this date.

This was a suit in equity in the chancery court of the city of Richmond, brought in December, 1873, by Charles Y. and Robert F. Morriss, executors of Richard G. Morriss, deceased, to have a final settlement of their accounts, and a division of his estate. Richard G. Morriss died in 1867, possessed of a large estate, and leaving a will which was duly admitted to probate in the circuit court of Richmond. In his lifetime he made large though unequal advances to his four children, viz: Charles Y. Morriss, Robert F. Morriss, Ann E. the wife of William N. Barrett, and Marcella C. the wife of E. S. Hammond.

274 *In the progress of the cause the accounts were settled. In December, 1875, there was a decree for a sale of the real estate, in part to pay a large debt which had been established by the decree of the court in another suit against the executors, and for a division; and the sales having been made the only remaining subject was the division of the proceeds of the land among the legatees of Richard G. Morriss. In order to that it became necessary to fix the date from which interest should be charged upon advancements made to the said legatees.

The commissioner to whom the subject was referred, looking to the provisions of the will which forbade a sale of the land in the lifetime of Mrs. Morriss, who lived until 1872, and to the suits pending against the estate for a large and uncertain amount, not decided until December, 1875, fixed upon the 11th of December, 1875, as the date from whence interest on advancements should be charged; and his report was confirmed by the decree of the court made on the 12th of May, 1877. From this decree Barrett and wife applied to a judge of this court for an appeal; which was awarded.

The provisions of the will of Richard G.

Morriss, and the facts bearing on the question are sufficiently stated in the opinion of the court delivered by Staples, J.

John A. Meredith and Guy & Gilliam, for the appellants.

E. L. Brown, John Lyon, and John Howard, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion the chancery court did not err in fixing upon the 11th of December, 1875, as the period from which it was proper to charge the legatees

275 *of Richard Morriss respectively, with interest upon any excess of advancements either of them may have received. The testator in the second clause of his will, gave to his wife an annuity for life of two thousand dollars, to be paid her in half yearly installments, out of the rents and profits and income of his estate; and in order to secure its payment beyond any contingency, he directed that no sale of his real estate should take place as long as she should live.

By the fifth, sixth, seventh, and eighth clauses of his will the testator confirmed to his four children the advancement charged to them respectively, in his account book: that is to say, to Charles Y. Morriss, \$31,000; to Robert F. Morriss, \$34,000; to Mrs. Barrett, \$32,891; and, to Mrs. Hammond, \$35,121. After these and other bequests he makes the following provision:

"9. What shall remain of my estate after my funeral charges, expenses of administration and debts, and the preceding devises and bequests shall have been paid and satisfied, I direct to be so divided as that there shall be four shares; whereof the first, together with thirty-one thousand dollars, and any further advancement I may make hereafter to my son, Charles Y. Morriss; the second, together with thirty-four thousand dollars, and any further advancement I may hereafter make to my son, Robert F. Morriss; the third, together with thirty-two thousand eight hundred and ninety-one dollars, and any further advancement I may hereafter make to my daughter, Ann E. Barrett; and the fourth, together with thirty-five thousand and twenty-one dollars, and any further advancements I may hereafter make to my daughter, Marcella C. Hammond, shall severally and respectively be equal to one another."

His language is—"What shall remain of my estate after my funeral charges, expenses of administration and debts,

276 *the preceding devises and bequests shall have been paid and satisfied." It is apparent therefore that no final division of the estate could be made until these objects were accomplished. The testator knew they would require time. He knew the advancements made to some of his children were greatly in excess of those made to others. He was very accurate and careful in keeping his accounts with each of them, and very exact in prescribing the mode by which the deficiency in each case should be made up.

*The principal case is cited in Smith v. Yancey, 81 Va. 88; Davis v. Hughes, 86 Va. 909, and is distinguished in Kyle v. Conrad, 25 W. Va. 786.

Had it been his intention that either of the legatees should pay interest upon any excess received in the testator's life time, it is fair to presume he would have so provided. The legatees were to be made equal it is true; not, however, by charging either with interest upon any excess, but by giving to all an equal share of the estate. And this is precisely what the law prescribes in cases of advancement, in the absence of any contrary provision by the testator. The property or money belongs to the legatee or distributee, and not to the estate of the decedent. The legatee or distributee is not accountable for interest, or for rents and profits, upon the amount received by him. If he can be held so liable at all for interest, it can only be from the time the estate is ready for a final distribution and division. See *Cabell, ex'or, v. Puryear et als.*, 27 Gratt. 902.

The court is further of opinion, that the chancery court did not err in fixing upon the 11th of December, 1875, as the period for a final distribution of the estate among the parties entitled under the will. The commissioner to whom the whole matter was referred for investigation, has conclusively shown that the estate was in no condition for such distribution at an earlier day. The suit of *Davis v. Morriss' ex'ors* was instituted in August, 1871, and was for an amount large and unascertained until by 277 the decree of December, 1875, *the liability of the estate was determined to be \$8,452.85, rendering necessary a sale of a portion of the real estate. The commissioner states that other suits were pending and undetermined against the estate involving a large amount in the aggregate, which rendered impracticable any final division of the estate earlier than the 11th of December, 1875. The facts stated by the commissioner are not controverted, and are conclusive of the correctness of the decree in this particular.

Upon the whole case the court is of opinion there is no error in the decree, and the same must therefore be affirmed.

Decree affirmed.

278 *Corr v. Porter & als.

July Term, 1880, Wytheville.

1. **Wills—Codicils—Republication.***—No particular words are necessary to be used in a codicil to effect a republication of the will to which it is annexed. It is only necessary that it shall appear that the testator referred to and considered the paper as his will at the time he executed the codicil; and where this so appears, even though the codicil refers to personal property only, it may operate as a republication, as to realty, even so as to pass after acquired lands.

2. **Same—Same—Same.**—Words used in a codicil which are sufficient to constitute a republication of the will.

*Approved in *Hatcher v. Hatcher*, 80 Va. 169. See 2 Min. Inst. (4th Ed.) 1029 *et seq.*; *Nickell v. Tomlinson*, 27 W. Va. 721; *Tomlinson v. Nickell*, 24 W. Va. 161.

3. **Same—Same—Same—Effect.**—The effect of a republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time.

4. **Same—Same—Construction—Case at Bar.**—A testator made his will in 1819, whereby he devised his land to his son A forever, provided he should leave issue; if not, then it should be divided amongst his other children, or their issue. In consequence of the birth of another child, after the date of his will, he made a codicil thereto in October, 1820, which amounted to a republication of his will; died after the 1st of January, 1820, and there was nothing on the face of the will or codicil to show that the limitation over to the other children and their heirs should not take effect if A should die without issue. A died without issue living at his death or born within ten months thereafter—having first by deed, in which his wife united, conveyed said land to a grantee. In an action of ejectment brought by the other children and heirs of the testator to recover said land. **Held:**

The will is governed by the laws in force at the time of the execution of the codicil, and the plaintiffs (the other children and heirs) are 279 therefore entitled to recover the 'land from the grantee of A, and the fact that the wife of A united in the deed to the grantee does not convey any dower interest that she might be supposed to have therein to him.

5. **Alienation of Fee-Simple Estate Defeasible upon Failure of Issue—Liability of Alienee.**—A having a perfect title during his life, defeasible on his dying without issue, and having conveyed that title to the defendant, the plaintiffs are not entitled to recover for the use and occupation of the premises during said A's lifetime.

6. **Husband and Wife—Conveyance by—Effect.**—The effect of a wife uniting with her husband in a deed, is not to vest in the grantee any estate, *separate and distinct*, from that of the husband, but simply to relinquish a *contingent* right, in the nature of an incumbrance, upon the land conveyed, which, if not so relinquished, would attach, and be consummate on the death of the husband.

7. **Practice—Exceptions after Verdict.**—The same jury which tried the case on its merits was allowed, without objection from either side, to fix the value of the land, the rents and profits thereof, and the value of the improvements claimed by the defendant. It is too late after verdict to object to this action of the court.

This case was argued at Richmond, but decided at Wytheville. It was an action of ejectment brought in the circuit court of King and Queen county by Charles H. Porter and Mary Ann his wife (who was Mary Ann Bowden), Lemuel G. Bowden, William W. Brigg and Eloise Hunter (alienees of Thomas Russell Bowden), Roderick Bland, Jr., and Ann B. his wife, who was Ann B. Corr, James E. Bland and Catharine G. his wife, who was Catharine G. Corr, and D. L. Kenan and Victoria his wife, who was Victoria Corr, against Thomas Corr, to recover a tract of land lying in said county, and the rents and profits of the same. The facts found by the special verdict were in substance as follows: George D. Shackelford made his will on the 22d of January, 1819,

by which he devised the land in controversy as follows: To his son, "Anthony G. Shackelford, provided he leaves a child lawfully begotten of his body; but in the event of
 280 my son *Anthony G. dying without child, then it is my wish the land given him be divided amongst my surviving children or their issue." That said George D. made two codicils to said will, the first of which bears no date; but the second was duly executed October 25, 1820. The second codicil is in part in these words: "It is my wish that this shall be taken as a part of my will. Having another child born since the date of the above, it becomes necessary to provide for the same upon conditions. Let it be distinctly understood that only in this part of my will or codicil is my youngest child, Sarah Iverson Shackelford, embraced or included. I give to my daughter, Sarah Iverson Shackelford, in the event that my wife, Martha, will be satisfied with what I have left her in lieu of her dower, two negroes named Polly and Buck," &c. That the testator died after January 1, 1820, and that his will and the codicils were duly admitted to probate March 12, 1821; that Anthony G. Shackelford, after attaining lawful age and marrying, conveyed the land by deed, in which his wife united, to the defendant, Thomas Corr, who, by virtue thereof, entered on and still retains possession of said land; that said Anthony G. died January 6, 1874, without leaving any child, or the descendants of any, and that no child was born to him within ten months after his death; that all the children of said George D., the testator, died many years ago, leaving said Anthony G. surviving them, and all died unmarried and without issue, except Mary Ann who married the defendant, Thomas Corr, and Martha Ellen, who married Lemuel G. Bowden, deceased; that Ann B. Bland, the wife of Roderick Bland, Jr., Catharine G. Bland, the wife of James E. Bland, and Victoria Kenan, the wife of D. L. Kenan, are the only children left to Mary Ann Corr, the wife of said defendant, Thomas Corr, who survived their uncle, the said Anthony
 281 G. Shackelford, *but that she had two other children who survived their mother, and then died in the lifetime of their uncle, the said Anthony G.; that Mary Ann, the wife of Charles H. Porter, Lemuel G. and Thomas Russell Bowden, are the only children left by the said Mary Ellen, the wife of said Lemuel G. Bowden, deceased, who survived their uncle, Anthony G.; that Thomas Russell Bowden has conveyed his interest in said lands to said William W. Brigg and Eloise Hunter; and that there is nothing on the face of the will or codicil of said George D. Shackelford, deceased, expressly or plainly declaring his intention, that the limitation over to the plaintiffs should not take effect when said Anthony G. died without issue living at the time of his death, or born within ten months thereafter. That Ann, the widow of Anthony G. Shackelford, is still living. Upon the special verdict found by the jury, the court found the law for the plaintiffs and

entered judgment for them for the possession of the premises in controversy and costs, from which the defendant obtained a writ of error. The errors assigned, and the other facts incident to the trial, are set out in the opinion of the court.

J. H. C. Jones, for the appellant.

Sands, Leake & Carter, for the appellees.

STAPLES, J., delivered the opinion of the court.

The learned counsel who argued this case have discussed very elaborately the question whether the devise to Anthony Shackelford is to be considered an estate-tail, which, under the laws then in force, was converted into a fee, or whether it is to be considered a fee simple estate, defeasible upon the
 282 said Shackelford's dying *without issue living at the time of his death. In the view I take of the case, the decision of this question is unnecessary. It appears that George D. Shackelford, the testator, made two codicils to his will—the first of which is without date, the second bears date the 25th day of October, 1820. In this second codicil the testator uses the following language: "It is my wish that this (codicil) shall be taken as part of my will. Having another child born since the date of the above, it becomes necessary to provide for the same upon conditions. Let it be distinctly understood that only in this part of my will or codicil is my youngest child, Sarah Iverson Shackelford, embraced or included. I give to my daughter, Sarah Iverson Shackelford, in the event that my wife, Martha, will be satisfied with what I give her for dower—two negroes named Polly and Buck." The question arises, Does this codicil amount to a republication of the will? There is some conflict among the authorities upon the proposition, whether a codicil proprio vigore, independently of an expressed or implied intention, operates as a republication, or whether it must appear on the face of the codicil or otherwise it was so intended. It has been settled, however, by a long train of decisions, that no particular words are necessary to constitute a republication. All that is necessary is, that it shall appear that the testator considered the paper as his will at the time he made the codicil. Anything is sufficient which indicates a continuance of the testamentary intent with respect to the disposition of the testator's property. In *Goodtitle v. Meredith*, 2 Mank & Sel. 5, it was held not necessary there should be an actual republication of the will by its being before the testator at the time, and by his declaring that he means to republish it; but if the codicil declares it is to be taken as a part of the will, this constitutes a republication.

283 *Lord Hardwicke said, in a case before him, he saw no great difference between the words "I desire this codicil may be a part of my will," and the words "I republish it." There are cases in which it has been held that the codicil was not such a republication of the will as to pass after-acquired lands, because it plainly appeared

that the devise was not intended to include any other lands than those specifically devised by the will. *Kendall's ex'or et als. v. Kendall*, 5 Munf. 272. But where the testator in the codicil refers to the will, and gives sufficient demonstration that when making the codicil he considered the will as his will, there a republication may be implied. And even though the codicil refers to personal estate only, it may operate as a republication as to realty, so as to pass after-acquired lands. See *Hulme v. Heygate*, 1 Meriv. R. 285; *Redfield on Wills*, Part I., 369, 70, 71; 3 *Lom. Digest*, 93-104, where the authorities are collected. In the case before us, the testator declares it to be his wish that the codicil shall be taken as a part of his will, and in other respects recognizes the will as still existing, thus bringing it directly within the influence of the authorities cited. The effect of a republication, according to all the cases, is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. It is the same in effect as if the testator had made a new will of the same date with the codicil, and the whole may be controlled and governed by the laws then in force. See authorities already cited.

The testator here having died after 1st of January, 1820, and the codicil having been executed also subsequent to that date, the will is to be governed by the provisions of the statutes then in force. These provisions may be found in the 25th and 26th sections of *chapter 99, Code of 1819. Vol.

284 I. 369. It is not necessary to quote these statutes here in full. They in effect declare that every estate in lands, limited by deed made after the 1st of January, 1820, or by a will of a person dying after that date, which would have been an estate-tail as the law stood on the 7th of October, 1776, shall be deemed to be an estate in fee simple, and every limitation upon such an estate shall be valid if the same would be valid when limited upon an estate in fee simple; and further, every contingent limitation in any such deed or will made to depend upon the dying of any person without heirs or heirs of the body, or without children or other descendant or relatives, shall be held and interpreted a limitation to take effect when such person shall die not having such heir, child, offspring, descendant or other relative living at the time of his death or born to him within ten months thereafter, "unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it." Now, if it be conceded that the estate devised to Anthony Shackelford was an estate-tail under the laws as they existed on the 7th of October, 1776, yet under the operation of the 25th section that estate would be deemed an estate in fee simple, and the limitation upon it in favor of the surviving children of the testator or their issue must be deemed valid, because under that section it is to be held and interpreted a limitation to take effect upon the death of Anthony Shackelford without having a child

living at the time of his death or born to him within ten months thereafter—the intention of such limitation not being otherwise expressed or plainly declared on the face of the will. The result is that upon the death of Anthony Shackelford without issue his interest in the estate ceased, the title acquired by the defendant from him 285 also ceased, and the limitation *in favor of the plaintiffs took effect. The plaintiffs have a title, therefore, to the land in controversy, and may recover the same in the present action.

Under the second assignment of error, it is claimed that whether the devise to Anthony Shackelford creates an estate-tail converted into a fee or a fee simple estate, defeasible upon a failure of issue, in either case, it is such an estate as confers upon the wife of the devisee, Anthony Shackelford, a right of dower in the lands in controversy, according to the decisions of this court in *Jones & wife v. Hughes*, 27 Gratt. 560; *Medley v. Medley*, *Ibid.* 568; and she having united with her husband in the deed to the defendant, and having survived her husband, the defendant is entitled to hold, if no more, at least dower interest of Mrs. Shackelford during her life time.

In the cases just cited and relied upon by defendant, the wife had not relinquished her dower, and having survived her husband, asserted in her own behalf her right of dower. In the case before us, she united with her husband in the deed to the defendant, who seeks in her name to recover or hold the dower relinquished by her. A moment's reflection will be sufficient to show that the claim cannot be sustained. During the life of the husband the wife has no estate or interest in his lands. She has a mere contingent right of dower which may be the subject of a conveyance or relinquishment under the statute. It may also constitute a valuable consideration for a post-nuptial settlement, because it is in the nature of a contingent lien or incumbrance upon the realty. Beyond this, however, it is not even a right in action. When the wife unites with her husband in conveying the property to a purchaser, the effect is not to vest in the latter the dower interest or any estate separate and distinct from that of the husband, but simply to relinquish a con-

286 tingent *right in the nature of an encumbrance upon the property conveyed, which, if not so relinquished, will attach and be consummate on the death of the husband. This right being relinquished, is gone forever, the charge upon the estate ceases, and the title of the purchaser becomes complete. The title so acquired is not to two estates or interests, that of the husband and wife, but to one estate, that of the husband, discharged of the wife's contingent claim of dower. Indeed, the dower is a mere continuation of the husband's estate, so that upon his death the freehold immediately descends upon the heir, and the widow has a mere right of action to recover her interest. See *Tyler on Coverture and Infancy* 584, 586.

But if it be conceded that the effect of the wife's relinquishment is to vest in the purchaser a distinct interest capable of being enforced, the concession would not at all help the defendant. The case presented would then be one of the union of the dower estate with that of the fee in one and the same person, and the result would be a merger of the less in the greater estate, and the consequent extinction of the less.

Nemo potest esse dominus et tenens is an universally recognized maxim. There is, says Chancellor Kent, an absolute incompatibility in a person filling at the same time the character of tenant and reversioner in one and the same estate. 4 Kent's Com. 99; 1 Lomax Dig. 13.

If, therefore, the defendant acquired the dower interest of the wife, he being the owner of the fee also, the dower estate is merged in the fee, and no longer exists. These considerations are conclusive against the claim of the defendant to set up in himself a dower interest after the termination of his title as purchaser.

287 *The third error assigned is to the action of the court admitting certain evidence objected to by the defendant as set out in the second bill of exceptions. The plaintiffs claimed rents and profits from the defendant for the use of the land. The defendant, on his part, claimed compensation for improvements. It seems that the amount so claimed by defendant exceeded the value of the rents and profits to which plaintiffs were entitled for the five years preceding the institution of the suit. And thereupon the plaintiffs were permitted by the court to show and to claim for the use and occupation of the premises from the time of the conveyance of the lands by Anthony Shackelford to the defendant to the time of the death of said Shackelford, to be applied as a set-off against the claim of the defendant for improvements. In this the circuit court plainly erred. The defendant claimed under Anthony Shackelford, and whatever title the latter had was vested in defendant. As already seen, Anthony Shackelford had a fee-simple estate defeasible upon his dying without issue, or he had an estate-tail converted into a fee upon which there was a valid limitation. In either case, whether he had issue or not, his title during his life was perfect. He could not be charged with the use and occupation of the premises which he held as owner for life, neither could the defendant as his alienee. It is clear, therefore, that the circuit court committed an error in admitting the evidence offered by the plaintiffs as set out in the second bill of exceptions. The question now presented is the judgment of the circuit court to be reversed on that ground.

The statute under which these proceedings are had provides that the plaintiff, if judgment is rendered for him, may elect to relinquish his estate in the premises to the defendant at the value ascertained by the jury, and the defendant shall henceforth hold all the estate *the plaintiff may have had, provided he pays to the plaintiff the value

so ascertained by the jury in the manner prescribed by the court. Code of 1873, ch. 132, § 13. This section was framed upon the idea that the plaintiff might prefer to surrender the land to the defendant rather than to pay for the defendant's improvements. If, however, the defendant fails to pay the plaintiff the assessed value of the land, the court may order it to be sold, and the proceeds of sale to be applied to pay the plaintiff the assessed value, and the surplus, if any, to be paid over to the defendant for his improvements. It seems that in the case before us, after the jury had fixed the value of the land exclusive of the defendant's improvements, at the sum of \$4,032, and the amount due defendant for improvements at \$2,400, the plaintiffs thereupon elected to relinquish their estate in the premises to defendant. Whether the defendant concluded to take the property on these terms does not appear. The court, however, entered an order for the sale of the premises in default of payment by the defendant. It would seem, therefore, that the error of the circuit court, in admitting the evidence already adverted to, was rendered immaterial by the subsequent proceedings. For whether the defendant's claim for improvements was a hundred or a hundred thousand dollars, the plaintiffs were not personally liable for it, nor could the land itself be held liable until the plaintiffs were paid its assessed value. When, therefore, the plaintiff released the land to the defendant at its assessed value, the defendant could keep it upon paying such value, or allow it to be sold, and take the balance of the proceeds, whatever they were, after paying the plaintiffs such assessed value. The question of the rents and profits became, therefore, wholly immaterial, and the defendant

289 was not and *could not be prejudiced by the admission of the testimony in question.

The next error assigned is the action of the court in allowing the same jury which tried the case on its merits to assess the value of the land in controversy, and also to fix the amount of the rents and profits for which the defendant was liable. This objection is based upon the decision of this court in *Goodwyn v. Myers*, 16 Gratt. 336, in which it was held that where the defendant claims for improvements, the plaintiff may, under the statute, require, at any time before judgment, that the value of his estate in the premises, without the improvements, shall also be ascertained; but this enquiry must be made by a different jury from that which tried the cause on its merits. A sufficient answer to this objection is found in the conduct of the defendant himself. After the jury had rendered a special verdict on the title, they were detained by the court for the purpose—first, of assessing the value of the defendant's improvements; second, the value of the premises without such improvements; thirdly, the rents and profits for which defendant was liable. The defendant made no objection to this mode of proceeding. He not only acquiesced in what was done, but he seemingly approved it, for he was repre-

sented by counsel, and introduced his testimony upon all these issues. If he was not willing that the same jury should make all the inquiries, good faith required, he should make his objection known then and there. Having taken his chances before that jury, he cannot be heard to say that a different jury ought to have been empanelled to try one of the issues. The defendant had the right to waive the point, and we think he has waived it. Without undertaking, therefore, to say what force there would have been in the objection if made in due time, it was too late first to urge it

290 after the verdict *was rendered and the court was about to pronounce its judgment. This disposes of all the errors assigned by the defendant's counsel. For the reasons stated, we think there is no error in the judgment of the circuit court, and the same ought to be affirmed.

Judgment affirmed.

291 *The Commonwealth v. Fields.

July Term, 1880, Wytheville.

Criminal Law—Costs as Part of Fine.—

Upon an indictment for assault F is fined \$1 and the costs. He pays one dollar to the clerk before execution issued, and directs him to apply it to the fine. The costs are a part of the fine, and F being taken upon a *capias pro fine* can only be released by paying the costs as well as the one dollar.

This was a writ of error to the judgment of the circuit court of Scott county, affirming a judgment of the county court of said county, by which Joel Fields was discharged upon a writ of habeas corpus, from custody upon a writ of *capias pro fine* sued out by the Commonwealth upon a judgment recovered against him on an indictment for assault and battery. The case is fully stated by Judge Christian in his opinion.

The Attorney-General, for the Commonwealth.

There was no counsel, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The defendant in error was convicted upon an indictment for assault and battery in the county court of Scott county. He was fined one dollar, and judgment for said fine and the costs of prosecution was entered up against him. Before any execution or other process was issued on the judgment he 292 paid the sum of *one dollar to the clerk of the court which sum he directed to be applied to the payment of the fine. Execution was afterwards issued for the fine, and costs amounting to the sum of nineteen dollars and eighty-seven cents. This execution was returned "no property found" and thereupon a *capias pro fine* was issued for the fine and costs, ascertained by the judgment. Under this *capias* the defendant was arrested and committed to jail. He

then filed his petition for a writ of habeas corpus before Hon. H. S. K. Morrison, judge of the county court of Scott county. The writ was awarded, and upon the hearing of the case the defendant in error was discharged from custody. To this judgment of the county court discharging the defendant in error, the Commonwealth's attorney of Scott county applied for a writ of error, which was awarded by the circuit court of Scott county.

The case being heard in the circuit court, the judgment of the county court was affirmed.

To this judgment a writ of error was awarded by this court.

The court is of opinion that the judgment of the circuit court affirming the judgment of the county court is erroneous.

The *capias pro fine* in this case was issued for the fine and costs. The costs are a necessary incident to the fine, and are as much a part of the judgment of the court, as the fine. They cannot be separated. And where a *capias pro fine* is issued, as in this case, for the fine and costs adjudged against the accused, and he is taken under that process, there is no means by which he can discharge himself except by paying both fine and costs. He must discharge himself by paying the whole judgment; of which the amount adjudged against him as costs, is as 293 much a part of the judgment as *the fine assessed against him. See Webster's case, 8 Gratt. 702.

The court is therefore of opinion that the judgment of the circuit court affirming the judgment of the county court discharging the defendant from custody, is erroneous and that the same be reversed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the circuit court of Scott county affirming the judgment of the county court of said county, discharging the defendant in error from custody is erroneous. It is therefore adjudged and ordered that the said judgment be reversed and annulled, and the Commonwealth (the plaintiff in error) recover against the defendant in error her costs by her expended in the prosecution of her writ of error here. And this court now proceeding to render such judgment as the said circuit court ought to have rendered, it is adjudged and ordered that the said judgment of the said county court be reversed and annulled, and that the case be remanded to said county court, for further proceedings to be had therein in conformity with the opinion of this court. And it is further adjudged and ordered that the plaintiff in error (The Commonwealth) recover against the defendant in error her costs by her expended in the prosecution of her writ of error in said circuit court. All of which is ordered to be certified to the said circuit court of Scott county.

Judgment reversed.

294 *The Commonwealth v. Johnson & als.

July Term, 1880, Wytheville.

Board of Public Works—Contracts—Validity.—The contract made on the 27th of February, 1867, by the board of public works with B. T. Johnson, N. Poe and J. P. Poe, for prosecuting the claims of the State of Virginia against the Chesapeake and Ohio canal company, was authorized by the resolution of the general assembly of February 26, 1867; and a full and final and honest settlement of all the matters involved in the contract having been made by the board and Johnson, &c., the same is conclusive upon the State.

This case was heard at Richmond, but decided at Wytheville. By a resolution of the general assembly of Virginia passed the 26th of February, 1867, the board of public works of the State was authorized and directed to adopt such measures as in their judgment may be necessary and advisable to realize the preferred liens of the State upon the tolls and revenues of the Chesapeake and Ohio canal company; and for that purpose contract with counsel for the enforcement of said liens in concert with other holders of similar liens: provided, however, that the compensation of said counsel shall be contingent only, and shall be paid by said board only out of the proceeds to be realized from the proceedings or the debts and liens secured thereby. At this time the State was a large creditor of the canal company for the payment of interest on its bonds guaranteed by the State and as assignee of Selden, Withers & Co. of a like claim for interest

paid on said bonds, and of one of said bonds, *and the State was also liable as guarantor of \$300,000 of the said company's bonds, part of \$1,695,500 secured by a first lien on the tolls and revenues of the said company which would fall due in 1881, 1883, 1884; and she was also guarantor on \$200,000 of said bonds which would fall due in 1869.

On the 27th of February, 1867, the board of public works made a contract with Bradley T. Johnson, Neilson Poe and John P. Poe by which they were to prosecute the claims of the state against the canal company, to enforce not only the payment of the debts held by the State, but to make effective the liens to secure the said bonds; and said counsel were to receive a compensation of twenty per cent. upon the amount received upon the debts, and for which the State should be secured on her said guarantees. In 1873 Johnson, &c., made their final report to the board of public works, showing how much of the debt had been paid or secured; that the bonds for \$200,000 with the interest had been paid by the canal company, and that the company was paying from its net tolls the back interest on the other bonds, and under the then conduct of the company would pay the interest and provide readily for the principal as it fell due. There was then a final settlement between the board and Johnson, &c., they receiving out of the moneys collected or secured twenty per

cent. on the amount of debts secured, and liabilities as guarantor, against which the State was secured.

In December, 1877, under a resolution of the house of delegates of Virginia, a bill was filed in the circuit court of the city of Richmond in the name of The Commonwealth against General Johnson and the Poes, the object of which was to set aside the contract and settlement made by the board of public works with Johnson and the Poes, and to recover a large portion *of the compensation which had been allowed them by the board. The grounds upon which the Commonwealth relied in her bill for sustaining the case, were that the resolution of the general assembly of the 26th of February, 1867, did not authorize the board of public works to make the contract, made with Johnson and the Poes; that the resolution only referred to the debts claimed by the State to be due to her from the canal company for moneys paid by her as guarantor of the bonds of the company, and as assignee of Selden, Withers & Co.; and that the defendants had been guilty of fraud, though as to this charge no facts were specified.

Neilson and John P. Poe living out of the State, were proceeded against as absent defendants. General Johnson answered. He insisted that the board of public works had authority to make the contract. He details at length the action of himself and his partners in prosecuting these claims of the State, and their success after five years of constant and expensive service. He says they reported to the board from time to time what they had done, and in 1873 when their work was accomplished they made a full report to the board of public works; when a full and final settlement was made with the board, and they were allowed by the board, the compensation they were to receive under their contract. And he denies all fraud in any of their action. The circuit court dismissed the bill, and there was an appeal to this court. The view of the case taken by this court sufficiently appears in the opinion of Judge Anderson.

The Attorney-General, John M. Forbes, and M. B. Seawell, for the Commonwealth.

Robert Ould and Charles Marshall, for the appellees.

297 *ANDERSON, J., delivered the opinion of the court.

The contracts and settlements which are drawn in question by this suit, and sought to be set aside, were entered into by the board of public works of Virginia, on behalf of the Commonwealth (party of the first part) with Bradley T. Johnson, Neilson Poe and John P. Poe, the appellees (parties of the second part), the board claiming to be specially clothed with power and authority for the purpose, by a joint resolution of the general assembly of Virginia, of the 16th of February, 1867, which is recited in the contract, which was made on the 27th of Feb-

*Cited in Cecil v. Clark, 44 W. Va. 675.

ruary of the same year, and which is supplemented by another contract of the 5th of March following.

Soon after the contracts were concluded, the appellants proceeded with their execution which by the terms thereof, was to be at their expense. They were actively engaged in its performance from February 27th, or March 5, 1867, until January, 1873, when their final settlement was made with the board—a period of nearly six years. By that settlement their performance of the contracts was acknowledged and approved by the board of public works, and the Commonwealth was released from any further obligation to them under said contracts. No objection was made to the contracts, or to their fulfillment by any one, so far as the record shows, whilst they were engaged in their performance, although the general assembly which passed the joint resolution was in session at the time the contracts were made, and must be presumed to have been cognizant of them. It was a public transaction. The contracts were filed with the public records, and were open to the inspection of any member of that assembly, or of the succeeding assemblies which were annually in session, whilst they were engaged in their performance;

298 *or by any person who might have felt sufficient interest to look into them. It was a matter in which the public interest was deeply concerned, which had been brought to the attention of the general assembly, and the board was acting under its order. And after the services had been rendered by the appellees, and after they had made a final settlement with the board of public works, and had paid to the sinking fund under its directions the balance due the Commonwealth from their collections, as it had been finally adjusted between them and the said board, the whole transaction was reviewed by a joint committee of the general assembly, under whose joint resolution the board of public works had acted in the premises, who, upon their investigation, came unanimously to the following conclusions:

"First. That the contracts made by the board of public works with the counsel were authorized by law, and were judicious and advantageous to the State.

"Second. That they have been executed by counsel with zeal, energy, ability and success; and

"Third. That the final adjustment and settlement was strictly in accordance with the agreement and contracts made and entered into."

Which they reported to the general assembly. The report is signed by H. W. Thomas (Judge Thomas), chairman senate committee; T. G. Popham, chairman house committee, and Robert L. Montague (former lieutenant-governor, afterwards an eminent judge of the circuit court).

Whether at that, or a subsequent session of the general assembly, does not appear, on notion of a member of the house of delegates, prompted, as would seem from the preamble, by publications in some of the newspapers, a series of resolutions were

adopted, calling for information to be reported *to the house, from *the board of public works; from James Neeson, attorney for the State; and from the auditor of public accounts; and a committee of five was appointed, afterwards increased to seven, of which the mover was chairman, to examine all the statements and exhibits which may be furnished in response to said resolutions, and to inquire into all matters pertaining to said transactions, and report the facts to the house, with such recommendations as they may deem proper.

It appears that only six of the committee, including the chairman, participated in this investigation. The report of the majority, approved by four of the committee, substantially affirms the unanimous conclusions of the joint committee, which had previously investigated the transactions, under a joint resolution of both houses of the general assembly. The chairman made a minority report, in which he claims to have discovered, and reasons ingeniously to show, that the board of public works were not invested with power to make the contract they made with the appellees, and assails the transactions on other grounds, and recommends the adoption of a joint resolution to the effect, that the governor be authorized and instructed, to employ able counsel to examine into all matters pertaining to the contracts made by the board of public works with the appellees, on the 27th of February, and 5th of March, 1867, and their settlements under said contracts; and if in their opinion there are proper grounds for so doing, the governor shall cause legal proceedings to be instituted by the attorney-general, in connection with other able counsel, to recover whatever balance may be due the State on account of collections made by her attorneys, the appellees, from the Chesapeake and Ohio canal company. There is a special concurrence by one of the committee (William F. Gordon) with the chairman in

300 the facts as set forth *by him, and his construction of the resolution of the general assembly of February 26, 1867, and in the resolution recommended by him for the adoption of the general assembly. He does not express further concurrence in the minority report. Two of the majority of the committee say in substance that they prefer the construction given to the joint resolution of February 26, 1867, by the majority report, but not being confident of its correctness, and being unwilling to conclude further inquiry into the matter by competent counsel, they assent to the recommendation of the minority report.

It seems that the said resolution was adopted only by the house of delegates, and not as a joint resolution; and the governor in obedience to its requirement, appointed able counsel to investigate and report their opinion on the matters referred to in the resolution. In their report they set out the resolution as the foundation of their authority, and describe it as a "resolution of the house of delegates, adopted 9th of March, 1877." The counsel employed, we doubt not,

honestly formed their opinion upon the investigation of the case, which they endeavored to maintain in an elaborate report, and as the result of that opinion, they advised the institution of suit. And one of them, James G. Field, having become the attorney-general of the State, the same counsel were directed by the governor, in obedience to the resolution aforesaid of the house of delegates, to institute this suit in the name and on behalf of the Commonwealth. The case was thoroughly and laboriously investigated in the circuit court of Richmond, and the learned judge thereof, in a well-considered, and able opinion, dismissed the plaintiff's bill; and the case is brought here on an appeal from that decree.

301 *The first question is, and it is the material question in the case, Did the board of public works, in entering into this contract with the appellees, exceed their powers? They professed to act under and by authority of the joint resolution of the 26th of February, 1867, before referred to, which is as follows:

"Be it resolved by the general assembly, That the board of public works be and they are hereby authorized and directed to adopt such measures as in their judgment may be necessary and advisable to realize the preferred liens of the State upon the tolls and revenues of the Chesapeake and Ohio canal company, and for that purpose to contract with counsel for the enforcement of said liens, in concert with other holders of similar liens: provided, however, that the compensation of such counsel shall be contingent only, and shall be paid by said board only out of the proceeds to be realized from the proceedings, or the debts and liens secured thereby."

To "realize the preferred liens of the State," evidently means to give effect to them. And the board is invested with full powers to adopt such measures as in their judgment may be necessary and advisable for that purpose; and it is authorized to employ counsel for their enforcement. It is contended that this language gave power to the board to provide only for the collection of debts due from the company to the State, and not to provide for the security of the State as to her liability as guarantor for debts due others. The duty imposed on the board, was not limited to the collection of debts. It needed no special authority for that purpose. It could have placed the claims of the State in the hands of counsel for suit or collection, without any special authority from the legislature. But a suit or judgment against the canal company, whose property and resources were all covered by mortgages

302 *for more than could be realized by a sale, could have availed nothing to the State of Virginia. An execution against the company, would have been utterly unavailing to obtain satisfaction of the debts it owed the State. And the resolution does not even direct that suit shall be brought for the debts due the State. It instructs the board to adopt such measures, as in its judgment, may be necessary and advisable, (it is

not restricted as to the measures it may adopt: that is left entirely to its discretion). "to realize" that is to give effect to the preferred liens of the State, upon the revenues and tolls of the company. Debts are not mentioned—showing that the legislature did not mean to restrict the action of the board to the recovery of debts due the State, for which she had a lien, but also to secure the State from loss, by reason of her liability for debts due from the company to others, for which the State was liable, by giving effect to the liens which it was believed she had for her indemnity. So that by using the term liens, instead of debts, the instruction was more comprehensive, and imposed the duty on the board to take measures, not only to realize the debts due from the company to the State, and to enforce and give effect to the liens of the State for that purpose, but also to secure the State from loss on account of debts due by the company to others, for which the State was liable as guarantor, by giving effect to liens which the State was believed to have for her indemnity.

We think the instructions to the board imposed the duty to adopt measures both for the security of the State for what was due her from the company, and indemnity for debts due by the company to others, for which the State was liable; and that it is expressed by the use of the term "liens" which would not have been, if the terms debts due the State had been employed, instead of "liens of the State."

303 *But we are told that the State had no liens for her protection as guarantor, and therefore that the general assembly, by the terms "to realize the preferred liens of the State," could not have had reference to the State's guaranties. The truth is the State had no liens except as guarantor, but for the bond of \$13,500, assigned to her by Seldon, Withers & Co.

There is no doubt that the canal bonds, which were guaranteed by the State, were secured by a preferred lien upon the net tolls and revenues of the company, and that it was upon the faith of that security, that Virginia guaranteed them. There is also no doubt that when Virginia guaranteed them, she became entitled to the benefit of that security for her indemnity. There ought to be as little doubt, that when the general assembly by its joint resolution aforesaid, instructed the board of public works to take measures to realize, that is, to give effect to, the liens of Virginia on the revenues of the company, it meant to save Virginia from loss by her guaranty of those bonds, in the only way by which it could be done, by giving effect to the liens which Virginia had a right to for her indemnity as guarantor. They were liens which Virginia had a right to look to for her protection, and in that sense they were her liens.

In order to support this construction it is not necessary that the language used in the resolution should be technically correct, or that they were absolutely and unqualifiedly Virginia's liens. If she had a right to rely on them, and did rely on them, for her protec-

tion and indemnity, when she contracted to guarantee the bonds, they are embraced in the instructions, though she could not actually enforce the right, until she had paid the debt. The right attached immediately upon the execution of the guaranty, and the general assembly was warranted in characterizing it as a lien of the *State. The using the term "liens," instead of the term debts, shows that the resolution means more than debts. And it implies that, in the opinion of the general assembly, there were other interests of the State, besides the debts due from the canal company, which required attention, all of which might be secured, by realizing or giving effect to, her preferred liens.

But why should it be thought that the legislature intended to restrict the board to measures, only for the recovery of debts due the State from the company? The language of the resolution, we have seen, does not require such a construction.

The company had issued coupon bonds to the amount of \$1,699,500, for completing the construction of the canal to Cumberland, which are called construction bonds—and had issued similar bonds to the amount of \$200,000, for the repair of the canal from dam No. 6, to Georgetown, a distance of one hundred and twenty-three miles, called repair bonds; and had secured them by a mortgage on the revenues and tolls of the canal—Maryland consenting that it should have precedence as to the tolls and revenues, over a prior lien which she held on all the property of the canal company, as well as on its tolls and revenues, amounting on the 1st of January, 1867, to \$5,968,586.94. Virginia had guaranteed \$300,000 of the construction bonds, and the whole of the repair bonds. The company had been in default in the payment of the almost entire interest, from the time of the completion of the construction to Cumberland, and the repairs from dam No. 6, to Georgetown, to the 1st of January, 1867—a period of sixteen or seventeen years. Selden, Withers & Co. had paid the coupons on the construction bonds, which fell due on the 1st of July, 1851, and 1st of January and 1st of July, 1852, amounting to \$140,000 which they

surrendered to the company, and took its *bonds therefor, which are called special bonds. They also held a construction bond for \$13,500, with coupons on it; and being indebted to Virginia, they assigned said bonds to her as collaterals. These constituted one of the debts claimed by Virginia against the canal company. It was at least questionable whether the special bonds for \$140,000 were secured by the mortgage lien, and the court of appeals of Maryland afterwards held, that they were not, and were not a specific charge upon the property of the company, or its revenues. Being postponed therefore until after the payment of all the other debts due by the company, for which all its property and revenues were specially charged, which were augmented every year by accumulating interest, and which there was no probability could ever be paid, this debt of \$140,000, un-

der that decision, was absolutely worthless.

Virginia as guarantor, had paid all the coupons both on the construction and repair bonds, which had accrued subsequent to 1st of July, 1852, to the 1st of January, 1865, which had been presented to her for payment, amounting to about \$300,000—\$35,400 of which the canal company had funded, and given to the State certificates therefor. Virginia claimed that the company was indebted to her for the whole amount, and interest upon the coupons from the date of their maturity respectively. But there was a difficulty in the enforcement of her claim for the coupons which had not been funded inasmuch as they had been lost, or destroyed or stolen and could not be produced by the State. The court aforesaid, after much litigation, established the claim of Virginia to the lost coupons, upon the evidence which the appellees, as counsel of the State, had collected and adduced; but required that the State should give indemnity to the canal company against loss, should any of the coupons *allowed, be afterwards produced by bona fide holders, and recovered, and the appellees entered into a personal obligation to the company for its indemnity in the amount of \$175,000.

Another difficulty they had to encounter. The State as guarantor had paid no interest since 1st of January, 1865, and it was earnestly contended by the holders of the bonds, and other coupons, that the State being in default as guarantor, should be postponed until their coupons were satisfied. The court sustained them in this position, as to the repair bonds; which was no serious loss or disadvantage, however, to the State, as under the reformed administration of the canal, which had been introduced mainly by the exertions of the appellees, the canal company by the year 1870 had paid off the whole of the repair bonds, with the interest on them, which of course included the claim of Virginia, for the coupons which she had paid on those bonds. But the contention of the holders of the construction bonds, and the coupons on them, for the postponement of Virginia as defaulting guarantor, if it had been successful, would have been disastrous to her, as \$18,000 of those bonds guaranteed by Virginia, did not mature until 1882. \$131,500 of them not until 1883, and the remainder \$150,500 not until 1884, and Virginia would have received nothing for the coupons which she had paid, until the whole of them, with the coupons past due and accruing in the hands of other parties, were fully satisfied, nor any interest on what she had paid, as under the rulings of the same court, the lien did not extend to the interest on the coupons which had accrued, then amounting to as much as the principal, or which thereafter accrued on the coupons which she had paid. But the court held that as to the construction bonds Virginia should be paid *paxi passu* with the other holders of coupons. This in connection with

the decision that the repair bonds were entitled to precedence in payment, over the construction bonds, was a

great success for Virginia, and for her counsel, as their compensation was wholly contingent upon their recovery, and was to be paid out of what they recovered.

These were the debts claimed by Virginia at the date of the joint resolution aforesaid. As to a large portion of the claim it was at least doubtful whether it was covered by the lien; and if not, it was not recoverable. It was due from a company that might well be regarded hopelessly insolvent as to all debts which were outside its mortgages. It was afterwards settled judicially by the final decision of the supreme court of Maryland, that this portion of the Virginia debt, was not entitled to the benefit of the lien. It was therefore worthless.

The coupons and bonds which were afterwards adjudged to be due the State, and entitled to the benefit of the lien, seem to have had but little value at that time. It is testified by Mr. Joseph Bryan, an eminent lawyer, who had thoroughly investigated the condition of the company in another case, that they were worth little or nothing at that time. And it seems that in 1865 bonds of the company secured by the first lien with fourteen years of interest upon them, were appraised at ten cents in the dollar. But the State was guarantor for \$200,000 of repair bonds, with the coupons on them which matured on the 1st of July, 1869, which was rapidly approaching, and for \$300,000 of the construction bonds, and the coupons which were past due, and had not been paid, and for those which were semi-annually accruing until the maturity of the bonds, as before mentioned. These she was bound to pay, according to their face value—dollar for dollar. A general assembly which recognized the ob-

308 ligation of the State's contracts, and its duty to provide for them, as the assembly of 1867 did, would naturally have regarded it as more important to the State to be relieved from its liabilities as guarantor for these large debts, than to secure the payment of debts which were then of such inconsiderable value. They must have regarded the stock of \$250,000, which the State had subscribed to the capital of the company, as sunk—a total loss, and would have given themselves no concern in reference thereto. The debts due the state, so far as the net revenues of the company were pledged for their payment, *pari passu* with a greatly larger debt due others, they would not have regarded as wholly and hopelessly lost, though for seventeen years the State, and the other creditors had derived nothing from the revenues of the company, but they would have regarded it as much worse for the State to have to pay the large debt, dollar for dollar, which she had solemnly guaranteed, with the coupons past due, and those accruing, and for the payment of which, as doubtless was believed by that general assembly, her faith and honor, were sacredly pledged, than the loss of the debt then due the State, whose market value was so inconsiderable. And thus as the subject had been brought to the attention of the general assembly, it was their duty, not only to re-

quire that measures should be taken, to secure the debts due the State as far as practicable, but more especially, to provide for her indemnity against loss, by reason of her guaranties. It would seem unreasonable, therefore, that the general assembly of 1867, in requiring the board of public works to take action on the subject, would have entirely ignored the heavy liabilities of the State by reason of her guaranties, and restricted the action of the board, only to the collection of the debts due the State.

309 *But we are told that in securing the debts due the State, she would be necessarily indemnified against loss as guarantor. That is true, as to that portion of the debt guaranteed by the State, which had been paid by her. But if that could be secured or collected in any way, which would not include the guaranteed debt, which had not been paid, the State would not be guaranteed as to the latter—and it is to be observed that the resolution does not prescribe any mode for the board to adopt, but leaves it entirely to its discretion.

But if the services of counsel contracted for by the board, were necessary and advisable, in its judgment, to secure the payment of debts due the State, the board did not, in any view of the case, exceed its authority, in contracting for those services, because they would result in indemnity to the State as guarantor, and the contract is not *ultra vires* on that ground. But the board gave the counsel a contingent per centum, on the sums guaranteed by the State, as well as the debts secured; did it exceed its powers in that?

The restriction that the counsel should be paid their compensation out of the debts due from the company to the State, secured by their proceedings, did not limit the board in ascertaining and fixing the measure of their compensation, to a per centum on those debts. The only restriction on the discretion of the board was, that whatever compensation it allowed should be contingent, and paid in the debts and liens secured by the proceedings. The fixing the counsel's compensation was one thing, and the designating the means for its payment was another, and a very different thing. There is no limitation whatever on the powers and discretion of the board as to the mode of ascertaining the measure of the counsel's compensation, whether by a per centum on the debts due the

State which were secured, or upon them
310 and the liabilities of the State *for the debts due from the company to others, from which she was relieved. For the accomplishment of both, the services required were one and the same, and the benefits to the State, as we have seen, were at least no greater in the former than in the latter; and it was right that the compensation should be measured by a per centum on both. And we think that in allowing it, the board acted strictly within the limits of their powers and discretion.

Whether they allowed the counsel too much or not, is a different question. Whatever may be thought of that, it cannot affect the question of power. The power may

be clear, and unquestionable, though its exercise may be injudicious. The board, we think, undoubtedly had the power to determine, with the consent of the counsel, what their compensation should be. In this respect the only restrictions upon them, were those which we have mentioned, and which were complied with in the contract.

The compensation which the counsel received does seem, at first sight, to be so disproportioned to the amount which they paid over to the State, that without knowing, or considering the whole case, objection to it naturally arises in the mind. We do not like the idea of the State getting so little of what was justly due her from the canal company, and her counsel getting so much the larger proportion of what was recovered. And men are often too ready to condemn in such a case, without giving due weight to the facts and circumstances which should be considered in the formation of a just opinion. In this case it ought to be remembered and considered, that whilst the State surrendered to the counsel, through the board of public works, in consideration of their services, a large portion of her debt, justly due from the canal company, the debt, under the

311 circumstances then existing, was *of little value, and it was to obtain the efficient services of able counsel, to relieve her from heavy liabilities then impending, which was of vastly more importance to her than the debts of such inconsiderable value, which were then due her, in which her counsel were to be paid.

The services rendered by the counsel, were, beyond all question, of a very extraordinary and arduous character. The usual limit of an opinion will not allow us to detail them. In the language of a distinguished witness in the cause, who was well informed on the subject, and which we think is corroborated by the other evidence, "they were not merely for the enforcement of legal rights, but the control of political influences of great and important character, all of which was to be done at their own expense, and their reward or compensation to be only in the evidences of debt of the canal itself, the value of which at that time was little or nothing." The policy of a sovereign State, which had the absolute control of the administration and management of a great work of internal improvement, which had been persisted in for a period of seventeen years, had to be overturned. In the accomplishment of which, opposition from the dominant political power in possession, and strong local prejudices and interests had to be encountered.

It is argued by the appellant's counsel, that the legislature of an enlightened State, as Maryland is claimed, and conceded to be, it may be presumed, will not pursue a line of policy adverse to the welfare of the State—and that the services of the Virginia counsel were not necessary to effectuate a change of policy in the administration of the canal, which was so obviously for the benefit of the State, as well as the other creditors. And yet it is shown by this record that a line of policy had been pursued by Maryland for

312 seventeen *years, which had proved disastrous to the canal and its creditors, and that it was persisted in, until the public mind had been enlightened, and some of the leading minds of the State were drawn to the subject, and were convinced of the importance and necessity of a change of policy: and this, we think, the record shows, was mainly through the active agency of the Virginia counsel. An enlightened State may pursue a course of policy for a long time, under political or other influences, which is injurious to her own interests. This was the case with Maryland, her own governor being the witness. In 1870 Governor Bowie, in a special communication to the general assembly of the State on this subject, after portraying the disastrous policy which had been pursued in the administration of the Chesapeake and Ohio canal, says to the general assembly, that "For this condition of affairs the State is to a great extent, justly responsible."

Yet notwithstanding the extraordinary character of the undertaking of the counsel, which is characterized by the witness before cited, as so complicated and difficult an undertaking, "that very few counsellors or attorneys possessed the legal and political qualifications, or pecuniary resources necessary to carry it out," and although it was conducted by them with great skill, ability, zeal and energy, at their own expense, during a period of five or six years of almost incessant labors, the compensation they received was a rich and ample reward. And this—the extent of the reward realized by them—may account for the persistent effort that has been made, first in the legislature, then by the press, again in the legislature, and then in the courts, to assail these transactions, and to set aside the contracts. But it should be borne in mind, that if the counsel had failed of success, they would 313 have received *nothing, after having carried on such a warfare for the State, at their own charge.

To say that the State received so small a portion of her debt, does not present the case in its true light. They paid the State \$82,000, in money, which was vastly more than her whole debt recovered, would have brought in market, when it was placed under their management; with which sum under the operation of the sinking fund, the State extinguished more than \$200,000 of her indebtedness. They relieved the State of her liability for \$200,000 of repair bonds, which she had guaranteed, and of the interest on them, amounting to more than the principal, by securing the payment thereof. And they gave effect to the liens to secure the construction bonds, so as substantially, we think, to relieve the State from loss, by reason of her guarantee of \$300,000 of those bonds, and the past due coupons on them which had not been paid, and those which were accruing and yet to mature, amounting to largely more than the principal. Such was at least conceded by the board of public works in their final settlement with them. And such was the unanimous conclusion of the joint com-

mittee of the general assembly, who had the whole matter under investigation; and that the contract was advantageous to the State, and had been faithfully fulfilled. And such was the conclusion of a majority of the committee subsequently appointed by the house of delegates.

At the time these contracts were entered into, such was the condition of the State's claims against the Chesapeake and Ohio canal company, and of her liabilities for said company, that if suit had been brought soon after the contracts were made to set them aside, we are constrained to believe that it could not have been maintained in any court of justice. It would then have

314 most probably, been universally regarded as *a good contract for the Commonwealth. And this is most probably the reason that no objection was made to it by any member of the assembly then in session, by whom the joint resolution in question was passed, to whom the existence of the contract was doubtless known, or by any member of the subsequent general assemblies, which were annually in session, whilst the contracts were being performed. And if that be so—if a suit could not have been maintained to set aside these contracts, before the counsel had seriously entered upon their performance, can it be conceived, that now, after the services have been rendered, and the contract has been performed by the counsel, and they have received their compensation, and have had a final settlement with the board, and no objection made to the contracts during the entire period of their performance, which was rendered with the knowledge of the State, and she has received the benefit of those services, a suit brought five years after the final settlement of the whole matter to set aside the contracts, upon grounds which if they have any existence at all, existed in the same manner, and precisely to the same extent, before the performance of the contracts were entered upon, could be maintained? If A enters into a contract with the agent of B to perform a certain work, and he goes on and performs the work, B knowing of the contract and that he is engaged in its performance, and lays by, making no objection until the work is done, and the contract performed, he will not be entertained by a court of equity to set it aside, upon the ground that the consideration paid by his agent was excessive, or that he exceeded his authority.

But in this case the per centum which the counsel was to receive, was payable in the debts of the canal company itself, which were of so little value at the time, that it was a very inadequate compensation

315 for *their difficult and intricate undertaking, and doubtless would never have been assented to by them, but from the hope that by their exertions in the execution of the contract, they would be able to infuse value into those debts which they were to recover for the State, and out of which they were to be paid. They did succeed; and the bonds of the canal company, in which they

were to receive payment for their services, which before they entered into the contract, were not worth more than ten or fifteen cents in the dollar, would about the time they completed the contract, command in market their par, or more than par value. It was in this way their compensation became munificent. It was the result of their success in the execution of their contract with the board. We do not believe that the halls of legislature, or the courts of justice, would ever have been made the arena of this contention but for the appreciation of the value of the debts of the canal, out of which the counsel were paid.

But a complete and sufficient answer to all this is, that they rendered the services, and received compensation therefor, pursuant to the contract they made with the board of public works, which it was invested with power and authority to make. What we have said with reference to the services and compensation of the counsel, was designed to show, that the transaction was not liable to much of the criticism to which it has been subjected, and that no want of fairness, or good faith, in either of the parties to it, can justly be predicated of it; and not to vindicate its wisdom, with which we have nothing to do. With us the question is as to the power of the board to enter into the contracts, under the act of the legislature. And its power over the subject being plenary, the wisdom of its action cannot be reviewed by the courts. Such contracts

316 if *bona fide made and entered into, are binding on the State.

There is a general charge in the bill of fraud, which is repelled by the answer, and positively denied. The bill makes no specifications, upon which the defendants could vindicate themselves against so grave a charge. All that it alleges in support of the charge is vague and indefinite, and wholly insufficient, we think, to support it. We have searched this record in vain, for any evidence of fraud. On the contrary, we think, it appears from the record, that all the parties to this transaction, in making the contracts, and in their execution, acted fairly, and in good faith, and that the evidence fails to establish the allegation of fraud. Upon the whole we are of opinion that there is no error in the decree of the court dismissing the plaintiff's bill, and are of opinion to affirm the same. The decree must be affirmed.

Having reviewed the case and decided it upon its merits, we deem it unnecessary to consider the question raised by the demurrer, and the answer of Bradley T. Johnson, in which he invokes a decision upon the merits, as to the power of the house of delegates to direct the institution of this suit.

I am authorized by Judge Burks, to say, that he concurs in the affirmance of the decree dismissing the plaintiff's bill. He has no doubt that he would concur in the opinion just read, but not having heard it, he cannot of course express a concurrence in it.

Decree affirmed.

317 *Haymond, Trustee, &c., v. Jones & Wife, &c.

July Term, 1880, Wytheville.

Absent Moncure, P. and Burks, J.—sick.

I. **Husband and Wife—Wife's Antenuptial Estate.**—A separate estate may be made to a *feme sole*, which upon marriage will be good against the marital rights of the husband, although at the time it is made no particular marriage is contemplated.

II. **Same—Separate Estate—Creation.**—No particular form of words is necessary to create a separate estate; any words, showing clearly an intention to do so, will suffice.

III. **Same—Same—Power of Wife to Bind.***

—A testator gave his property to his wife for life, and at her death to be divided equally among his five children, two of whom were daughters. He then directs whatever portion came to the daughters to be "put into the hands of trustees of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them," and afterwards directs: "Should any of my children die without an heir of their body, it is my desire that whatever may be then left, of what they have received from my estate, revert to the same, with such restrictions in regard to my daughters that may be entitled to a portion, as hereinbefore provided." One of the daughters married, and during the pendency of a friendly suit for partition of the testator's estate, but before any portion was actually assigned to her, united with her husband, who was insolvent, in a deed conveying whatever interest she may be entitled to under the will of her father, to a trustee, to secure certain debts of her husband named in the deed. **Held:**

1. The executor of the testator would have no power under the will to pay the daughter's legacy to any one except a trustee chosen and qualified as the will directed, and if the daughter had the right to convey it at all, she could

318 *only do so with the concurrence of her trustee, and therefore the deed of trust is a nullity. *Christian, J.*, dissenting.

2. *Quære:* Would she have the power to convey it, even with the concurrence of her trustee, duly chosen and qualified?

This is an appeal from a decree rendered by the circuit court of Bedford county. The facts of the case necessary for a proper understanding of the points decided are as follows, viz:

Addison Maupin died in 1872, leaving a widow and five children. By the terms of his will he gave the whole of his property to his wife for life, and then says: "After the death of my wife, Lucy T. Maupin, I wish my estate divided among my children. I give to each one of my children one-fifth part of my estate. * * * I wish whatever may be coming to my daughters, Mary E. Hicks and Lucy Isabella Maupin, put into the hands of trustees of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them.

"5. Within twelve or eighteen months after the death of my wife, Lucy T. Maupin, I desire my executor to sell all of my estate, either privately or publicly as he may deem best, with the view of making such division among my children as herein directed.

"6. * * * I wish the portions coming to my daughters, Mary E. Hicks and Lucy Isabella Maupin, placed in the hands of their respective trustees, and used for them as hereinbefore directed.

"7. Should any of my children die without an heir of their body, it is my desire that whatever may then be left of what they may have received from my estate, revert to the same, to be equally divided among my surviving children, with such re-

319 strictions in regard to *my daughters that may be entitled to a portion, as hereinbefore provided."

Lucy Isabella Maupin married one James Lennox Jones.

The widow of the testator and his family enjoyed the estate together until September, 1877, when she filed a bill proposing to surrender a large portion of the estate for division among the children, to which they consented, and of which partition and allotment was afterwards made by the court. During the pendency of this suit for partition, to-wit: on the 18th of June, 1878, James Lennox Jones and Lucy I. his wife conveyed their whole interest in the estate of said Addison Maupin, deceased, by deed to L. D. Haymond, trustee, to secure sundry debts of said James Lennox Jones, the husband, specified in said deed; and Haymond, the trustee, then filed his petition in the said suit for partition, brought by Mrs. Maupin, asking that whatever amount might be found coming to said Jones and wife should be decreed to be paid over to him on account of the debts attempted to be secured in the deed to him as aforesaid. On a rule against said Jones and wife to show cause why the prayer of the petition should not be granted, Mrs. Jones, by her next friend, answered, taking the ground that by the terms of her father's will she took a mere trust estate, which she could not convey in the deed to Haymond, and therefore said deed, so far as it attempted to do so, was void; and she also asked that said interest should be settled on her in the hands of a trustee. Her husband was then insolvent.

The circuit court was of "opinion that, according to the true construction of the will of said Addison Maupin, deceased, he gave to each of his daughters the use and profits of one-fifth part of his estate, with

320 contingent remainder of the principal thereof over to his *other children, and placed the legal title to the same in trustees, in order to preserve it, and prevent the disposition of the principal of the estate so given by them or their husbands;" directed the share of Mrs. Jones to be placed in the hands of a trustee, to hold it and "apply the use and profits" for her benefit, and dismissed Haymond's petition; from which he obtained an appeal and supersedeas.

*See 1 Min. Inst. (4th Ed.) 345 et seq.: notes to *Ropp v. Minor*, 33 Gratt. 97. And see 2 Min. Inst. (4th Ed.) 1057; *Gaskins v. Hunton*, 92 Va. 531.

L. D. Haymond, for the appellant.

John R. Thurman, for the appellees.

ANDERSON, J. It is claimed by the appellee that a separate estate was limited to her by her father's will, when she was a feme sole, and after her marriage she held it free from her husband's control. Whether it was competent for the father to make such a settlement, we will first consider; and it seems to be well settled affirmatively. Bishop says:

"In legal principle and on the prevailing authorities, both English and American, it is competent to limit an estate to the separate use of a woman yet unmarried, where no particular marriage is contemplated; and on her afterwards becoming convert, she will hold it as her separate estate, free from the control of her husband. But in most of the cases in which this has been allowed—not, it would appear, in all—there has been a trustee, who was a third person, in whom the legal title was made to vest." He cites Robert and wife v. West, 15 Ga. R. 122, 138; Fears v. Brooks, 12 Ga. R. 195; Waters v. Tazewell, 9 Md. R. 291; Lamb v. Wragg, 8 Port. R. 73.

In Fears v. Brooks, supra, at page 197, it is said in a note that Nesbit, J., stated the English doctrine and authorities thus: "A

separate estate may be made in
321 *a feme sole as was as in a married woman, which upon marriage will be good against the marital right; and this, although no particular marriage be contemplated." And many English cases are cited in accord. The contrary was held by Lord Cottenham in Massey v. Parker, 2 Myl. & C. R. 174. In that case it was ruled that when property is given or settled to the separate use of an unmarried woman, it vested in her husband on the marriage. In the subsequent cases of Tullett v. Armstrong and Scarborough v. Borman, that decision was overruled; and on affirming these decisions on appeal, Lord Cottenham overruled himself. So the doctrine may be considered as settled.

It being competent to limit a separate estate to a feme sole, which, on her subsequent marriage, she will hold free from the control of her husband, we will next inquire, was the estate given to Lucy Isabella Maupin by the will of her father, Addison Maupin, limited to her separate use?

No particular form of words is necessary to create a separate estate. Any words showing an intention to do so will suffice. 1 Bishop on the Laws of Married Women. The same doctrine is enunciated in West v. West ex'or, 3 Rand. 373, cited in petition of appellant. Judge Cabell said: "No particular phraseology is necessary to the creation of a separate estate in a feme covert, even where it is created by deed. Much less is it necessary when the estate is created by will. In this respect, as in all others growing out of wills, the intention of the testator is to govern."

In this case the gift or settlement was made by a will, which is very inartificially drawn, and shows upon its face that the draughtsman was not a lawyer, or one skill-

ed in drafting such instruments, and therefore it cannot be expected that the intention of the testator will be expressed with

322 philological accuracy or legal *precision. It was evidently his intention that his wife should have his whole estate during her life, though that intention is not declared anywhere in the instrument, that I can find, in express terms. But he gives no part of his estate to either of his children until after the death of his wife. After that event he directs that his estate shall be divided among his children as soon as it can be conveniently done, and gives to each one of them one-fifth part thereof, subject to a deduction of whatever may be found charged to him or her on a certain account-book. He evidently meant that each of his children should be charged with their respective advancements as charged to them in that book. He then qualifies the foregoing gifts by adding: "I give to my son, Chapman W. Maupin, in addition to his one-fifth part of my estate, my family clock." Then follows a qualification and restriction of the gift to his daughters, all in the same fourth clause of his will, in the following language: "I wish [which in a will is a command] whatever is coming to my daughters, Mary E. Hicks and Lucy Isabella Maupin, put into the hands of a trustee of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them."

The testator evidently felt that he was confiding important interests of his daughters to a third person, and that he would be invested with great powers and a large discretion affecting their interests. He could not select and designate the person himself, because before the time came for him to act, which could not be until after the death of his wife, who might survive him a great many years, the person he selected might not be living. He also doubtless desired that the trustee selected should be a friend of his daughter and acceptable to her, and therefore preferred that he should

be chosen by her at the time he was
323 needed; *but, lest her choice might not fall upon one who would firmly and faithfully execute the important trust, he required that he should give ample security for its faithful performance.

By the fifth clause he directs the sale of all of his estate by his executor, which was partly real and in part personal, with a view to a division, which was to be made within twelve or eighteen months after the death of his wife.

Again, in the sixth clause, he reiterates the injunction upon his executor as to the disposition of the portions coming to his daughters, as follows: "I wish the portions coming to my daughters, Mary E. Hicks and Lucy Isabella Maupin, placed in the hands of their respective trustees, and used for them as hereinbefore directed." He had before directed that the trustee into whose hands it should be placed should be required to give ample security for the faithful performance of the trust committed to him. That is not repeated here, but the require-

ment is, by the words "as hereinbefore directed." But in this sixth clause he is more explicit as to the powers and duties of the trustee; he is to hold the trust property in his possession, which implies that the legal title, which goes with the possession of personal property, is to be in him, but he is "to use it for them." The words are few, but they are replete with meaning. How to use it? It is money, to be placed in his hands by the executor. How can he use it for them but to lend it out, or otherwise invest it? If he invested it in stocks, or in real estate, or other property for them, it would be using it for them, and it would be within the scope of his power and authority, provided the investment was made in the exercise of a sound discretion with a view to their benefit and the advancement of their interest; for this is required by the terms, which require him to use it for them. It is

324 *not to be used for himself nor for their husbands, but "for them."

Which words imply that any investment or disposition he makes of it is to be for their benefit and the furtherance of their interest; and whether it will be or not, it is for him to determine; which invests him with a large discretion. The duty of determining, or the right to determine, is given to no other person by the will, not even to his daughter, much less to her husband, and no one is authorized by the will to control him in the exercise of his discretion, not even the beneficial owner of the property. If he was exercising his discretion indiscreetly, or abusing his trust, a court of equity would doubtless interpose, at her instance, to prevent it, and for cause shown might remove him from his office of trustee. But as long as he makes judicious investments, and acts discreetly in the exercise of his discretion, and uses the trust property for the benefit of his cestui que trust, and faithfully performs his trust, it would not be in the power of even a court of equity to interfere to restrain him or to divest him of the powers with which he is invested by the will. Does he not, therefore, hold the property and the power to use it for the cestui que trust, separate from the husband and free from his control? Such is clearly the logical conclusion.

The seventh clause of the will tends, I think, to confirm this construction of the previous clauses. It gives to his surviving children, if one of them should die without an heir of his or her body, "whatever may then be left" of what he or she received from his estate, to be equally divided among them, "with such restrictions in regard to my daughters that may be entitled to a portion, as hereinbefore provided." This is the third time that the testator in his will enjoins these restrictions upon the gift to his daughters, showing how important he regarded them. And that he *intended

325 them to be restrictions, he here calls them such. By this section he qualifies the gift to each of his children by making it contingent upon his leaving an heir of his body. In that case, what is left of what he

has received from his estate shall go to his surviving brothers and sisters. But it applies to only what is left, which may imply that he did not intend to restrict his daughters to the use only of the income on what he gave them, but not necessarily. It would equally apply, if no part of the principal was consumed by the daughter before her death without heir of her body, but a part of it had been lost without fault of her trustee or legal responsibility.

But if it implies that the daughter might use a part of the principal, with the assent of the trustee in his discretion, it implies that it was not intended that she should use the whole of it, and what might remain is not left to her disposal, but the will disposes of it, and it is a limitation upon her right of property, and to that extent it is a contingent right. It is not in conflict with the construction given to the previous clauses, but supports it, and should be read in connection with them.

It is a familiar rule in the construction of wills, that "all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, when several parts are absolutely irreconcilable, the latter must prevail." (Mr. Jarman's seventh rule of construction, approved by Redfield on Wills, 1 vol. 426, 427.) And this court held, in a recent case (*Bank of Greensboro' v. Chalmers*, 30 Gratt. 202) that "in the construction of every instrument, the paramount rule is, so to construe it as, if possible, to give effect to every part of it; and in order to discover the intention of the parties we look not only to the terms of the instrument, but to the subject mat-

326 ter *and the surrounding circumstances." And that was said with regard to a deed, which created a separate estate in the wife. It may be applied with more reason to the construction of a will, by which it is claimed that a separate estate is created in the wife; especially when such construction is necessary to give effect to the plain intention of the testator, and to prevent injustice and inhumanity. If such was not the intention of the testator, why would he have imposed these restrictions upon the gift to his daughters, and not upon his sons, except as to the limitation contingent upon their dying without an heir of their body, which latter limitation was intended to secure to his surviving sons, as well as his daughters, the enjoyment of the property, upon the happening of such contingency; but with the same restrictions as to his daughters as were before impressed upon the portions given to them, which could only have been to protect their weakness against their husbands' power, and to preserve the property from his marital rights. In *West v. West's ex'or*, 3 Rand. supra, Judge Green said: "I think the necessary construction of John Hooke's will is, that he gave to his executors one-fifth of his estate, for the separate use of his daughter, Mrs. West, a married woman," &c. They were to hold it for her benefit, at their discretion—a discretion (he says) which could not have been

vested in them for any purpose but to prevent her improvident use of it, and to preserve the property from the marital rights of the husband. And for what other purpose could Addison Maupin have required the property he gave to his daughters to be vested in their trustees, and have clothed them with such large powers and discretion as we have seen? It is a question of intention from the construction of the will, did the testator intend to invest his daughter with a separate estate, free from the control of her husband,

327 *if she should marry? The language of John Hooke's will did not more strongly convey such intention, than is conveyed by this will. Cases may be found, and have been cited in the argument of this case, where a different conclusion has been reached upon facts, some of which resembled the facts of this case; but as was said by Judge Burks, with the concurrence of the whole court, in *Bank of Greensboro' v. Chambers & als.*, supra 215: "Judicial decisions, based mainly on construction, can seldom be relied on as precedents for construction in other cases, for the obvious reason, that the instruments construed differ, more or less, in their terms, subject matter, and attending circumstances." To point out those differences in the numerous cases, would protract this opinion to too great a length. I have been unable to find any case, which was held not to constitute a separate estate, in which the same language relied on in this case to create a separate estate, was used. Each case must depend upon its own facts and circumstances, whether it shows an intention to create an estate in the wife free from the control of the husband or not. That is the important enquiry here. Did the testator intend that his daughters should have the benefit of the property he gave them by his will, free from the control of their husbands? And did he so provide, by requiring that a responsible person, or persons, should be chosen by his daughters, who should be put in possession of their property, and manage, control, and dispose of it in trust for them, as hereinbefore described? The powers and duties of the trustee, being incompatible with the possession and disposal of it, by the husband, or even by the wife herself, we can come to no other conclusion than that such was his intention, and we think that the provisions of his will are effectual to that end.

328 *"But it is contended, that if this be so, a married woman, as to her separate estate, has the power of alienation; and that it was competent for Mrs. Jones to unite with her husband in making the conveyance under which the appellant claims.

There are various and a contrariety of decisions on this subject. In Virginia the current of decisions have been to the effect, that a married woman, as to her separate estate, may act as a feme sole, and has the power of disposing of the same; unless she has been restricted by the instrument of settlement. In *Burnett and wife v. Hawpe's ex'or*, 25 Gratt. 481, Judge Staples, whilst

recognizing this as the established rule in Virginia, says: "If the question was res integra, it would be a matter of grave consideration, whether it would not better accord with justice, humanity, and the intention of the parties, to hold with Chancellor Kent, that the right of a married woman to dispose of, or encumber her separate estate, is not absolute, but only sub modo to the extent of the power given her by the instrument creating the estate. The doctrine of the courts as now expounded, while protecting the wife against the debts of the husband, leaves her helpless and exposed, not only to her generous impulses in his favor, but to his secret influences, as difficult to be resisted as they are to be detected." Whilst it seems to me the foregoing should commend itself to every generous mind, I am obliged to agree with him, that the opposite rule seems to be too firmly established in Virginia, now, to be called in question, and that the wife may exercise the *jus disponendi* as to her separate estate, as a feme sole, unless restricted by the instrument which invests her with the estate.

Those restrictions need not be in express terms. But if the exercise of the power to encumber or alien the separate estate, be inconsistent with the scheme of

329 *settlement, or would defeat the plain intent pervading the will, it is as much forbidden as if expressly denied. *Bank of Greensboro' v. Chambers and als.*, 30 Gratt. 202. And as was held by this court in *Nixon v. Rose*, 12 Gratt. 425, Judge Moncure delivering the opinion, the exclusion of such power being often, if not generally, necessary for the protection of the wife, as well from her own weakness as from the power and influence of her husband, the law favors its exclusion, and will give effect to such intention, whenever it can be ascertained by a fair construction of the instrument.

It is true that the mere appointment of a trustee will not be sufficient to show such intention. But Addison Maupin, by his will, required the property he gave his daughters, which would be in money, to be placed in the hands of a responsible trustee, who would be a friend of his daughter, whom he invested, in effect, with such powers and discretion as to the management and disposal of it for her, as I have shown, would be incompatible with either his daughter, or her husband, having the possession or disposal of it. And that was the scheme of his settlement on her; and it was his intention, pervading the whole instrument, so far as it effects his daughters. And this conclusion excludes the right of the daughter to encumber or alien her property. Whether she could do it with the consent of the trustee is another question, upon which we deem it unnecessary to express an opinion. Certainly she could not, within the concurrence of her trustee. She would be entitled to receive the income regularly from her trustee. And he might permit her, if necessary for her support, to draw upon the principal.

Upon the foregoing views, it is obvious that the deed in which Mrs. Jones united with her husband—conveying all her in-

terest in her father's estate to the
330 *appellant, in trust, to pay the debts of her husband, which were in the main, she says, contracted before their marriage—passed nothing of her interest in the estate, and is null and void.

There is another view of this case which may be briefly presented. When this deed was made, no part of the property was in the possession of the husband, or wife. Upon the division, Mrs. Jones was entitled to the one-fifth part of it, which, by the terms of the will, was not to be made until the death of her mother, who was still living, and in possession of the estate, as she had been since the death of her husband. Any right which Mrs. Jones had to any part of the estate, when the division took place, was contingent. If she should die before that event, without an heir of her body, she took nothing; but the portion bequeathed to her would go, by the express terms of the will, to her surviving sister and brothers. She may have had issue at the date of the deed, but that does not appear. At the date of her petition, it does appear that she had two children. But she may survive her children, and afterwards die without an heir of her body, and before the event occurs, upon the happening of which the division of the estate was to be made, under the will. In that case no interest could ever vest in her, in possession. If she is living when the division, by the requirement of the will, is made, she could not take possession of her share of the estate. The executor could not pay it to her, but could only pay it to her trustee, to be used or administered for her by him. And a payment to her by the executor, and her receipt, would be no discharge to him. Consequently, a payment by the executor to the trustee of her husband's creditors, and his receipt therefor, a fortiori, could be no discharge to him.

331 *We are of opinion, that the executor of Addison Maupin has no power, under the will of his testator, to pay over her legacy to any one except a trustee, chosen and qualified as the will directs, who is constituted an active trustee in the management and disposition of the trust property. And that if Mrs. Jones had, to any extent, the *jus disponendi* of her trust estate, it was only with the concurrence of her trustee, and consequently that no valid alienation of it could be made, before the trustee was chosen and qualified, according to the requirements of the will. Such, we think, was the intention of the testator, upon a fair construction of his will, which ought to be liberally construed, in order to give effect to that intention, which the law approves, and which is in harmony with the claims of justice and humanity. It appears that Mr. Jones, the husband, is insolvent; and to enforce the deed in question, would take every particle of his wife's property, which her father was evidently very desirous, and much concerned, to secure to her, to pay debts which she was neither legally nor morally bound to pay, and leave her destitute of means for the support of herself and children; and so to rule,

we think, would be to disappoint and defeat the will of the testator.

We are of opinion, therefore, to affirm the decree of the circuit court rejecting and dismissing the petition of L. D. Haymond, trustee, with costs.

STAPLES, J., concurred in the results of Judge Anderson's opinion.

CHRISTIAN, J. I am constrained to dissent from the opinion of the majority of the court in this case. With great respect for the opinions of my brethren, I think the conclusion arrived at, is directly opposed by the *whole current of authority in this State, and runs counter to the established law as I understand it.

I will proceed therefore to express my own views of this case regretting, that after a careful consideration, I am forced, with my convictions of what is the established law, to enter my unqualified dissent, upon the main question raised by the record.

Before entering upon a discussion of that question I desire to express my concurrence in so much of the opinion of the majority of the court, as declares that the estate which is the subject of dispute, is personal estate. An equitable conversion of the land into money was certainly effected by the will. The direction to sell is imperative. The familiar maxim of courts of equity, (which under certain circumstances changes the very nature of the thing devised, sometimes making land money and sometimes making money land), that "whatever ought to be done is considered in equity, as done," applies with full force to this case. When a will directs real estate to be sold, equity regards it as sold, and from the moment of the testator's death the real estate is converted into personalty, and as absolutely bears the character, quality and incidents of personal estate, as if the thing devised was money. Where the will directs the estate to be sold and the proceeds divided among certain persons entitled thereto, equity regards the conversion as complete, and courts of equity will see to it that the conversion is carried into practical effect.

In the case before us, the direction of the will to sell the estate in controversy, is imperative, and upon the principles of equitable conversion it must be regarded as personal and not real estate. (See 1 Lead. Cas. in Equity; 1 Am. Ed. 563, and cases there cited.)

I come now to consider as briefly, as the importance of the case will admit, the **333** main question in the case, *and the one in which I do not concur with the court. That question is, whether under the will of the testator Addison Maupin, his daughter Isabella, who afterwards intermarried with the appellee James Lennox Jones, took such an interest in the estate of her father as she could dispose of; and whether the deed of said Jones and wife to the appellant Haymond, trustee, conveyed that interest for the purposes set forth in said deed. Or in other words, whether the estate devised to the daughter, was so restricted by limitations in

the will as to deprive her of the power of alienation, or created in her such a separate estate, as prevented the marital rights of her husband from attaching thereto.

The solution of these questions depend upon the true construction to be given to those clauses of the will (taken together) which dispose of and refer to the property in question.

In the fourth clause of the will is the following provision: "After the death of my wife Lucy T. Maupin I wish my estate divided among my children as soon as it can be conveniently done as follows: I give to each one of my children one-fifth part of my estate, subject to a deduction of whatever may be found charged against him or her on account book marked 'Ledger' on the back. * * * I wish whatever may be coming to my daughter, Mary E. Hicks, and Lucy Isabella Maupin, put into the hands of a trustee of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them."

In the sixth clause is the following provision: "The deduction that I have directed to be made from what may be coming to each of my children upon a division of my estate among them, I wish equally divided among them as hereinbefore provided; that is, I wish the portions coming to my daughters, Mary E. Hicks and Lucy Isabella
334 Maupin placed in *the hands of their respective trustees, and used for them as hereinbefore directed."

The seventh clause is as follows: "Should any of my children die without an heir of their body, it is my desire that whatever may then be left, of what they may have received from my estate revert to the same, to be equally divided among my surviving children with such restrictions in regard to my daughters that may be entitled to a portion as hereinbefore provided."

These are all the provisions of the will which have any reference to the questions to be determined, and upon the construction of these provisions these questions must be solved.

I think it is clear that under the fourth clause of the will, Mrs. Jones, who was Isabella Maupin, took an absolute estate. The provision is, "After the death of my wife Lucy T. Maupin, I wish my estate divided equally among my children as soon as it can be conveniently done as follows: I give to each one of my children one-fifth part of my estate, subject to a deduction of whatever may be found charged to him or her on account book marked 'Ledger' on the back. * * * I wish whatever may be coming to my daughters Mary E. Hicks and Lucy Isabella Maupin put into the hands of a trustee of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them."

These words certainly create an absolute estate, and are apt and legal words for that purpose—"I give to each one of my children one-fifth part of my estate." The direction that "whatever may be coming" to his daughters "be put in the hands of a trustee,"

does not change the character of the estate devised. It is no less an absolute fee simple estate in the cestui que trust, because the legal title is in the trustee.

335 *But the seventh clause of the will relieves the question from all doubt and conclusively shows that the testator intended to give to his daughters as well as his sons an absolute estate in the property devised. It is in these words: "Should any of my children die without an heir of their body, it is my desire that whatever may then be left of what they may have received from my estate revert to the same, to be equally divided among my surviving children," &c. This plainly implies the power of the first taker to dispose of the whole estate. The limitation over therefore is inconsistent with, and repugnant to the estate granted the first taker, and is therefore void. May v. Joynes, 20 Gratt. 692. I think therefore the daughters took an absolute estate in the property devised to them.

I am also clearly of opinion that the will did not vest in them a separate estate. There are no words in the will creating a separate estate. The word husband is not mentioned in the will at all; although one of his daughters was already married, as she is mentioned in the will as Mary E. Hicks. Certainly there are no express words creating a separate estate in the daughters. The will and every clause thereof may be searched in vain to find such words. There is not a word or line anywhere in the instrument, excluding the marital rights of present or future husband. And it is a matter of inference only and a very slight ground of inference at that, that the testator intended to invest his daughters with a separate estate, and exclude the marital rights of their husbands, because he directed that whatever part of his estate "might be coming to my daughters be put in the hands of a trustee" and "used for them" by said trustees. It is to my mind, impossible to say, that these words by necessary implication create a separate estate and oust the marital rights of the husband.

336 *But suppose it be conceded that the testator intended by his will to invest, and did invest his daughters with a separate estate, still there is nothing in the will to restrict or limit the power of alienation of this (so-called) separate estate.

The *jus disponendi*, the most useful and valuable incident of property, is not restrained by any line or word in this will. Certainly if the property devised to Mrs. Jones be separate estate she may dispose of it, unless her power of alienation be restrained by the instrument creating such estate. Upon this question this court has spoken with no uncertain voice.

In *Burnett & wife v. Hawpe's adm'r.* 25 Gratt. 486, it was well said by Judge Staples. "It is the established doctrine of this court that a married woman, as to property settled to her own use, is to be regarded as a feme sole, and has the right to dispose of all her separate personal estate, and the rents and profits of her separate real estate, in the same manner as if she were a feme sole, unless her

power of alienation be restrained by the instrument creating the estate. As incident to this *jus disponendi*, a feme covert may charge the separate estate with the payment of her debts. She may charge it as principal or surety for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over her. And although the separate estate is conveyed to a trustee his assent is not necessary to a valid alienation or charge by the wife unless it is required expressly, or by strong implication, in the instrument under which the property is derived." In support of these well-settled doctrines a number of cases are cited, and the decisions of this court from 4th Randolph down to 21st Grattan, and to which I beg

leave to add a very recent case in which 337 the opinion was delivered by *Judge Burks reaffirming the same doctrines. *Bank of Greensboro' v. Chambers*, 30 Gratt. 202.

It is clear that if the estate devised, can under the terms of this will, be held to be separate estate in Mrs. Jones, she has disposed of it, as she had a right to do, as a security for the debts of her husband. Certainly if it be held, she took a separate estate she had by all the authorities a right to dispose of it. Now it is plain, the estate devised to her, is separate estate, or it is not—if not, it is an absolute estate. It must be one or the other. If an absolute estate where is the clause in the will which restricts the power of alienation, or which excludes the marital rights of the husband? The seventh clause only can be relied on to effect this result, because it uses the words "restrictions in regard to my daughters * * as hereinbefore provided." But that clause furnishes the strongest proof of an absolute estate, for it provides—"Should any of my children die without an heir of their body, it is my desire that whatever may be left revert to my estate, and be equally divided among my surviving children. This plainly implies, as before said, that the first taker has the power to dispose of the whole estate; and on the authority of *May v. Joynes*, (supra), makes the estate devised an absolute estate in Mrs. Jones, and all the children of the testator. But the words relied upon to operate as a restraint upon the power of alienation are the words in the same clause, "with such restrictions in regard to my daughters (that may be entitled to a portion), as hereinbefore provided."

Now it is perfectly plain that all the testator meant to say, and did say in the seventh clause, that whatever might be coming to his daughters (from what was left) from any of his children dying without heirs of their body, should be held by his daughters under the same restrictions (and none other) im-

338 posed upon the *estate before devised to them in the fourth clause of his will. Now what are these restrictions? Simply and plainly these—that the estate devised should be "put into the hands of a trustee," and "used for them." These are the only

restrictions. Do they impose any restraint on the power of alienation? Does the mere fact that the estate is to be put into the hands of a trustee to be used for them, affect to any degree the *jus disponendi*? What has been the uniform decisions of this court on this question? Let us see. In *Vizonneau v. Pegram*, 2 Leigh 183, the settlement in express terms, provided that the separate estate should be held by the trustee for the use of the wife. Notwithstanding, this court said she must be regarded as the absolute owner, and should be permitted to make any disposition of it that she might desire to make. In *Brown v. George*, 6 Gratt. 424, the testatrix bequeathed property to her married daughter for life, for her separate use, and so much thereof as may be in existence at her death to go to her children, or their descendants, if any there be. And more fully to preserve said property to the separate use of the daughter for her life, and to her children after her death, the testatrix appoints a trustee to whom the property is to be delivered by her executor. And she further directs that all receipts given to the trustee by her daughter for payments made to her, either of principal or interest of the property, shall be to him a full discharge. Held that the daughter is entitled to use both principal and interest of the property at her discretion.

See also 17 Gratt. 503, *Penn. v. Whitehead*, 21 Gratt. 521; *Muller v. Bayly*; *Justis v. English*, 30 Gratt. 585; *Bank of Greensboro' v. Chambers*, 30 Gratt. 202; *Darnall v. Smith*, 26 Gratt. 878.

I can find no case and I believe none can be found, where (as in this case) the 339 direction of the testator, *that the property devised "be put into the hands of a trustee" to be used for "the *cestui que trust*", has ever been construed as a restraint upon the power of alienation, or as excluding marital rights of the husband. On the contrary a number of cases, some of which have been already cited, expressly declare that such a direction that the property be held as trustee, or be put into the hands of a trustee, does not affect the *jus disponendi*, or restrain the power of alienation in the *cestui que trust*.

It has been held by this court repeatedly, and I thought it was the settled law, that the assent of the trustee is not necessary in such a case to the valid alienation of the property, unless required expressly, or by strong implication from the language of the instrument.

Certainly it will be conceded that there are no express words in the will before us, which operate as a restriction upon the power of alienation, and I am equally clear that there are no words which raise an implication to that effect. The only words relied upon, are the words "to be put into the hands of a trustee" "to be used for them." But, as already seen, this court has declared these words do not raise such implication.

I think it is plain that under the fourth clause of the testator's will Mrs. Jones took an absolute fee simple estate. The subsequent provisions as to trustees, does not change the character of that estate, nor does it

limit or restrict, or cut down, or rescind it.

It was said in *Barksdale v. White*, 28 Gratt. 224, "It is a settled rule in the construction of instruments that if an estate be conveyed, an interest given, a benefit bestowed in one part, by clear, unambiguous, explicit words upon which no doubt could be raised, to destroy or annul that estate, interest, or benefit, it is not sufficient to create a doubt from

340 other terms in *another part of the instrument. The terms to rescind or cut down the estate or interest before given, must be as clear and decisive as the terms by which it was created. If the benefit is to be taken away, it must be by express words, or necessary implication."

Upon this subject, the language of the great Lord Brougham, when lord chancellor of England, uttered in the house of lords, in an important case before that august tribunal, is so appropriate here that I cannot forbear to repeat it. He said, "My lords, I hold it to be a rule that admits of no exception, in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms, upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt; in order to reverse that opinion, to which the terms would of themselves, and standing alone have led, it is not sufficient you should show a possibility, it is not sufficient you should deal in probabilities; but you must show something in another part of that instrument, which is as decisive the one way, as the other terms were decisive the other way: and the interest first given cannot be taken away either by tacitum or debitum or by possible or even by probable, but it must be taken away, and can only be taken away, by *expressum et certum*." 2 Clarke & Fin. R. 22, 36.

See also Judge Joynes' opinion in *Rayfield v. Gaines*, 17 Gratt., p. 1.

I feel constrained to hold, upon every rule of construction, and upon the established law of this State, as I understand it, declared by an unbroken current of decisions, that in the will of Addison Maupin, there is no restraint upon the power of alienation of the property *devised to his 341 daughters, and there is no provision in said will, excluding the marital rights of their husbands.

I am of opinion therefore, that the deed to Haymond, trustee, in which husband and wife both united, was a valid deed, and conveyed the interest of Mrs. Jones, in her father's estate, and is a valid security for the debts of the husband as set forth in said deed.

I am of opinion therefore to reverse the decree of the circuit court.

Decree affirmed.

342 *Terry v. Ragsdale.

July Term, 1880, Wytheville.

1. **Checks—Evidence of Debt.**—A check upon

*Checks.—The first headnote was followed in Mc-

a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of said check; and though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication, and to establish the contrary fact.

2. **Witnesses—Competency.**†—In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness. The defendant so introduced becomes a competent witness in the cause; but this does not render the plaintiff a competent witness.

3. **Appeal—Review—Practice.**‡—There is a verdict in favor of the defendant in a cause, which, upon motion of the plaintiff, is set aside by the court; and upon a second trial there is a verdict and judgment for the defendant. Upon writ of error by the plaintiff, if it was error in the court below to set aside the first verdict and grant a new trial, the appellate court will affirm the judgment, without enquiring into the proceedings on the second trial.

This case was heard at Richmond, but was decided at Wytheville. It was an action of assumpsit in the circuit court of Pittsylvania county, brought by Joseph M. Terry against Charles Ragsdale, survivor of himself and Daniel C. Ragsdale, deceased, as late partners under the name and style of D. C. & Charles Ragsdale. There was a verdict for the defendant; which, on the

343 *motion of the plaintiff, was set aside; and on a second trial there was a verdict and judgment for the defendant. And thereupon Terry applied to this court for a writ of error and supersedeas; which was awarded. The case is fully stated by Judge Moncure in his opinion.

Lain v. Lowther, 35 W. Va. 299; *McVeigh v. Chamberlain*, 94 Va. 77. See also *Ford v. McLung*, 5 W. Va. 165; *Peasley v. Boatwright*, 2 Leigh 195; 5 Am. & Eng. Enc. Law (2nd Ed.) 1030.

†**Trial—Witnesses—Competency.**—As to the second headnote, see 4 Min. Inst. (2nd Ed.) 764 *et seq*.

‡**Appeals—Practice.**—The rule stated in the third headnote is approved in *Muse v. Stern*, 82 Va. 33, where additional authorities are cited; and also in *Jones v. Old Dominion Cotton Mills*, 82 Va. 143.

In *Tucker v. Sandidge*, 85 Va. 546; *Hudgins v. Simon*, 94 Va. 661, the rule under Code of 1887, § 3484 is stated; see also *Eastern Ice Co. v. King*, 86 Va. 97.

In *Southwest Imp. Co. v. Smith's Adm'r*, 85 Va. 306, it was held that § 3484, Code of 1887, was applicable though the judgment of the lower court had been rendered before the Code took effect, such sections being held to merely prescribe a rule of practice.

By subsequent enactments amending § 3484, the appellate court is required, in such cases, to look first to the proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, then to set aside all the proceedings subsequent to the verdict and enter judgment thereon. Acts 1889-'90, p. 36; Acts 1891-'92, p. 962; *Mears v. Dexter*, 86 Va. 828; *Stearns v. Richmond*, 88 Va. 992.

James M. Whittle and Ould & Carrington, for the appellant.

William M. Tredway, Jr., for the appellee.

MONCURE, P., delivered the opinion of the court.

This was an action of assumpsit, brought by the plaintiff in error, Joseph M. Terry, in February, 1872, against the defendant in error, Charles Ragsdale, survivor of himself and Daniel C. Ragsdale, deceased, late partners under the firm and style of D. C. & Charles Ragsdale. In the declaration it is stated, that in May, 1863, the said firm was indebted to the plaintiff in the sum of \$10,000, for money lent, paid, had and received, and found due on an account stated; and being so indebted, promised to pay the said debt on demand; yet the said firm, although often requested, did not, nor did either of them, pay the said debt or any part thereof to the plaintiff during the lifetime of the said Daniel C. Ragsdale, nor has the said surviving partner, Charles Ragsdale, paid the same or any part thereof to the said plaintiff since the death of the said Daniel C. Ragsdale, although often requested so to do. The defendant plead non assumpsit to the action; to which plea the plaintiff replied generally. And the general issue being thus joined in the case, the same was tried by a jury, which found a verdict for the defendant on the 7th day of November, 1872. Whereupon the plaintiff

344 moved the court to set aside the said *verdict and grant him a new trial; which motion the court, after taking time to consider the same, sustained. On the trial of the cause the plaintiff tendered to the court two bills of exceptions to opinions given by the court, which were signed and sealed and made part of the record.

On the second trial of the cause, which occurred on the 11th and 12th days of November, 1873, the jury again found a verdict for the defendant. Whereupon the plaintiff moved the court to set aside the said verdict and grant him a new trial; which motion the court, after taking time to consider the same, overruled and rendered judgment for the defendant, to-wit: on the 14th day of November, 1873. On the said second trial of the cause the plaintiff tendered to the court four bills of exceptions to opinions given by the court, which were signed, sealed and made a part of the record.

The first matter for enquiry in this case is: Whether the circuit court erred in granting a new trial, and in not rendering judgment according to the first verdict?

Two bills of exceptions, as we have seen, were taken to the action of the court in the course of the first trial. Let us now examine, consider and decide upon these two bills, in their order.

In the first it is stated, that the plaintiff, having offered testimony tending to prove a bank check and an endorsement thereon in the words and figures, viz:

"Pittsylvania C. H., May 25th, 1863.
"\$10,000.

"Bank of Pittsylvania, pay to the or-

der of D. C. & Charles Ragsdale ten thousand dollars.

"Jos. M. Terry.

"Endorsed:

"D. C. & Chas. Ragsdale."

345 *And having offered evidence tending to show that Daniel C. Ragsdale, who purports to have made the said endorsement, drew the amount of the said check out of the Bank of Pittsylvania; that no testimony was offered by the defendant to prove that, at the time of drawing said check, the plaintiff owed said Ragsdale anything; that in the month of May, 1864, a settlement was made between the firm of Ragsdale & Co., composed of said D. C. and C. Ragsdale, in which Charles Ragsdale fell in debt to the plaintiff a considerable amount, and the plaintiff fell in debt to Ragsdale & Co. a small amount, which was deducted from the amount due from Charles Ragsdale to the plaintiff, the plaintiff moved the court to instruct the jury that if they believed that the facts aforesaid are proved, they ought to infer that said check was evidence that the amount thereof was loaned by plaintiff to said D. C. & C. Ragsdale, and not of the payment of any debt due them. But the court refused to give said instruction; to which ruling said exception was taken.

The court is of opinion that the circuit court did not err in refusing to give the said instruction. The check is prima facie evidence that the drawer, at the time it was drawn, was indebted to the payees in the amount of the check on an indebtedness previously existing, or created at the time the check was drawn. There is no plainer, nor better settled principle of law than that. There is nothing stated in the said first bill of exceptions which tends to repel that presumption. It follows therefore that the court, properly refused to give the said instruction.

In the second of the said two bills, it is stated that, after the jury had rendered their verdict in this cause, the plaintiff moved the court to set aside the same and grant him a new trial, for the following reasons, viz:

346 *1st. That the court had not allowed the plaintiff Terry to testify in his own behalf, and had thereby deprived him of his most important testimony, the plaintiff's counsel stating that, feeling confident that his own evidence should legally be admitted, he did not prepare himself with the evidence which he could have procured, to show that the \$10,000 check was a loan by the plaintiff to the defendant, and not a payment of a debt, and was thus taken by surprise.

2d. That Charles Ragsdale was admitted as a witness to testify against D. C. Ragsdale, and was called by the counsel of said Terry and not objected to by defendant, while the plaintiff was excluded as a witness.

3d. That the court refused to allow the plaintiff to file interrogatories to Charles Ragsdale after the jury had been sworn and before the introduction of C. Ragsdale, although the deposition of said Ragsdale

was accessible, from which he could refresh his memory on the points mentioned in said interrogatories.

4th. Because the verdict was contrary to the evidence. And the court having sustained the plaintiff's motion for a new trial, certified that the following are all the facts proved before the jury at the trial, viz: A check for \$10,000, dated May 25th, 1863, signed by the plaintiff and endorsed by D. C. and Charles Ragsdale, in the words and figures following, viz: (see the same hereinbefore inserted); that D. C. Ragsdale drew the money on said check; that D. C. Ragsdale managed the financial part of the firm business of Ragsdale & Co. exclusively; that said firm consisted of D. C. and Charles Ragsdale; that D. C. Ragsdale frequently borrowed money for the firm without consulting Charles Ragsdale; that Charles Ragsdale was frequently ignorant of the fact that D. C. Ragsdale had contracted a loan for the firm; that Charles Ragsdale

never heard of D. C. Ragsdale borrowing \$10,000 from *the plaintiff; that Charles Ragsdale did not know what use the firm had for \$10,000; that all the books and papers of the firm are in the possession of Charles Ragsdale, who since the death of D. C. Ragsdale has examined them carefully and can find no evidence of plaintiff being indebted to said firm at the time the said check was given, or that the said firm was indebted to the plaintiff; that in March, 1864, the plaintiff and Charles Ragsdale had a settlement of accounts between themselves and between the plaintiff and the aforesaid firm, at which settlement the papers of said Terry relating to the said settlement were produced, and no mention was made of said check, nor was any account taken of it; that in said settlement, Charles Ragsdale owed the plaintiff \$2,500 or \$3,000, and the plaintiff owed D. C. Ragsdale & Co. \$700 or \$800; that the amount due from the plaintiff to the firm was deducted from the amount due from C. Ragsdale to the plaintiff, and that C. Ragsdale settled with the plaintiff for the balance; that C. Ragsdale never knew of the existence of the check until two years before the trial of this suit; that the names of D. C. and Charles Ragsdale endorsed on said check are in the handwriting of D. C. Ragsdale, as is the body of said check; that D. C. Ragsdale kept the books of the firm as long as he lived, since which time Charles Ragsdale has had possession of them, and that the said firm of Ragsdale & Co. expired by limitation on 1st January, 1863, and was continued to wind up the business; and these being all the facts proved on the trial, the court sustained the plaintiff's motion and granted him a new trial, on the ground that the court had erred in permitting Charles Ragsdale to testify as a witness before the jury, and that the jury may have been misled by his testimony, to which ruling of the court the defendant excepted.

348 *The court is of opinion that the circuit court erred in sustaining the plaintiff's motion to set aside the first verdict

of the jury and grant him a new trial in the case; and that instead of doing so, the said circuit court ought to have overruled the said motion and rendered judgment on the said verdict in favor of the defendant.

The check for ten thousand dollars, given by the plaintiff Terry to D. C. Ragsdale on the 25th day of May, 1863, on the Bank of Pittsylvania, payable to the order of D. C. & Charles Ragsdale and endorsed by D. C. Ragsdale in the name of D. C. & Charles Ragsdale, implies that it was given in payment of a debt due by said Terry to said D. C. & Charles Ragsdale, or for money loaned by the latter to the former at the time of the execution of the said check; and though such implication can be repelled by evidence that the said check was not so given, but was in fact given as a loan by the said Terry to the said D. C. & Charles Ragsdale. Such evidence, however, being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication and to establish the contrary fact.

Certainly the facts certified to have been proved on the first trial can have no such effect. The facts so certified are hereinbefore set out. The said facts if they do not tend to confirm the implication of the check as aforesaid, certainly do not tend to repel the same. The check was given on the 25th of May, 1863, when Confederate notes, which were of very little value, was the only currency of the country. This action was not brought until after the death of D. C. Ragsdale, nor until February, 1872, nearly nine years after the date of the check. Charles Ragsdale knew nothing of the check, and had heard nothing about it until two years

before the action was brought. In 349 *March, 1864, the plaintiff and Charles Ragsdale had a settlement of accounts between themselves, and between the plaintiff and the aforesaid firm, at which settlement the papers of said Terry relating to the subject of the settlement were produced, and no mention was made of said check! Nor was any account taken of it!

If at the time of that settlement Charles Ragsdale, or the firm of D. C. & Charles Ragsdale, had been indebted to said Terry in the amount of said check, or any material part of it, would not said Terry have then mentioned it to said Charles? and claimed that the \$700 or \$800 then found to be due by said Terry to said firm, should be credited upon the amount due upon the said check, instead of the amount then found to be due by said Charles Ragsdale to said Terry?

The ground on which the circuit court set aside the first verdict of the jury was, that the said "court had erred in permitting Charles Ragsdale to testify as a witness before the jury, and that the jury may have been misled by his testimony." The conclusive answer to this ground is, that Charles Ragsdale was so permitted to testify at the instance of the plaintiff, who cannot, therefore, object to the competency of the said testimony, and the plaintiff was not thereby rendered a competent witness in the case.

The plaintiff was rendered an incompetent witness in the case by the death of D. C. Ragsdale, one of the chief actors in the transaction and the only one on his side, who could not testify and the plaintiff therefore could not testify in the case.

The court being of opinion that the circuit court erred in setting aside the first verdict rendered by the jury in favor of the defendant, and in not overruling the plaintiff's motion to set aside that verdict, and not rendering a judgment in conformity with that verdict; and the court being further of opinion that the said *circuit court, in deciding and rendering judgment in favor of the defendant on the second trial, arrived at precisely the same result as if it had decided and rendered judgment in favor of the defendant on the first trial: it is therefore unnecessary to enquire now if the said court erred in rendering the judgment which it did render on the second verdict, considered without reference to the action of the court on the first verdict; but without doing so, it is sufficient and only necessary for this court to affirm the judgment of the circuit court to which the writ of error was awarded in this case; which is therefore accordingly done.

Judgment affirmed.

351 *Gray & al. v. Stuart & Palmer.

July Term, 1880, Wytheville.

Absent *Moncure, P. and Burks, J.**

Upon bill by S against G and P to subject the land of G to satisfy a judgment recovered against G, P and others, it appears and was so decided by the circuit court upon appeal from a judgment of the county court on a *scire facias* to revive the judgment, that no process had been served on P, and that he had not entered his appearance in the original action, and the *scire facias* was dismissed for a variance between the writ and the evidence.

Held:

1. **Judgments—Failure to Serve Process—Validity.**†—The judgment against P was void and a nullity, the court having no jurisdiction to render a judgment against him, he not having been served with process, or appearing in the cause.

2. **Judgment Void as to One Defendant—Validity as to Co-Defendant.**—The judgment against G is a valid judgment; and is not affected by the judgment of the circuit court dismissing the *scire facias* for a variance between the writ and the evidence.

3. **Same—Same.**—Though at common law a joint judgment erroneous as to one must be reversed as to all; yet in this case the judgment against P was not an erroneous judgment; but it was a void judgment, and a nullity.

*They were too unwell to be in court.

†**Judgments—Service of Process.**—As to the force and effect of judgment rendered without service of process, see *Lovell & Jordan v. McCurdy's Ex'ors*, 77 Va. 763, citing the principal case; *Blanton v. Carroll*, 86 Va. 539, citing the principal case; 4 Min. Inst. (2nd Ed.) 559, 865; *Fowler v. Lewis*, 36 W. Va. 126; *McMillan v. Hickman*, 35 W. Va. 718; *Lamar v. Hale*, 79 Va. 147; *Wade v. Hancock*, 76 Va. 620.

4. **Void and Erroneous Judgments Distinguished.**‡—There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere

352 nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed in any court, anywhere, whenever any claim is made, or right asserted under it.

5. **Case at Bar.**—The bill should have been dismissed at the hearing in the court below as to P, and that court having made a decree subjecting G's land, and having made no decree against P, upon appeal by G and P, the appellate court will dismiss the suit as to P, but without the costs of the appeal; but will amend and affirm it as to G.

This was an appeal from the decree of the circuit court of Washington county in a suit in equity brought by Stuart & Palmer against Robert E. Gray and others. The decree directed the land of Gray to be rented out for the purpose of satisfying a judgment which had been rendered against him and others. And the appeal was by said Gray and John Preston, who was a party in the suit, but had not been served with process. The case is fully stated in the opinion of the court delivered by Judge Christian.

Campbell & Trigg, for the appellants.

Johnson & Trigg, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on appeal from a decree of the circuit court of Washington county.

The following facts are proved in the cause as shown by the record:

The appellees Stuart and Palmer were the holders of a negotiable note for \$1,304.34, of which Cuthbert Owens was the maker, and John S. Owens, Joshua Owens, R. E. Gray, John Preston, and William King Heiskell, were endorsers. The note was not paid at maturity, and was duly protested. Suit

353 was brought *on this note against the maker and all the endorsers; and on the 26th June, 1868, judgment was rendered against R. E. Gray, John Preston and William King Heiskell. Subsequently a judgment was rendered in the same court against all the defendants.

The stay laws being then in force, no execution was issued. In March, 1877, (William King Heiskell having in the mean time departed this life), a *scire facias* was issued to revive the judgment against all the defendants. The three Owens having left the State, the *scire facias* was served only on Gray and Preston. Upon this *scire facias* judgment was entered by the county court against all the defendants. An appeal was taken by the

‡**Void and Erroneous Judgments Distinguished.**—As to distinction between void judgment and erroneous judgment, see *Staunton Perpet. B. & L. Co. v. Haden, Tr.*, 92 Va. 201; *Poe v. Marion Machine Works*, 24 W. Va. 524.

defendants Preston and Gray to the circuit court. None of the proceedings in the circuit court appear in record before us except the judgment of that court which is in these words:

"This day came the parties, by their attorneys, and the transcript of the record of the proceedings in the county court being seen and inspected, the court here is of opinion that the record given in evidence before the county court disclosed two several judgments, the one rendered on the 26th day of June, 1868, valid against R. E. Gray and Wm. King Heiskell, (they and the said Preston being severally and not jointly bound for the debt sued on), and void as to the said Preston, no process having been served upon him, and he not having entered an appearance to the action; the other rendered on the 5th day of December, 1868, after the final order entered on the 26th of June, 1868, against R. E. Gray, John Preston and Wm. King Heiskell, who were not further served with process, was only a judgment against the defendants Cuthbert Owens, John S. Owens and Joshua Owens, the recitals in the judgment of the appearance of the parties and of the rendition of judgment against the defendants applying

354 *only to the parties served with process, and against whom the action was pending. (*Moss v. Moss*, 4 Hen. and Munf.) The judgment recited in the writ of scire facias being a judgment against R. E. Gray, John Preston and Wm. King Heiskell, and a joint judgment against all the defendants named in the original summons, and the record of the judgment produced showing a judgment only against R. E. Gray and Wm. King Heiskell, and a judgment only against Cuthbert Owens, John S. Owens and Joshua Owens, it seems to the court here that there is a variance between the description of the judgments recited in the writ, and the judgments offered in evidence, and that there is error therefore in the judgment of the county court. It is therefore considered by the court that the judgment of the county court be reversed and annulled, and that the appellants recover against the appellees their costs by them in this behalf expended. And this court proceeding to render such judgment as the county court ought to have rendered, it is considered that there is no such record as by the writ of scire facias aforesaid is supposed, and that the appellees take nothing by their said writ, and that the appellants recover against the appellees their costs in their defence in the county court expended."

To this judgment of the circuit court neither plaintiffs nor defendants applied for a writ of error, but submitted to the judgment of the circuit court reversing the judgment of the county court and dismissing the scire facias upon the ground of the variance set forth in its judgment of reversal.

In September, 1877, Stuart and Palmer filed their bill in equity in which they set forth the aforesaid judgment and the proceedings by scire facias in the county and circuit court above referred to, and after alleging the insolvency and non-residence

355 of the Owens, *and admitting that Preston had never been served with process, and that Gray had no personal property which an execution could reach, sought to subject the lands of Gray to the lien of said judgment. To this bill Gray alone was made a party defendant.

A demurrer for want of proper parties was sustained; and afterwards an amended bill was filed, in which the Owens, Heiskell's representative, and John Preston were made parties. The amended bill was answered only by Gray and Preston; it being taken for confessed as to the other defendants. A demurrer was also filed to the amended bill. With this bill was filed exhibits above referred to showing a judgment for the amount of the negotiable note, the scire facias sued out to revive said judgment, and the proceedings under the same in the county and circuit courts of Washington county.

The defendant Gray in his answer admits that the allegations of the bills so far as they are verified by the exhibits filed are true. He denies that there is a judgment against him valid and binding in law, or that there is a lien upon his land which can be enforced by the court. He denies that the judgment, if there be one, can only be made by a sale of his real estate. He asserts that the rents and profits of the land will pay the judgment within five years.

Preston in his answer denies that there is any such judgment against him as that named in the bill, or any judgment whatever against him in favor of complainants.

The cause came on to be heard upon the bill and answers and exhibits filed, and the court overruling the demurrer, decreed that the plaintiffs recover of the defendants Cuthbert Owens, John S. Owens and R. E. Gray, the amount of their judgment, being \$1,304.47, with legal interest thereon from the 5th day of December, 1868, till paid, and

356 \$10 costs, subject to a credit of *\$81.50, 2nd August, 1869, \$650, July 30, 1870, and \$76.55, July 17th, 1871. And it was further decreed (parties being willing to waive order of reference to a commissioner to ascertain the rents and profits of the land), that unless the defendants, should pay within thirty days, the amount of said judgment with interest and costs, a commissioner appointed for the purpose should rent out the land of the defendant Gray for a time sufficient not exceeding five years, to pay said debt interest and costs.

From this decree the defendants, Preston and Gray, applied for an appeal; which was awarded by one of the judges of this court.

The court is of opinion that as to Preston the bill ought to have been dismissed. The circuit court had declared in its judgment on the scire facias that Preston had never been served with process. This is taken as a conceded fact in the cause. The plaintiffs did not make him a party to their original bill, nor did they seek to hold him in any way responsible for the judgment recovered against his co-defendants. The judgment as to him was treated as a void judgment. He was made a party to the suit by the direc-

tion of the court, and against the protest of the plaintiffs. While it was proper on the filing of the amended bill that Preston should be made a party, as his interests might have been effected by the decrees of the court, yet it is plain that upon the hearing the bill ought to have been dismissed as to him, inasmuch as it was conclusively shown that the judgment, which was the foundation of the chancery suit, was a void judgment—no process ever having been served upon him. We think therefore the decree must be reformed so as to dismiss the suit as to Preston. But we do not think that this is such a reversal of the decree as entitles Preston to recover costs against Stuart and Palmer in

357 this court. *They were not seeking to hold Preston liable for their judgment, and only made him a party to the suit by the order of the court. There was no decree against Preston, either interlocutory or final, and non constat there ever would have been. His action thereof was premature in taking an appeal, and therefore he ought not to recover against Stuart and Palmer his costs on his appeal here. The decree will be so amended as to dismiss the suit as to the defendant Preston.

The court is further of opinion, that with the exception above stated, there is no error in the decree of the circuit court.

The judgment against Gray was a valid judgment. He was served with process and a judgment was regularly obtained against him as one of the endorers of the negotiable note to Stuart & Palmer. There was no writ of error to that judgment, and it stands unreversed to this day, and is a subsisting lien upon his real estate. The proceedings upon the scire facias to revive that judgment and the action of the court thereon did not affect the validity of the original judgment. The action of the court was simply to dismiss the scire facias upon the ground of a variance between the description of the judgments recited in the writ and the judgments offered in evidence. Certainly this did not invalidate the judgment nor discharge its lien upon the lands of Gray. But if it could have had that effect, it is too late to raise that question. It cannot be raised in a collateral proceeding. It being a judgment of a court of competent jurisdiction, and obtained after due service of process, and standing unreversed it cannot be assailed in another court. The judgment of a court having jurisdiction of the parties and the subject matter, until reversed upon writ of error to an appellate court.

358 must be accepted *always and everywhere as final adjudication of the questions between the parties to the suit.

Want of jurisdiction or fraud in the procurement of a judgment may be shown in any case, and when established will in any court invalidate the judgment; but nothing else will, when relied upon in another suit, which brings into question collaterally the judgment of a court of competent jurisdiction. *Lancaster v. Wilson*, 27 Gratt. 624, and cases there cited.

It is earnestly urged, however, by the

learned counsel for the appellants, that the judgment being a joint judgment, against Gray, Heiskell and Preston, and the action being a joint action against all, and the judgment against Preston being declared void, that therefore the judgment against Heiskell and Gray is also invalid.

It is true that at common law when the action is joint, whatever operates as a discharge of one joint obligor or promisor accrues to the benefit of all, and must discharge all, unless the matter pleaded is personal in discharge of one, such as bankruptcy, infancy, &c. And where, too, a judgment is erroneous as to one and is reversed as to one, when the judgment is joint, it must be reversed as to all. Execution must issue against all or none. This is undoubtedly the common law rule. As to how far or whether at all, this rule has been changed by statute it is not necessary to determine in this case. The judgment against Preston was not an erroneous judgment; but it was a void judgment. There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter

359 may be assailed *in any court anywhere, whenever any claim is made or rights asserted under it.

In the case before us the judgment against Preston was a void judgment, a mere nullity. It is conceded that no process was ever served upon him, and that he had no notice of any proceedings against him before judgment was obtained. So far as Preston was concerned the court had no jurisdiction, and the judgment was void in toto; must be so regarded even in a collateral proceeding. As was said in *Underwood v. McVeigh*, 23 Gratt. 409: "It lies at the very foundation of justice that every person who is to be affected by an adjudication should have an opportunity of being heard in defence both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court or elsewhere, when it has been pronounced ex parte, and without opportunity of defence. A tribunal which decides without hearing the defendant or giving him an opportunity to be heard, cannot claim for its decree or judgment the weight of a judicial sentence." Such decree or judgment is a mere nullity, void in toto, and is no more effective than if it had never been pronounced. See also *Fairfax v. City of Alexandria*, 28 Gratt. 16; *Connolly v. Connolly*, 32 Gratt. 657; and *Lancaster v. Wilson* (supra).

Therefore it follows that the defendant Preston never having had notice, and in fact never being before the court, the judgment entered against him is no judgment at all, and he must be regarded as out of the case, and the joint judgment against him, Heiskell and Gray, must be regarded as only a judgment against Gray and Heiskell.

In this view of the case it is plain that the rule of the common law invoked by the appellant's counsel, has no application to this case.

360 *Upon the whole case we are of opinion that there is no error (except in not dismissing the bill as to Preston) in the decree of the circuit court, and that the same be amended in this respect and affirmed. The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said circuit court ought to have dismissed the plaintiff's bill as to Preston; and this court proceeding to reform and amend the decree in this respect, it is ordered that said bill be dismissed as to him; but without costs in this court.

It is further ordered that the said decree be further amended, so that the amount decreed by the circuit court, shall bear interest from the 5th of April, 1861, instead of the 5th day of December, 1868. And it is further decreed and ordered that the said decree of the said circuit court, amended in the manner herein indicated, be and the same is affirmed.

Decree amended and affirmed.

361 *Sage & als. v. Dickinson & als.

July Term, 1880, Wytheville.

*Absent Moncure, P.**

A judgment is obtained in 1870 on a contract entered into prior to the present Constitution of Virginia, and in the same year an execution issued thereon, placed in the hands of the deputy sheriff and levied on property of the judgment debtor, who gives a forthcoming bond; and has the property forthcoming, on the day and place of sale. The debtor then claims the property as exempt under the homestead provision of the Constitution and statute of Virginia; and the deputy sheriff releases the property to him, without requiring an indemnifying bond of the creditor, or even notifying him of the claim of homestead set up by the debtor. In a suit by the creditor against the sheriff and his sureties to recover the value of the property lost by the conduct of the deputy—**Held:**

1. Sheriff—Surrender of Property Levied on—Failure to Require Indemnifying Bond—Liability.—The sheriff and his sureties are liable.

2. Case Distinguished.—The case distinguished from *Huffman v. Lefell's adm'r*, 32 Gratt. 41.

3. Executions—Surrender of Property Seized under—Liability of Officer.—When an officer surrenders property he has seized under execution, he does it at his peril, and the burden of establishing that it is not liable to levy is on him.

4. Same—Same—Same—Action to Enforce—Waiver—Limitation.—The plaintiff in the judgment, after the sheriff's return on the execution filed his bill in equity to subject the land of his debtor to satisfy his debt and having in 1875 exhausted this fund, he then in 1876 instituted his

action against the sheriff and his sureties to recover the balance. **Held:**

362 *1st. The delay in bringing the action is not a waiver of his action against the sheriff.

2d. The liability of the sheriff and his sureties being fixed, it cannot be affected by any delay short of the statutory period of limitation.

This was an action at law in the circuit court of Lee county brought in 1876 by William B. Dickinson (suing by the Commonwealth of Virginia), against William W. Sage, sheriff of Lee county, and his sureties in his official bond. William B. Dickinson had recovered a judgment against John D. Sims in May, 1870, for \$5,320, with interest and costs, on a contract entered into prior to the adoption of the present Constitution of Virginia, containing the homestead exemption. In June, 1870, he sued out an execution of fieri facias on this judgment, which went into the hands of Daniel S. Dickinson, deputy for W. W. Sage, and he levied it on the property of the judgment debtor, who gave a forthcoming bond; and the property was delivered at the time and place of sale. Sims then claimed the property as exempted under the homestead provision of the Constitution, and statute of Virginia. Commissioners were then appointed to value the property, and they having valued it less than \$2,000, the deputy declined to proceed to sell it and left it with Sims; not having required an indemnifying bond; or so far as it appears not having given any notice to the plaintiff in the execution. His return upon the execution after setting out the property levied on, and that a forthcoming bond was taken, concludes—"Whereupon the defendant John D. Sims, filed his homestead deed, and commissioners were appointed to value his property, and nothing was left upon which this fi fa could act."

William B. Dickinson then proceeded to subject the real estate of Sims to the payment of his judgment; *and a balance still remaining after the land had been exhausted he brought this suit against the sheriff and his sureties to hold them liable for the value of the property released by the deputy.

The only question made in the circuit court was, whether the deputy sheriff was liable for releasing the property upon which he had levied the execution. And a jury being waived the court rendered a judgment in favor of the plaintiff for \$700.35, with interest from the 1st of December, 1870, and his costs. And thereupon the defendants excepted, and applied to a judge of this court, for a writ of error and supersedeas; which was awarded.

P. Hagan, for the appellants.

Campbell & Trigg and Harrison, for the appellees.

STAPLES, J., delivered the opinion of the court.

In this case the deputy sheriff levied the execution upon the effects of the debtor, a forthcoming bond was given, and the property subsequently delivered at the time and place appointed for the sale. Thereupon the

*Judge Moncure was compelled by ill health to leave the court, and did not sit in any subsequent case decided at Wytheville.

debtor claimed the benefit of the homestead exemption; the deputy sheriff surrendered the property to him, and returned the execution to the office with the following endorsement: "Executed by levying on eight head of horses, fifteen head of cattle, eighty head of hogs including pigs, twenty head of sheep, one stack of wheat, thirty bushels of wheat, four stacks of wheat, three hundred dozen oats; delivery bond taken." Whereupon the defendant John D. Sims filed his homestead deed; commissioners were appointed to value his property, and nothing was left upon which this could act. This was in September, 1870. The present **364** action was *brought in 1876, to hold the sheriff liable for an alleged default of his deputy in failing to sell the property embraced in the levy.

Two facts are conceded: First, that the debt was contracted prior to the adoption of the present Constitution; and therefore as to that debt, the debtor was not entitled to the homestead exemption. Secondly, that the deputy sheriff abandoned the levy, and surrendered the property without demanding an indemnifying bond, and without even informing the plaintiff of the claim of homestead and the surrender of the property to the defendant. In this respect the case is very different from that of *Huffman v. Lef-fel's ex'or*, reported in 32 Gratt. 41. In that case where the claim of homestead was made, the deputy sheriff informed the creditor of the fact, and required an indemnifying bond to be given—which was not done; and then the officer refused to proceed with the levy and sale. It was held by the circuit judge that even this state of facts did not release the sheriff from liability, because the constitutional provision exempting property as against antecedent debts is null and void; and there was no such doubt with respect to the liability of the debtor's effects to levy and sale as warranted the sheriff in demanding indemnity. And this court had at first some difficulty in reversing the judgment. It was, however, finally decided, that the unsettled state of the law with respect to the validity of these exemptions as applied to antecedent debts, the great diversity of opinion on that subject, among judges and members of the bar, in this and other states, until the adjudication by this court and the supreme court of the United States, justified the sheriff in demanding an indemnifying bond, and in refusing to proceed with the levy upon the refusal of the creditor to give the bond. But a reference to the opinion

365 of the court in *that case as delivered by Judge Burks, will show that the exemption of the sheriff from liability was placed almost exclusively upon the ground that the creditor had been requested, and had refused to give the indemnity. Judge Burks said—"There could be no doubt that the sheriff is liable to the relator for the full amount of the execution unless he has been excused from making seizure and sale of the property by the failure or refusal of the plaintiff in the execution to give the indemnifying bond which was required of him."

This rule thus laid down is decisive of the present case unless it is now to be abandoned. We see no reason for so doing. When an officer deliberately surrenders property he has seized under execution he does so at his peril, unless he can show it was not justly liable to levy. In every such case he takes upon himself the burden of establishing the exemption. *Herman on Executions*, § 412; *Freeman on Executions*, § 254. In the condition of things existing in this State before the courts had finally passed upon the constitutionality of the homestead exemption as applied to pre-existing debts, no sheriff or other officer was under any obligation to take upon himself the responsibility of disregarding the exemption. Neither was he authorized, on the other hand, to assume the power of deciding that these exemptions were valid. The law afforded him an easy remedy for avoiding every difficulty, and of relieving himself of all liability on the subject, and if he did not choose to avail himself of it the loss must fall upon him, and not upon the creditor. Code of 1873, ch. 149, § 4.

That the deputy did have doubts in the present case is obvious from the fact that when the exemption was claimed he declared he would not sell the property till he could see further. What further enquiries he **366** *made, if any, does not appear. It is not pretended that he ever notified the creditor of the claim of homestead, or of his surrender of the property. Why he did not do so, we are not informed. His counsel suggests that the creditor resided in a different county. If this be so, it would constitute no valid excuse. On the contrary, the fact of such non-residence would seem to make it the more important to inform the creditor, that he might take the necessary steps for protecting himself.

The real difficulty in this case grows out of the long delay of the plaintiff in bringing this suit. From which it has been argued with some force, that he must have been content with the action of the deputy sheriff in refusing to sell; and the present action is an after thought, due to the decision of this court in the "homestead cases." It seems, however, the decision in the homestead cases was made in 1872; and as already stated, this suit was instituted not till 1876, so that there must have been some other cause for the delay. That cause is found in the fact that the plaintiff some time after the abandonment of the levy by the deputy, filed his bill in equity to subject the debtor's real estate to his judgment. That suit was greatly delayed by an appeal to this court by some of the parties. Finally a decree of sale was obtained in 1875 or 1876; but the plaintiff only realized part of his debt—and then, this action was commenced. In this connection it has been very properly urged by appellee's counsel, that the bill in equity was in aid of the sheriff: that the creditor instead of embarking in a doubtful controversy with the sheriff, very properly first exhausted all his remedies against his debtor; and it was only after this was done he has attempted to hold the officer liable for the default of his

deputy: and furthermore that liability being fixed, cannot be affected by any mere delay in bringing the action short of the statutory period of limitation.

In addition to all this it may be observed that the parties went to trial upon a single issue: the defendants on one side, alleging that the deputy sheriff was justified in surrendering the property to the debtor, because it was exempt under the Constitution and laws of the State; and the plaintiff alleging that his debt was contracted before the Constitution and laws were adopted, and therefore the pretended exemption was invalid. This was the single point in controversy. Neither in the pleading nor in the evidence is there anything said with reference to the supposed ratification or acquiescence on the part of the plaintiff in the proceedings of the deputy sheriff. Had the point been directly presented in the court below as matter of defence, it is impossible to say the plaintiff could not successfully have answered it. At all events this court could not undertake to say that the judgment is erroneous upon a mere matter of argument in this court based upon a supposed state of facts which might be affected by extraneous evidence. For these reasons we are of opinion the judgment of the circuit court must be affirmed.

Judgment affirmed.

368 *Peters v. The Auditor.

July Term, 1880, Wytheville.

Absent Moncure, P. and Anderson, J.

1. **Commissioners of Revenue—Statute Construed.**—The act of March 9, 1880, entitled "An act to provide for the election of one commissioner of the revenue for the county of Giles," is only prospective in its operation, and does not affect the authority of the commissioner of the revenue district to which that act relates, to act as commissioner of the revenue for that district during the time for which he was elected.

2. **Same—Mandamus to Compel Delivery of Books by Auditor.**—If the auditor of public accounts declines to deliver to the commissioner copies of the land and property books for his district, this court will compel him by *mandamus*.

This was an application by John D. Peters, claiming to be commissioner of the revenue for district No. 1. in Giles county for a writ of mandamus to require John E. Massey, auditor of public accounts, to furnish him with four copies of the land and property books of his said districts. The case is fully stated in the opinion of the court delivered by Judge Christian.

Williams & Easeley, for the petitioner.

The Attorney-General, for the auditor.

CHRISTIAN, J., delivered the opinion of the court.

*See 1 Min. Inst. (4th Ed.) 27, 72; 4 Min. Inst. (2nd Ed.) 248, 358, 963.

This is an application to this court invoking its original jurisdiction by way of *mandamus*.

369 *The petition is filed by John D. Peters, a commissioner of the revenue for the county of Giles.

Upon the filing of the petition in this court, a rule was awarded against John E. Massey, auditor of public accounts, who answered the rule, to which answer the petitioner tendered a demurrer. The case, is before us therefore upon the petition, answer, and demurrer. From these the following facts are disclosed, and upon these facts, together with the statute relied upon, in the answer of the auditor the decision of this court must turn.

On the 31st March, 1873, a joint resolution was adopted by the general assembly proposing certain amendments to the Constitution, which were afterwards adopted, by a vote of the people. Among these amendments was the following "Article VII.—County Organization." "There shall be elected by the qualified voters of the county, one sheriff, one Commonwealth's attorney, * * * one county clerk * * * and so many commissioners of the revenue as may be provided by law." Sess. Acts 1872-3, p. 274-5.

By an act approved March 16th, 1874, entitled "an act prescribing general provisions in relation to commissioners of the revenue, and the assessment of taxation." &c., it was provided that there shall be four commissioners of the revenue for certain counties (naming them) and two commissioners for certain counties (naming them) and one commissioner for every other county to be elected by the qualified voters thereof. Among the counties for which two commissioners are prescribed is the county of Giles. This act further provides that the term of office of the commissioners of the revenue, shall commence on the 1st day of July next after their election, and continue for four years from the day when their terms of office respectively commenced, unless sooner removed. The act further provides, that in those counties in which there may be more than one commissioner, each shall be for a certain district, the bounds whereof shall be laid off and described by an order of the county court; * * * and makes it the duty of the county judge of such counties to lay off and provide such districts.

Under the provisions of this act the county of Giles was divided by the county judge into two districts, defined by certain boundaries in its order, as district No. 1, and district No. 2.

At the general election held by the voters of Giles county on the fourth Thursday in May, 1879, petitioner John D. Peters was duly elected commissioner of the revenue for district No. 1, for the term of four years, from and after 1st July, 1879. He qualified and gave bond as commissioner of the revenue for district, No. 1, in the mode prescribed by law. At the same general election in May, 1879, one Floyd Williams was elected commissioner of the revenue for district No.

2, of Giles county, and also qualified by giving the bond required by law as such commissioner of district No. 2.

On the 9th March, 1880, the following act was passed:

"1. Be it enacted by the general assembly, That the district known as district No. 1, for the purpose of electing a commissioner of the revenue lying west of New river in Giles county is hereby abolished, and hereafter said county shall have but one commissioner of the revenue and on the fourth Thursday in May, 1883, and every four years thereafter, there shall be elected by the qualified voters of said county, one commissioner of the revenue for said county, whose term shall commence on the 1st July thereafter.

371 *2. All acts and parts of acts in conflict with this act are hereby repealed.

"3. This act shall be in force from its passage."

On the 4th May, 1880, the auditor of public accounts, sent to the said John D. Peters, commissioner of the revenue for district No. 1, Giles county, the following communication by postal card addressed to John D. Peters, Esq., late commissioner of the revenue district No. 1, Pearisburg, Giles county, Virginia:

"District No. 1, Giles Co., John D. Peters late com'r of rev., was abolished by act of March 9th, 1880. Through oversight, the blank books and forms were sent to you. Please deliver them to Floyd S. Williams, who will assess the county this year. The binder mailed them through mistake.

"Yours resp'y,

"Jno. E. Massey,
"Aud. P. A."

On the 19th May the petitioner John D. Peters addressed to the auditor the following note:

"D'r Sir: You will please send me as soon as possible four property books and four land books, so that I will be able to complete my work in good time.

"(Signed) Jno. D. Peters."

To this communication the auditor responded refusing to send to petitioner the four land books and property books demanded, and informing him that upon consultation with the attorney-general, he had concluded that the office of commissioner of the revenue for the district No. 1 was no

372 longer in existence; that the legislature had a right to abolish and did abolish that office by the act of March 9, 1880, above referred to.

Thereupon John D. Peters applied to this court for a rule against John E. Massey, auditor of public accounts, to show cause why a writ of mandamus should not be awarded compelling the auditor to deliver to him the land and property books demanded. The rule was accordingly awarded.

To that rule the auditor filed his answer, with which he exhibits a copy of the act of March 9, 1880, and insists that by that act the revenue district of Giles county of and for which the petitioner was commissioner,

known as district No. 1, was abolished, and that said act by its terms took effect from its passage. That the books demanded by petitioner were for the purpose of commencing work after his said office was abolished: that the legislature had the right to prescribe the number of commissioners for every county or corporation, and has the right to change the number from time to time as the interest of the State may demand. That the legislature having abolished the office of said petitioner, respondent considered it his duty to withhold the official books demanded.

To this answer the petitioner demurred; and the question we have to determine, is made by the petition, answer and demurrer.

Our decision must turn upon the true construction to be given to the act of March 9th, 1880, already quoted.

Did the legislature intend to abolish, and did they in fact abolish, the office of commissioner of the revenue for district No. 1 of Giles county?

Undoubtedly the legislature has the power to prescribe the number of commissioners of the revenue for each county and corporation in the State. Whether after having prescribed the number, and after the election

373 *and qualification of the prescribed number, the legislature by abolishing the district can abolish the office, created by the Constitution, before the term fixed expires, is a very grave question, and one which we are not called upon to decide in this case. The real question before us depends upon whether the act of March 9th, 1880, is prospective or retrospective in its operation. The act itself is not clear and unambiguous in its terms. It was manifestly carelessly and inartificially drawn. It does not on its face, and in unmistakable terms, speak its meaning, but that meaning can only be ascertained by the application of fixed rules of construction. The title of an act is often, but not always, a sure guide to the true meaning and intent of the legislature, especially in this State, where the Constitution in terms requires that the object of the law shall be expressed in its title. Looking to the title of the act under consideration, we find it to be "an act to provide for the election of one commissioner of the revenue for the county of Giles."

The body of the act refers to the election of one commissioner instead of two. It does not pretend to abolish the office of commissioner elected for district No. 1; but simply provides that "the district known as district No. 1, for the purpose of electing a commissioner of the revenue, &c., is hereby abolished." And then declares that "hereafter said county shall have but one commissioner, and on the fourth Thursday in May, 1883, and every four years thereafter, there shall be elected by the qualified voters of said county one commissioner of the revenue for said county, whose term shall commence on the 1st July thereafter."

Now must this statute be construed so as to make it retrospective, and thus abolish an office already created, and in existence by a vote of the people, or shall we

374 *give to it a construction which makes it prospective in its operation?

There is no doubt that the legislature has the power to enact retrospective laws, provided those laws are not in conflict with the Federal or State Constitutions, are not ex post facto in their nature or operation, do not impair the obligation of contracts, nor disturb vested rights.

While this power is conceded, its exercise is universally admitted to be liable to great abuse; and some of the States deny the power to their legislatures by express constitutional amendments. Legislation generally looks to the future; and in seeking the legislative intent Mr. Cooley lays it down as a sound rule of construction—"that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley Con. Lim. 370 (marg.) and cases cited.

It was said by Chancellor Walworth "to be a general rule in the construction of statutes, that they are not to have a retroactive effect so as to impair previously acquired rights. And courts of justice will apply new statutes to future cases which may arise, unless there is something in the nature of the new provisions adopted by the legislature, or in the language of such new statutes which show that they were intended to have a retrospective operation." See Pollen's Dwar. 162, 166; Sedgwick 161, 172; see also Judge Burks' opinion in Price, ex'or, v. Harrison's ex'or, 31 Gratt. 114, 119-20; and Judge Staples' opinion in Town of Danville v. Pace, 25 Gratt. 1, 19.

According to the rules of construction established by these authorities, I am constrained to hold and declare that the act of March 9, 1880, was prospective in its effect and operation, and did not have the effect to remove the petitioner John D. Peters from his office *of commissioner of the revenue for district No. 1, of Giles county.

But there is another rule of construction of statutes recognized by this court, and by the supreme court of the United States, which applies with potent effect, to the proper construction of the act before us. That rule is stated thus by an eminent chancellor of New York, adopted by the supreme court of the United States, as follows: "A construction of a statute which will necessarily be productive of practical inconvenience to the community, will be rejected, unless the language of the law-giver is so plain as not to admit of a different construction."

Now if the construction contended for by the auditor and attorney-general be correct, and the act of March 9, 1880, in fact abolished the office of commissioner of the revenue for district No. 1, in Giles county, the question recurs, Who is to discharge the duties of the commissioner in district No. 1? Can the commissioner of district No. 2 discharge those duties?

He was elected commissioner of the revenue for district No. 2. He qualified and gave bond for the faithful discharge of his

duties as commissioner of the revenue for district No. 2. He cannot transfer his duties and obligations to another district for which he was not elected, and for which he never qualified or gave bond. The result of the construction of the act of March 9th, 1880, as interpreted by the auditor, would be, that in one-half of the county of Giles, no commissioner of the revenue elected by the people, could act; but that there would be assigned to another commissioner, elected by the people of another district, the duties which he was never elected to perform, and never gave bond for the performance of any such obligation.

376 *Upon the whole case, I am of opinion that the act of March 9th, 1880, was not intended to abolish the office of commissioner of the revenue for district No. 1 of Giles county, but that said act was prospective in its operation, and only intended to declare that at the next general election there should be one commissioner of the revenue instead of two elected by the people.

The result of these views and the principals of construction herein declared is, that a peremptory mandamus will be awarded by this court to compel John E. Massey, auditor of public accounts, to furnish to the petitioner John D. Peters the land and property books which he demanded and to which he is entitled.

The clerk of this court will therefore issue a peremptory mandamus.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the questions of law presented by the defendant's return to the rule heretofore awarded in the cause, and the plaintiff's demurrer to said return, together with the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the plaintiff is entitled to a writ of mandamus in the premises: Therefore it is considered that a peremptory mandamus be, and the same is hereby awarded the plaintiff to be directed to the said Hon. John E. Massey, auditor of public accounts, requiring him with all proper dispatch to furnish the plaintiff, as commissioner of the revenue for district No. 1 of Giles county, four blank land books, and four blank personal property books, as in the plaintiff's petition mentioned, to enable him to complete the discharge of the duties of his said office for the current year.

Mandamus ordered.

677 *Frank & Adler v. Lilienfeld & als.

July Term, 1880, Wytheville.

Absent *honore*, P.

1. A husband, who was a merchant, wishing to purchase a certain small lot of goods from another merchant, obtained from his wife, who had a separate estate, to secure the payment of the purchase money, an indorsement of a printed form of a negotiable note. The date, time and place of payment, amount and name of payee, were all left blank at the time of the delivery of said endorsed

blank note by the wife to the husband. The husband failed to make this purchase, and some time thereafter, and when the wife says she thought the blank endorsed paper had been destroyed, he went to another city and purchased from other parties a much larger amount of goods than was contemplated at the time of the endorsement. These last parties names were then inserted by their clerk as payees, and the note filled up as to amount, date, time, place of payment, &c., to suit the purchase as made from them—they being ignorant of the purpose for which the note was first signed by the wife and delivered to the husband. The note was protested for non-payment. On a bill filed by the payees to subject the separate estate of the wife to its payment—**Held:**

1. Negotiable Notes—Alteration by Husband of Blank Note Endorsed by Wife—Effect.*—The wife is bound by the endorsement. The authority implied by a signature to a blank note, and the credit given, are so extensive, that the party so signing will be bound, although the holder was only authorized to use it for one purpose and has perverted it to another. But the holder cannot alter the material terms of the instrument by erasing what is written or printed as part of the same; or pervert its scope and meaning by filling blanks and stipulations repugnant to what is clearly expressed in the note before it was delivered by the endorser in blank.

378 *2. Same—Endorsement in Blank—Holder's Rights—Burden of Proof.—

To invalidate the title of the holder of a negotiable instrument, endorsed in blank, acquired in due course of trade, and before maturity, it is not sufficient to show circumstances in the acquisition of the note affecting the holder with mere suspicion, or that he was guilty of gross negligence; but it is necessary to show that he was guilty of fraud. This is not proved against the holders of the note in this case.

3. Same—Liability of One Endorsing Blank Note Where Another Is Made Payee.—Instead of inserting the wife's name as payee in the note, the holders put in their own names. This is merely matter of form, does not make the wife a second endorser to the holders, or affect in any way her liability to them on said note.

II. The property settled on the wife belonged to her before her marriage, and consisted of realty and personalty—the personalty being her interest in a former husband's stock of goods, debts due, &c., worth ten thousand dollars. The provisions of the deed conferring on the wife the amplest power over the property, is followed by a clause which directs that the trustee "shall sell, convey, transfer and deliver all or any portion of the property, estate or effects conveyed, and the rents, issues and profits thereof, to such person or persons as the wife may direct by a writing, signed by her and attested by two witnesses." **Held:**

1. Wife's Separate Estate—Powers as to.†
—The wife must be regarded in equity as the ab-

solute owner, with all the powers of a *feme sole* over them, of the personal property and rents and profits of the realty conveyed by the deed with power to dispose of the *corpus* of the realty by her sole act in the mode prescribed by the deed, or, if that is not exclusive, by the joint deed of herself and her husband.

2. Same—Liability of Corpus Where There Is No Specific Lien.‡—The separate estate of the wife is liable to the payment of the debt, but the engagement of the wife being a *general* one, and not a *specific lien* (which must be created on the realty in the mode prescribed for its absolute sale), the *personal* property and the *rents and profits* of the realty only are liable to be subjected to its payments.

III. Same—Action to Subject—Wife Is Competent Witness.§—Where the object of a bill is merely to subject the separate estate of a wife, and

374, and cases cited; *Christian & Gunn v. Keen*, 80 Va. 369; *Muller v. Bayly*, 21 Gratt. 521; *Price v. Planters' Nat. Bank*, 92 Va. 468; *Woodson v. Perkins*, 5 Gratt. 345; *Penn v. Whitehead*, 17 Gratt. 503; *Darnall v. Smith*, 26 Gratt. 878; *Leake v. Benson*, 29 Gratt. 153; *Justis v. English*, 30 Gratt. 565; *Greensboro' Bank v. Chambers*, 30 Gratt. 202; *Finch v. Marks*, 76 Va. 207; *Burnett v. Hawpe*, 25 Gratt. 481; *Sages v. Lee*, 20 W. Va. 584; *Weinberg v. Rempe*, 15 W. Va. 829; *Radford v. Carwile*, 13 W. Va. 573; *Huges v. Hamilton*, 19 W. Va. 366.

Same—Presumption of Intent to Charge.

—Where a *feme covert*, having a separate estate, contracts a debt, either as principal or surety, she is presumed, in the absence of evidence to the contrary, to intend a charge on her separate estate, though no reference is made thereto when the debt is contracted. *Jones v. Degge*, 84 Va. 685; *Crockett v. Doriot*, 85 Va. 240; 1 Min. Inst. (4th Ed.) 355.

The leading case is distinguished in *McDonald et al. v. Hurst*, *Purnell & Co.*, 86 Va. 885.

Same—Restraint on Alienation.—That the intent to restrain alienation must be clear, in order that such restraint may be imposed, see *Christian & Gunn v. Keen*, 80 Va. 369 and cases cited; *Garland v. Pamplin*, 32 Gratt. 305 and note; *Ropp v. Minor*, 33 Gratt. 97 and note; 1 Min. Inst. (4th Ed.) 356; *Green v. Claiborne*, 83 Va. 386; *Chapman v. Price*, 83 Va. 392; *Lee v. Bank of U. S.*, 9 Leigh 200; *Bain & Bro. v. Buff's Adm'r*, 76 Va. 371; *Averett, Tr., v. Lipscombe*, 76 Va. 404.

Same—Power to Dispose of Corpus of Real Estate.—As to the power of the wife to dispose of the *corpus* of the separate real estate in the mode prescribed by the instrument creating it, see *Freeman v. Eache*, 79 Va. 43 and cases cited; *McChesney v. Brown's Heirs*, 25 Gratt. 393; *Bailey v. Hill*, 77 Va. 492.

§Same—Liability of Corpus of Real Estate.—That the *corpus* of the real estate is not liable in the absence of a specific lien, see *French v. Waterman*, 79 Va. 617, approving the leading case; *Hogg v. Dower (W. Va.)*, 14 S. E. Rep. 995.

The principal case was reviewed and overruled by *Price v. Planters' Nat. Bank*, 92 Va. 468.

See on this question Code of 1887, § 2295, and Acts 1895-96, p. 486.

§Witnesses—Husband and Wife—Competency.—Leading case distinguished in *N. & W. R. Co. v. Prindle*, 82 Va. 122; *Scott et al. v. Rowland*, 82 Va. 484; *Jones v. Degge*, 84 Va. 685; *Hoge v. Turner*, 96 Va. 630.

***Negotiable Notes—Endorsement of Blank Note.**—See 3 Min. Inst. (2nd Ed.) 434; 4 Am. & Eng. Enc. of Law 266, 269. The principal case is cited in *Lafferty v. Lafferty*, 42 W. Va. 789.

†Wife's Separate Estate—Power to Encumber.—That the power of the wife to bind her separate estate for debts is an incident of the *jus disponendi*, see *Bain & Bro. v. Buff's Adm'r*, 76 Va.

her husband is made a formal party only, she is a competent witness in the case, and the plaintiffs are also. *And an answer filed by the husband, although responsive to the bill, cannot be used as evidence for the wife and against the plaintiffs, whilst that filed by her can be so used, so far as its statements are responsive, and based on facts *within her own knowledge*.

This case was heard in Richmond but was decided at Wytheville. It was a suit in equity in the chancery court of the city of Richmond brought by Frank & Adler, partners, to subject the separate estate of Janette Lilienfeld to the payment of a negotiable note for \$628.66 made by her husband S. B. Lilienfeld and which the plaintiffs claimed was endorsed by her for his accommodation. The bill was dismissed by the court below; and thereupon Frank & Adler applied to a judge of this court for an appeal; which was awarded. The case is stated by Judge Burks in his opinion.

John S. Wise, for the appellants.

E. Y. Cannon, for the appellees.

BURKS, J., delivered the opinion of the court.

Before proceeding to the consideration of this case on its merits, several preliminary matters must be disposed of.

1. The exception to the deposition of Mrs. Lilienfeld on the ground of her alleged incompetency as a witness.

The rule at common law that husband and wife are not allowed to testify either for or against each other is not altered, but expressly retained by our statute removing the disqualification of witnesses on account of interest. Code of 1873, ch. 172, §§ 21, 22.

But Mrs. Lilienfeld did not dispose for her husband, nor against *him. She disposed wholly in her own behalf, and her evidence does not, and cannot effect him. It is true, he is a party to the suit, but for the sake of conformity merely. The sole object of the bill is to reach her separate estate. He has no legal interest in the subject matter. No relief is sought, nor could any decree be rendered against him in the cause. He does not dispute his personal liability on the note in controversy, and the remedy at law as to him is complete. The exception must be overruled.

2. It follows, that the exception to the depositions of the complainants, Frank & Adler, must also be overruled, as they are not incompetent to testify unless Mrs. Lilienfeld be so.

3. The counsel of Mrs. Lilienfeld claims that the answer of her husband to the bill is responsive, and therefore evidence for her against the complainants.

The refutation of this pretention is furnished by the facts already stated. The husband, although made a party for the sake of conformity, has no legal interest in the cause, and no discovery from him nor relief against him is asked; nor upon the case stated in the pleadings and made by the proofs could any personal decree be rendered

against him. Besides, the interest of the wife is adverse to her husband. They filed separate answers, and the separate answer of one defendant cannot be used as evidence in the cause either for or against a co-defendant. Such is the general rule. There are some exceptions in cases of joint interest, privity, and the like, but this case does not fall within any of those exceptions. On the contrary, the relation of the parties, (that of husband and wife), with an adverse interest in the wife, would seem to render the application of the general rule peculiarly proper. Whether a bill against several defendants,

381 having no interest in common, and without privity of *any sort, may not be so framed, in relation to the discovery and relief prayed, as to render the answer of one defendant, which is responsive to the bill and unfavorable to the complainant, evidence against the latter in favor of a co-defendant, is a question not presented by the case we now have to deal with, and therefore need not be determined. 3 Greenleaf's Ev., § 283 and notes; 1 Dan. Ch. Prac. (4th Per. Ed.), 841 note 7; Id. 843, note 7; Pettit v. Jennings and others, 2 Rob. R. (Va.) 676; Morris v. Nixon, 1 How. U. S. R. 118, 126, 127.

While the husband's answer is without any weight as proof in the cause, the answer of the wife is admissible as evidence in her own behalf and against the complainants, so far as its statements are responsive to the bill and based on facts within her own knowledge. Clark's ex'or v. Van Riemsdyk, 9 Cranch R. 153, 160, 161.

From the pleadings and proofs in the record, we have substantially the following case:

Lilienfeld (the husband), proposed to purchase from one Bloomberg, a merchant in Richmond, a lot of goods, and to secure the payment of the price, his wife, who had a separate estate, agreed to endorse her husband's note to be delivered to Bloomberg. She says, that her husband represented to her, that the amount of the purchase was some forty or fifty dollars. According to the testimony of other witnesses the actual amount was much larger. But whatever the amount was supposed to be, she endorsed in blank and delivered to her husband for the purpose aforesaid, a printed form of a note with blanks left on the face for date, time and place of payment, amount, and name of payee, and without the signature, it seems, at that time of her husband as maker. The printed part would seem to indicate, that the note was intended to be negotiable.

382 *The blank for the name of the payee was followed by the words "or order without offset — dollars negotiable and payable." &c. Lilienfeld did not consummate the purchase of the goods from Bloomberg, and therefore did not use the note for the intended purpose. He kept it, and his wife says, she thought it had been destroyed. Some months afterwards, (the precise time is not disclosed by the record), Lilienfeld, who, it seems, was merchandizing at Weldon, North Carolina, went to Baltimore to

purchase goods. He bought goods of the complainants and of another firm to the amount, in the aggregate, of \$628.66, for which he gave to the complainants the note which had been endorsed by his wife as before stated, (which is the note in controversy in this case), they assuming payment to the other firm of the price of the goods bought of said firm. He signed the note as maker at the time it was delivered to the complainants, and their bookkeeper filled up the blanks. Completed the note is of the tenor following:

"Baltimore, Sept. 17th, 1875.

"\$628.66-100.

"Four months after date. I promise to pay to Frank & Adler, or order, without offset, six hundred and twenty-eight 66-100 dollars negotiable and payable at Planters National Bank, Richmond, Va., value received. No. 1,464. Due Jan'y 17-20, '76.
"S. B. Lilienfeld."

Endorsed:

"Janette Lilienfeld,
"Frank & Adler."

I have underscored (to be italicized) such of the words as were in the printed form.

383 In filling up, the *printed language was left as printed, unaltered in any way.

After the note had been thus completed and delivered to the complainants, they deposited it for collection in the bank at Richmond where it was payable, Mrs. Lilienfeld being a resident of that city. Not being paid at maturity, it was duly protested and notice of the dishonor given to the drawer and endorser.

There is evidence tending to show, that some two weeks after the note was protested, it was presented to Mrs. Lilienfeld in Baltimore by a clerk of the complainants, and that she promised to see to its payment after she returned home; but on this point the evidence is conflicting. Facts omitted in the statement already made will be noticed, as far as deemed material, in the proper connection, as this opinion proceeds.

The bill of the complainants was filed to subject the separate estate of Mrs. Lilienfeld to the payment of the note which has been described, and the case is here on an appeal allowed the complainants from a decree of the chancellor dismissing the bill at the hearing.

The correctness of the decree will be best tested by considering the several grounds on which it is attempted by the appellees to be supported, and the claim of the appellants to relief is resisted.

1. It is contended on behalf of Mrs. Lilienfeld, that the negotiation and transfer to the complainants of the uncompleted note endorsed by her in blank and delivered to her husband for a special purpose, passed no title to the complainants as against her, and conferred upon them no authority to complete the note so as to make it binding upon her or her estate; and that this is so, whether the complainants had notice or not, at the time of the transfer to them, of the purpose for which the note was endorsed. But it is **384** further contended, *that they did have such notice, and therefore were guilty of bad faith in the transaction.

The law is too well settled, adversely to the first branch of the proposition contended for, to admit of dispute. The following summary of the general principles applicable in such cases, is taken from Mr. Daniel's valuable Treatise on Negotiable Instruments: "Parties," says the author, "often lend their mercantile credit to others by signing their names to blank papers to be afterwards filled as bills of exchange or promissory notes written over their signatures as drawers or makers; or by signing their names in the appropriate manner to indicate that they design to bind themselves as acceptors or indorsers of the instrument which it is contemplated to complete upon such blank papers. And it is a settled principle of commercial law, that when such instruments are afterward completed by the holder of such blanks, to whom they are loaned, such parties become as absolutely bound as if they had signed them after their terms were written out; and further, that the presence of their names upon blanks purports an authority granted to the holder to fill them for any sum, and with any terms as to time, place and conditions of payment. And that although the party may prescribe limits to the holder, a bona fide transferee from him, ignorant of such limitation of authority, when he takes an instrument which has exceeded it, may recover upon it." 1 Daniel on Neg. Ins. (2d Ed.), § 142.

"The authority implied by a signature to a blank, and the credit granted, are so extensive, that the party so signing will be bound, though the holder was only authorized to use it for one purpose and has perverted it to another." Id. § 1443; see also § 843.

The supreme court of the United States, speaking through Mr. Justice Clifford, **385** in Bank of Pittsburgh v. *Neal & others, 22 How. U. S. R. 96, 108, said, "where a party to a negotiable note intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it." The same was said substantially by the same justice in Goodman v. Simonds, 20 How. U. S. R. 343, 361, and repeated in part in Angle v. N. W. Mutual Life Ins. Co., 92 U. S. (2 Otto), 331, with this addition: "But the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered."

In Orrick v. Colston, 7 Gratt. 189, it was

said by Judge Daniel (in whose opinion the other judges concurred), "It is well settled that a blank endorsement on a negotiable instrument, blank as to date or amount at the time of the endorsement, if made for the purpose of giving a credit to the drawer, is as effectual to bind the endorser for any amount with which the instrument may be filled up by the drawer, or an innocent holder for value, as if the instrument had been completed at the time of the endorsement."

In that case, a paper entirely blank on its face except as to the signatures of Starbucks & Forman, was *endorsed in blank by Colston and delivered to Starbucks for the purpose, it would seem, of renewing a note in bank, of which Starbucks & Forman were the makers and on which Colston was accommodation endorser. Starbucks fraudulently used this paper to effect a loan of money from Orrick, who, ignorant of the purpose for which the endorsement was made, took the paper in its incomplete state and advanced his money on the faith of it. He wrote a non-negotiable promissory note on the face of the paper over the signatures of Starbucks & Forman for the money advanced payable to himself and a guaranty for its payment on the back of the paper over the signature of Colston. It was held, that he had implied authority to do this, and was entitled to recover of Colston the amount of the note, treating him, at his option, either as joint maker or guarantor.

The principle on which the endorser of blank commercial paper is held liable was clearly and succinctly expressed by Lord Mansfield about a century ago in *Russell v. Langstaffe*, 2 Doug. R. 514. and is the basis of later adjudications on the same subject. The case is stated by Daniel, 1 Neg. Ins., § 142. A party had endorsed his name on five copper-plate checks, blank as to sums, dates, and times of payment, and Galley, the holder, filled them up as his own notes with different dates, sums, and times of payment. The endorser was held bound to the plaintiff who had discounted them; and Lord Mansfield said, "The endorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.' It does not lie in his mouth to say the endorsements were not regular."

In the case under consideration, the note at the time it was ordered was blank not only as to sums, date and time of payment, but also as to payee. The endorsement *was therefore in the nature of a general letter of credit addressed to any person who would give credit to the drawer for any amount. In legal effect, it was a proposition of the endorser to become bound as security for the payment of whatever sum should be advanced or credited to the drawer by any person whatsoever. When, therefore, the complainants gave the credit, the proposition was thereby accepted, and the contract between them and the endorser was complete.

It may be, and, if Mrs. Lilienfeld's statement is accepted as true, it is proved, that in this transaction her husband basely de-

ceived and defrauded her. But if the complainants are innocent, who should bear the consequences of the fraud?

The answer is furnished by the familiar maxim, of general application, and as sound in morals as it is in law, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Ashhurst, J., in *Lickbarrow & another v. Mason & others*, 2 T. R. 63, 70.

Mrs. Lilienfeld trusted her husband and put it in his power to defraud her, and to mislead the complainants. She entrusted him with a paper, bearing her engagement, for his own use and accommodation, which had the force and effect of a general letter of credit, and when acted on as such by the complainants, it can avail her nothing to say, that the authority implied by her endorsement was limited by the agreement between herself and her husband, unless the complainants had notice or knowledge of such agreement at the time the paper was transferred to them. In other words, she cannot be relieved of the consequences of her husband's fraud, unless it is

shown that the complainants participated *in that fraud; and it is insisted, that they did so participate.

It has been shown, that the answer of Lilienfeld (the husband) cannot be read as evidence in the cause. But if it could be so used, it is entitled, in my judgment, to but little weight. He shamelessly avows his own fraud in the transaction, but seeks to palliate it by the pretence that he was induced to negotiate the note to the complainants by their solicitations after they had been apprised by him of its origin and his lack of authority to make a valid transfer of it to them. This is a very improbable story. Its credibility is not strengthened by the history he gives of the note in question. The impression is sought to be made, that after he had failed in the use of the note with Bloomberg he thought it had been destroyed; for he says, "it was intended to be destroyed and he has no doubt his wife thought it was destroyed." According to his account, after he had purchased the goods of the complainants at their store in Baltimore, they desired him to give a note with an endorser, to which he replied he could not give any. They then stated, that they understood he had real estate in Richmond; to which he answered he had none, but that his wife owned some held by her trustee. "While this interview was going on" (in the language of the answer), "this respondent had occasion, in the counting-room of the complainants, to examine some papers which he had with him in his wallet, and among them, he found the note endorsed by his said wife in blank, above referred to, though he was not aware that he had said note at the time he went to the store of said complainants." It was this sudden but seasonable discovery in the "wallet" of the note theretofore "intended to be destroyed," that enabled him, by the persuasion of the complainants, to perpetrate upon his wife a fraud never before

*contemplated! Such an answer might

serve to cast discredit on the respondent, but could not be safely relied on for any other purpose.

On the other hand, the complainant Adler, who sold the goods, in his testimony details the negotiation and explains the whole transaction, so far as the complainants were concerned, in which it does not appear that he or they had any notice or knowledge of the alleged special purpose for which the endorsement was made, or that there was any want of good faith on their part. Lilienfeld was introduced to the complainants by his brother-in-law and by him recommended for credit, which was refused. He then offered the note with his wife's endorsement as security, representing that fearing he could not buy goods on credit without giving security, he had procured his wife to endorse the blank note, so that he might buy goods and fill up the note with the amount of the purchase. Upon inquiries made of others likely to know, the complainants were informed that Mrs. Lilienfeld had a separate estate, was wealthy, and her endorsement would be sufficient security for any amount of goods sold to her husband. Upon the information thus obtained and the representations aforesaid, the goods were sold and the note was taken as security for payment. The possession by the husband of a note partly blank with his wife's endorsement in blank was no indication to the complainants of a fraudulent purpose on his part. Such a circumstance was not unusual in mercantile transactions; and besides, his statement was plausible and had the semblance of truth. After some fluctuation in judicial decisions, English and American, the law seems now to be quite well settled, that to invalidate the title of the holder of a negotiable instrument (not absolutely void by statute law), endorsed in blank, and acquired for value, in due course of trade, and before maturity,

390 *it is not sufficient to show circumstances in the acquisition of the note affecting such holder with suspicion merely, or that he was guilty of ordinary negligence, or even gross negligence (the omission of that care which even the most inattentive and thoughtless men never fail to take of their own concerns), but it is necessary to show that he was guilty of mala fides—in plain language, of fraud. The cases are referred to in the latest works on commercial law. 1 Parsons' Notes and Bills 258 et seq.; 2 do. 269-279; 1 Daniel on Neg. Inst., ch. 24. See especially Goodman v. Harvey, 4 Ad. & El. 870; Collins v. Gilbert, 94 U. S. (4 Otto) 753 and numerous cases cited in the opinion of the court by Mr. Justice Clifford.

The evidence falls very far short of establishing mala fides or fraud, that is, on the part of the complainants, however gross may have been the fraud of Lilienfeld (the husband), in which they did not participate, and of whose fraudulent purpose they had no notice at the time they acquired the note from him.

2. It is further contended, that if the complainants acquired a good title to the note

by the transfer, yet, by inserting their names as payees, they placed Mrs. Lilienfeld in the relation of second endorser to them, and thus rendered her endorsement previously made unavailing as a security, so far as they are concerned.

It seems to me, that this contention goes rather to the form than to the substance of the transaction, and is founded on a misconception of the true relation to each other of the parties to the note.

As has been seen, the endorsement in blank by Mrs. Lilienfeld of the incomplected note, entrusted to her husband for his use and accommodation, was, in legal effect, a proposition on her part to bind herself or her estate as security for the payment of whatever sum should be advanced or credited

391 to her husband by any *person whomsoever, and when the complainants, on faith of the endorsement, gave the credit and took the note, the proposition was accepted, and the contract between the parties complete, with authority in the complainants to give effect to it by filling the blanks. Her undertaking was that of surety, either absolutely bound as joint maker, or conditionally as guarantor or endorser in a commercial sense. If the paper, when it was delivered to the complainants, had been entirely blank, except as to the signatures, the complainants, according to the decision in *Orrick v. Colston*, supra, would have been authorized to write over the signature of Lilienfeld (the husband) a promissory note for the price of the goods sold to him, payable to themselves and either negotiable or non-negotiable, at their option. If made non-negotiable, they would have had the right, according to the case referred to, to treat Mrs. Lilienfeld either as a joint maker of the note or as a guarantor. If made negotiable (with themselves as payees), upon the principles of the same case, it is not clear that the rights and liabilities of the parties inter se would not have been the same as if the note had been non-negotiable.

But in the case before us, the paper, at the time it was endorsed, was not wholly blank (except as to signatures), as in the case of *Orrick v. Colston*, but it was an incomplete note. There is no doubt that when Mrs. Lilienfeld wrote her name across the back of it she intended her signature to represent an endorser in a commercial sense. She says she "endorsed a negotiable note." And I incline to think that the paper, before it was perfected as a note, had enough upon it to apprise the complainants of the character of the endorsement. The signature was in the place appropriate for the endorser of a negotiable instrument, and the paper itself

was the printed formula in common
392 *use, of a negotiable note, with the blanks before mentioned. It was proper, therefore, if not indispensable, to bind Mrs. Lilienfeld, that the blanks should be filled so as to preserve the negotiability of the note. They were so filled, but instead of inserting the name of Mrs. Lilienfeld as payee, which might and should have been done, so as to make the note conform to her endorsement and show on its face the true

relation of the parties, the book-keeper of the complainants, who filled the blanks, from inadvertence, mistake or ignorance, inserted the names of the complainants as payees. It would be a great defect in the law if an endorser were allowed to escape a just responsibility by reason merely of such an irregularity as this. But there is no such defect. If Mrs. Lilienfeld had gone in person to the complainants and said to them, "Let my husband have goods and I will endorse his note to you for the amount," and the goods have been furnished, and such a note, with like endorsement as in the present case, had been given and then filled up, as the note in controversy was, there is no doubt that the complainants could have maintained an action at law against her, on her endorsement, under the strictest rules of pleading, if she were liable, as one *sui juris*, to a personal action. The case supposed is the case we have, except that Mrs. Lilienfeld did not contract in person, but through her husband as her agent, by whose acts she is as much bound as if she had contracted in proper person. *Moore v. Cross*, 19 New York, R. 227, is an authority in point. Moore agreed to sell coal to McGervey for his note endorsed by Cross. The sale took place, and the coal and the note endorsed in blank by Cross were respectively delivered. Moore, the payee of the note, brought his action against Cross as endorser, and demand and notice being proved, he was allowed to recover

393 on the facts stated. It seems *that there was no formal endorsement of the note by Moore. In delivering the opinion of the court Johnson, Ch. J. said, "In Moore's hands the blank endorsement of Cross could have been rendered entirely conformable to the real agreement and object of the parties by Moore's making his own endorsement without recourse in terms. Upon such an endorsement the paper would no longer have afforded a *prima facie* answer to Moore's action against Cross; nor could Cross have maintained that such an indorsement was unwarranted, as it would have exactly carried out the intention of the parties. Between these parties I can see no reason why the endorsement might not thus have been made at the trial, or why it may not now, being a mere matter of form and the right to make it being proved, be treated as made."

To the same effect is the English case of *Morris v. Walker*, 69 Eng. C. L. 588, (decided by Queen's Bench in 1850). The action was on a negotiable note by the holder, who was the first endorser, against the second endorser. It was decided that the action was maintainable on the facts stated in the pleadings, and that the proper form of pleading in such a case is for the plaintiff to declare on the endorsement by him to the defendant as "without consideration."

When Mrs. Lilienfeld wrote her name across the back of the note in question, there was no other name upon it, and, it is clear, she intended to occupy the relation of first endorser; and that relation, though changed in form, was not changed in substance and

in fact by the manner in which the blanks in the note were filled. The difficulty presented is one of the merest technicality, and ought not to avail in a court of law, certainly not in a court of equity, which always looks to substance rather than form.

394 *3. Lastly, it is insisted that if all other objections fail, still the separate estate of Mrs. Lilienfeld is not bound by her endorsement, because she had no power thus to bind it; and if she had, she never intended to render her estate liable for the debt of the complainants.

When it is once determined, that a married woman has a separate estate, it results as matter of law, that she has to the fullest extent the incidental power to make it liable for her debts, if she will, unless such power is denied, or limited, or in some way qualified, expressly or impliedly, by the instrument creating the estate. The power to bind the estate for debts is incident to the *jus disponendi*.

There is no express denial, limitation, or qualification of this power by the deed of settlement in the present case. If it exists at all, it must arise by implication only. The property settled belonged exclusively to the wife, and was both real and personal estate, consisting of several lots in the city of Richmond, the wife's interest in her former husband's estate, debts due her, and furniture and a stock of goods on hand estimated as worth about ten thousand dollars. Provisions of the deed, conferring upon the wife in express terms the amplest power over the whole property, are followed by a clause, which, it is claimed, is restrictive in its operation upon the preceding clauses, and limits the wife's power of alienation, and consequently her power of binding the estate for debts to the mode of disposition prescribed by that clause, which provides, that the trustee "shall sell, convey, transfer and deliver all or any portion of the property, estate or effects conveyed (by the deed), and the rents, issues, and profits thereof, to such person or persons as (the wife) may direct by a writing signed by her and attested by two

395 witnesses, to take effect during her life; or by a writing, *in the nature of a last will and testament, to take effect at her death."

The applicability of the maxim, *expressio unius est exclusio alterius*, in the determination of questions arising upon the construction of marriage settlements, as to the mode to be observed by the wife in the disposition of the property settled to her use, has led to much discussion and a great contrariety of decision in the courts. It seems to have been applied by this court in *Williamson v. Beckham*, 8 Leigh 20, and rejected in *Lee v. Bank of the United States*, 9 Leigh 200, and in *Woodson v. Perkins*, 5 Gratt. 345; and in subsequent cases, the question whether, where the instrument creating the separate estate prescribes a mode of disposing of it, the prescribing of that mode, without negative words, should be construed as intended to exclude any other, on the principle of the foregoing maxim, has been adverted to as

still an unsettled question in this State. See *Nixon v. Rose*, trustee, 12 Gratt. 425, 431, 432; *McChesney & als. v. Brown's heirs*, 25 Gratt. 393, 401; *Justice v. English*, 30 Gratt. 565, 571. The determination of the question in each particular case, however, is, at last, one of construction, and while the maxim referred to is of general utility, yet, as has been remarked, great caution is requisite in dealing with it; for, as Lord Campbell observed in *Saunders v. Evans*, 8 H. L. Cases 720, 729, "it is not of universal application, but depends on the intention of the party as discernable upon the face of the instrument or of the transaction." *Broom's Leg. Max.* 653 (marg.).

Manifestly, the maxim has no just application to the case in judgment. It will be perceived from an examination of the deed, that a large portion of the property conveyed consisted of a stock of goods valued at \$10,000. This was probably the most valuable part of the property settled; though it does not appear what *was the value of the other property. The intention is plainly indicated on the face of the deed to "carry on" the business of merchandising, which implies daily sales of goods, and to purchase other goods with the proceeds "or with any property, estate, effects or proceeds thereof conveyed by the deed." Now, it would seem impracticable, if not absurd, to require these sales of goods to be made in the mode specified for the sale and conveyance of the property covered by the deed. I think therefore the clause in question, considered with reference to other parts of the deed and the nature of the property, was intended to enlarge the powers of the wife so as to enable her by her sole act to dispose of the corpus of her real estate, which she could not otherwise alien except by the joint deed of herself and her husband, and that it was not intended to restrain or to limit the general power of disposition which she retained over her personal estate and the rents, issues, and profits of the real estate. Such was the construction of a similar clause in the deed (in most respects like this) in *Woodson, trustee, v. Perkins*, supra.

So, Mrs. Lilienfeld must be regarded in equity as the owner of an absolute interest in the property under the deed of settlement, with all the powers of a feme sole as to the personal estate and the rents, issues, and profits of the real estate, and with the power to make disposition of the corpus of the real estate by her sole act in the mode prescribed by the deed, or, if that is not exclusive, by the joint deed of herself and her husband.

With such rights and powers, it cannot be doubted, she may make her separate estate liable for her engagements, if she will. To create a specific lien on her real estate, by way of mortgage or deed of trust, the same

mode of conveyance would be requisite as in case of *the absolute sale of such estate. But her general engagements, made with reference to her separate estate, while they would not bind her personally nor constitute liens on the estate, in a strict sense, would nevertheless create a liability of a general character which a court of equity

would enforce. According to the view of Lord Thurlow in the leading case of *Hulme v. Tenant*, 1 Bro. C. C. 16, as interpreted by Lord Cottenham in *Owens v. Dickenson*, Cr. & Ph. R. 48, 53, "the separate property of a married woman being a creature of equity, it follows, that if she has power to deal with it, she has the other power incident to property in general—namely, the power of creating debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied." 1 Lead. Cas. Eq. (4th Ed.), Part 2, side p. 500.

But the contract of the wife does not per se and of necessity create such a liability. To give it that operation, it is necessary that it should be entered into with reference to and on the credit of the separate estate. There must be an intention to make the estate liable. It need not, however, be express. It may be implied. It is implied when the wife executes a bond, note, or other instrument for the payment of money, either as principal, or as surety for another, even for her husband, no undue influence being used. It has been repeatedly so decided by this court. *Burnett & wife v. Hawpe's ex'or*, 25 Gratt. 481; *Darnall & wife v. Smith's adm'r & others*, 26 Gratt. 878; *Garland v. Pamplin & others*, 4 Va. Law Journal 99, 32 Gratt. 305.

The endorsement of a bill or note falls within the same *principle. *McHenry v. Davies*, 6 L. R. Eq. 596; 10 L. R. Eq. 88 (1 Lead. Cas. Eq., Part 2, 496, side p.).

It is admitted, that Mrs. Lilienfeld endorsed the note in question, and it is clear that she intended thereby to charge her separate estate; but it is said, that she did not intend to bind her estate for the payment of the debt of the complainants, but a different debt to another person and of a smaller amount. Yet, it remains, that by her endorsement in blank of the note in controversy put into her husband's hands for use, she represented to the complainants that her estate should be bound for the payment of whatever sum they might advance to her husband or give him credit for, and the complainants, relying on that representation, and ignorant of any limitation upon the husband's authority, were induced thereby to part with their goods to the husband for the amount specified in the note. In the face of these facts, Mrs. Lilienfeld cannot now be allowed, as against the complainants, to say that her intention was different from what by her acts and conduct she represented it to them to be.

I am of opinion, therefore, that the separate estate is liable for the amount of the note, and that the cause should be remanded with instructions to the chancellor, to subject said estate accordingly.

But as the bill prays, that the real estate may be sold to pay the complainants' debt, to prevent misapprehension, it is proper to state more explicitly to what extent the sepa-

rate estate may be subjected to meet the wife's general engagements. The rule, which seems to be the established doctrine of the English chancery, is thus laid down by Lord Thurlow in *Hulme v. Tenant*: "Determined cases" says his lordship, "seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits

399 of her real estate, and that *her trustees shall be obliged to apply personal estate and rents and profits when they arise, to the satisfaction of such general engagement; but this court has not used any direct process against the separate estate of the wife; and the manner of coming at the separate property of the wife has been by decree to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice, or the engagement of the wife, to be carried into execution. * * * I know of no case where the general engagement has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage or otherwise, raise the money to satisfy that general engagement on the part of the wife." 1 Lead. Cas. Eq., Part 2, side page, 509.

In the United States adjudged cases, following the analogies of the law which authorizes a compulsory sale of real estate for the payment of debts generally, go to the length of ordering such sale to satisfy the debt, if a sale be necessary for such satisfaction. See cases referred to in 1 Lead. Cas. Eq. (4th Ed.) Part 2, 752, top page.

I think the English rule, as stated by Lord Thurlow, is substantially correct, and therefore to satisfy a general engagement of the wife (and by general engagement I here mean an engagement made with reference to her separate estate, so as to make it liable in a general sense, but which does not amount to a specific lien of any sort upon such estate), the personal property, where the interest of the wife is absolute and there is no restraint upon the alienation of such property imposed by the instrument creating the separate estate, may be sold by decree of the court, and, under like conditions, the rents and profits of the separate real property may be subjected; and to that end, following the

analogy of the law so far, such real estate *may be leased from time to time, by order of the court, until the debt out of the rents be discharged; but in no case. I think, should the real estate or any part thereof be sold by decree to satisfy the debt of the wife unless such debt be one secured by specific lien on such estate, created in a mode which conforms to the mode required for a valid disposition by her of that estate. If the creditor desires to bind the real estate in such a way as shall authorize the sale of it for the satisfaction of his debt, let him take the appropriate security within the power of the wife to give. If he fails to do this, equity cannot provide him a security which he has neglected to provide for himself. These principles will be observed by the Chancellor in the further proceedings to be taken in the cause.

The decree was as follows:

This cause, which is pending in this court at its place of session at Richmond, having been heard but not determined at said place of session, this day came here the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellee, Janette Lilienfeld, by her endorsement of the negotiable promissory note in the bill and proceedings mentioned, made her separate personal estate and the rents and profits of her separate real estate (the same separate estate described in exhibit "B." filed with the bill in this cause), liable in equity to the appellants for the payment of the sum of money in said note specified, with interest thereon to be computed from the time the said sum became payable according to the tenor of said note until payment.

and the costs and charges of the pro-
401 test of said note; and *that the said chancery court should have proceeded to subject the said personal estate, and the rents and profits (but not the corpus) of the said real estate, so far as may be necessary, to the payment of the said sum, interest, cost and charges; and consequently, that the said decree of the chancery court, dismissing the said bill, is erroneous: therefore, it is decreed and ordered, that the said decree be reversed and annulled, and that the appellants recover their costs by them expended in the prosecution of the appeal aforesaid here, to be levied of the separate personal estate and the rents and profits of the separate real estate of the appellee, the said Janette Lilienfeld: and this cause is remanded to the said chancery court for further proceedings to be had therein, in order to final decree, in conformity with the opinion hereinbefore expressed.

And it is further ordered, that this decree be entered by the clerk of this court on the order book here and forthwith certified to the clerk of this court at its place of session at Richmond and entered by him on the order book there and certified to the clerk of the chancery court of the city of Richmond.

Decree reversed.

402 *Brown, Adm'r v. Campbell & ah.

July Term, 1880, Wytheville.

Absent *Moncure*, P.

1. **Payment—Sufficiency of Proof—Case at Bar.**—Under the circumstances of this case held, the proof is sufficient to establish the payment of a debt on which judgment had been rendered and execution issued twenty-three years before the filing of a bill to enforce the payment of the judgment.
2. **Judgments—Executions—Limitation of Actions.**—Where three executions have been is

*Execution—Return—Statute of Limitations.—In *Hamilton v. McConkey's Adm'r*, 83 Va. 533, it was held that under Code 1860, ch. 186, § 12, the limitation within which an alias execution may be

sued upon a judgment and two of them returned by the officer, the statute of limitations is twenty years from the return day of the execution on which a return was made.

This was a suit in equity in the circuit court of Washington county, brought in August, 1874, by Robert A. Brown, administrator de bonis non of Lewis Smith, deceased, against James C. Campbell and others, to subject certain lands which had belonged to said Campbell, to satisfy a judgment which had been recovered by William King Heiskell, a former administrator de bonis non of said Smith, against said Campbell and C. F. Trigg as surviving partners of the firm of Trigg & Campbell, for \$3,000 with interest from June 9, 1849, subject to certain credits. This judgment was recovered in March, 1856, and docketed in April of that year; and a judgment on a forthcoming bond was rendered in June, 1856. The plaintiff set out in his bill the different qualifications on said Smith's estate, and among them that of Heiskell; that two or three executions had been issued on said

403 last *judgment, and two of them had been returned unsatisfied. And he accounts for the delay in bringing this suit by the stagnation of business produced by the late war, and by the confusion and inadequate remedies following the same.

Campbell demurred to the bill, pleaded the statute of limitations, and in his answer averred that the judgment had been paid by himself in 1857 to A. T. Litchfield, the deputy of the coroner of the county, in whose hands the third execution then was; and that Litchfield had paid over the money to Heiskell. He states that his receipts were destroyed during the war, and he refers to entries in the clerk's office and also checks upon the bank at Abingdon by himself to Litchfield and by Litchfield to Heiskell, in evidence of the payment.

The cause came on to be heard on the 18th of October, 1879, when the court dismissed the bill. And thereupon the plaintiff obtained an appeal to this court. The evidence is sufficiently set out in the opinion of Judge Anderson.

Terry, for the appellant.

Campbell & Trigg, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that R. A. Brown, the appellant, regularly qualified as administrator de bonis non, of the estate of Lewis Smith, deceased, as appears by an attested copy of the order of the county court of Washington county, certified to this court by the clerk of the circuit court of Washington

issued is twenty years, where there is "a return of an officer"; and whether such return be true or false, sufficient or insufficient, is not a question which can arise under said section. See Code of 1887, 3577; Barton's Law Practice 790, note. See also *Werdenbaugh v. Reid*, 20 W. Va. 596; *Eppes v. Randolph*, 2 Call. 125; *Stuart v. Hamilton*, 8 Leigh 503; *Taylor v. Spirdle*, 2 Gratt. 44.

county, upon a writ of certiorari, and by the affidavit of — Blackley, Esq., of counsel for the said Brown.

404 *The court is further of opinion, that it appears from the record, that there was a judgment on a delivery bond of James C. Campbell and others at the June term, 1856, of the county court of Washington county, in favor of William King Heiskell, administrator de bonis non of Lewis Smith, deceased; and that three executions of fieri facias, were successfully issued upon said judgment, and that if there was a return by an officer upon either of those executions, the limitation of the statute is twenty years from the return day of the execution, on which such return was made. There is no direct evidence of a return on either of said executions. The best evidence would be the writ of fieri facias itself, with the endorsement on it by the officer. But the records of the office were destroyed by fire, and the presumption is that said executions were destroyed with the other records. The only evidence which it seems was preserved from the records touching the matters in question, is the judgment on the delivery bond, and the memorandum of the clerk kept in his office, showing, as we take it, the date of the issue of each execution; when returnable; and that the first two were returned. The first was issued 1856, July 5th, and was returned August: the second issued September 18th same year, and was returned October: the third issued December 17th, and was returnable in January, 1857, but no return noted, but a black mark made before "January," indicating that no return was made.

This being all the evidence, and in consequence of the destruction of the records by fire, it is impossible for the plaintiff to adduce better evidence from the record, we think it is proper to rely on this, and that it may be inferred from it, that the first two executions were returned by the officer unsatisfied; otherwise the successive executions would not have been issued by

405 the *clerk, and we may presume that the officer endorsed his return on them, as required by law to do. We may also infer from the entry made by the clerk, that the third execution which was issued, was never returned. The court is of opinion therefore, that the bar of the statute does not apply in this case, the suit having been brought within twenty years from the return day of the execution, not computing the time that the stay law was in operation.

We come now to a consideration of the case upon its merits. The bill alleges that no part of the judgment on the delivery bond "has ever been paid, but the same is yet wholly due and unpaid, together with the interest thereon." The answer denies that said judgment is still "subsisting and unpaid," and affirms that "on the contrary it has long since been fully paid and satisfied," and in support of that denial, and affirmation, he details the circumstances. He says, that when the last execution was issued on said judgment, Alexander C. Manwell was coroner, acting as sheriff, and A. T. Litch-

field was his deputy, riding in the lower end of Washington county, where defendant then resided. That the execution came to Litchfield's hands, and was duly levied by him on defendant's property; but before sale defendant paid up the debt in full, and took receipts from him, which, when he entered the military service of the Confederate States in 1861, he placed in the hands of A. Davis, Esq., with all his papers connected with the business of Trigg & Campbell, who had been selected by the parties as their agent, to wind up the business of the concern: and that these receipts have never been seen by him since. Davis who died before the institution of this suit, he says, informed him since the war, that said receipts, as well as other papers, were burned with his office in Abingdon in December, 1864. He says

406 *he recollects that he made the first payment of \$700 from the sale of property, in February or March, 1857—as the receipt has been destroyed, he cannot give the exact date. The last payment he says was made with money borrowed from the Exchange bank in Abingdon. He says he paid to said Litchfield on the 28th of March, 1857, \$4,400, by checks on said bank; that being the amount due him on this and other claims, which he held against him.

The foregoing statement, the defendant made in his answer on oath, and being affirmative matter, it must be supported by proof. But proof positive and direct is not required. It may be circumstantial and inferential. And it is especially reasonable and just to rely upon such evidence in defence against a stale demand—when the claim originated more than a quarter of a century ago, and when more than twenty-three years have elapsed since the last execution was issued upon the judgment, before the bringing of the present suit to enforce it, and the records of the office from which the execution issued, and was returnable, have been destroyed by fire. In such a case it must be presumed that many of the original parties and witnesses to the transaction are dead, and that if any are living, their memory of the transaction would naturally be imperfect, uncertain and unreliable.

But we are told that A. T. Litchfield, the officer in whose hands the execution was placed, and to whom defendant affirms it was fully paid, is still living, and competent to testify in this case, and plaintiff's counsel earnestly insist, that the failure of the defendant to take his deposition raises a strong presumption against the justness of his defence.

But, speaking for myself, he was equally as competent a witness for the plaintiff as for the defendant. Plaintiff was aware 407 that the defendant had affirmed on oath that he had long since paid the debt in full, and he must have been aware that he relied on strong presumptive evidence in support of what he affirmed, which, unless rebutted, might be effectual to maintain his defence. If it was not founded in truth, it could probably be shown by introducing the testimony of A. T. Litchfield. Why did he

not take his deposition? There was no conflict of interest between them to deter him and no community of interest between him and the defendant. If he should testify in favor of the plaintiff that the defendant had never paid him the execution in question, or any part of it, or even that he had no recollection of having received payment of it, or of any part of it, from the defendant, his testimony could not prejudice his own interests. It would seem, therefore, that the failure of the plaintiff to take his depositions might reasonably raise the presumption that he did not take it because he was apprehensive that his testimony would be against him.

But the relation of Litchfield to the defendant was different. If he had testified that the defendant had paid him the money on the execution he would have fixed his liability to the estate of Lewis Smith for it. And if he could not, in consequence of the loss of receipts, after such a lapse of time, and his absence from the country, or the death of witnesses, establish the fact that he had paid the money to W. K. Heiskell, the administrator, he might be held liable for it; for in a suit against him by the administrator de bonis non of Lewis Smith, it might be held that he would not be a competent witness to testify, Heiskell being dead, that he had paid the money to him. If the defendant had then called on him to testify that he had paid the money on the execution to him, it would have been to testify against his own interest. It would seem to be, therefore, unreasonable to conclude that be-

408 cause *the defendant did not take the testimony of Litchfield, and risk the making a party his witness, who, if he testified in his favor, would testify at least contingently against his own interest, that a presumption would thereby arise against the justness of his defence. The inference, I think, is more reasonable from what appears, that the defendant's counsel were confident that the plaintiff could not maintain his action upon the record as it was; that A. T. Litchfield being a nonresident and residing in a distant State, and having left the country perhaps a great many years ago, and not having his attention directed to these transactions for so long a time, and probably not having preserved his papers—having no use for them in Missouri, where he had made his home—might probably be unable to recall those transactions, and concluded to submit the case upon the record as it was, which they deemed sufficient, and not incur the trouble and expense of taking the deposition of Mr. Litchfield in Missouri, to do which it might have been necessary to send an agent there to take his deposition, and to refresh his memory of transactions which occurred so long ago, and which had probably for many years been entirely dismissed from his mind. Under all the circumstances, though it would be more satisfactory to have his testimony, I think no presumption can be raised unfavorable to the defendant in consequence of his not having taken it.

Does the circumstantial and presumptive evidence support the affirmative allegations of the answer, that the debt has been paid?

The judgment was obtained in March, 1856, in favor of William Heiskell, administrator de bonis non of Lewis Smith, and there seems to have been no disposition on the part of the plaintiff, after he obtained judgment, to extend indulgence to the defendants.

409 *An execution was promptly issued, a delivery bond taken, which it is presumable made the debt perfectly secure, and a judgment rendered thereon at the June term following. Upon this judgment executions were issued in rapid succession—one on the 5th of July, one on the 18th of September, and the third on the 17th of December. The first two were returned unsatisfied, as we have inferred, in favor of the plaintiff. Why the sheriff did not make the money on them does not appear. The last execution, which issued in December, was made returnable in January following, which, if the date of the issuing and of the return is accurately stated, did not allow the officer sufficient time to make a levy and sale of the property before the return day. The defendant avers in his answer that the levy was made on his property, and that before sale, which the sheriff (having levied) had a right to make after the return day, he paid the debt and satisfied the execution in full. But the plaintiff by requiring the execution to be returnable so quickly, showed a determination to force the collection of the debt without further delay. If this last execution was returned to the office it must have been burnt with the other records; and it is fair to presume that it was satisfied, as no other execution was ever issued thereafter, or any demand made for payment from that time until the bringing of this suit—more than twenty-three years afterwards. How the conduct of the plaintiff in pressing the payment of his debt, from the date of his original judgment up to December, 1856, can be reconciled with his never issuing another execution afterwards, or making any demand or effort to collect it for twenty-three years, except upon the hypothesis that the last execution he issued was satisfied, as the answer solemnly affirms, is inconceivable.

410 *The answer is supported in its details by the record as far as we have it, and by the written evidence. His first payment he says was \$700. He cannot remember the precise date, because the receipt he took from the officer was destroyed in the burning of Mr. Davis' office in Abingdon, with whom he had left it. It was said there is no proof in the record of the burning of Mr. Davis' office. An occurrence of such notoriety as that, and the subsequent death of Mr. Davis of Abingdon, we may presume was known to the judge of that circuit, and needed no proof. But he recollected that he raised the money by selling property, and made the payment in February or March, 1857. The record shows that the execution was issued on the 17th of December, 1856, and the presumption that the officer did his

duty, and made the levy before the return day, goes to support the affidavit of the defendant, and the sale, it is not probable, could have been made before February or March. It was never made; and the presumption is, it would have been made, if the execution had not been satisfied, as affirmed in the answer. It is in proof also that the officer had another execution in his hands against the defendant, and received from him on the 28th of March, 1857, checks to the amount of \$4,400 on the Exchange bank of Virginia in Abingdon, which is shown by the production of the checks themselves, written across the face "paid;" and the said officer on the 30th of March, two days after, paid to C. G. Bekem \$2,044.16, which was evidently paid in satisfaction of an execution which said officer had in his hands against the defendant and others in favor of William B. Neil, and which was returned "satisfied, and the money paid to plaintiffs' attorney as per receipt within." On the same day, 30th of March, 1857, the said A. T. Litchfield paid to William K. Heiskell \$2,280.65 by a check on the said Exchange

411 bank, as shown by the *check, which is marked "paid." And these two checks amount together to \$4,324.81, which the checks he received from the defendant two days before, put him in funds sufficient to pay, with a surplus of about \$75. It is a circumstance also entitled to be considered, that in January, 1857, Heiskell upon settlement of his administration of Smith's estate, was in advance to said estate, and was individually entitled to the amount less \$6 or \$7 paid him by Litchfield, the payment of which satisfied what was due him from the estate of Lewis Smith, and the payment to him by Litchfield of \$6 or \$7 more tends to show that it was intended to satisfy whatever was due on the execution against the defendant, who had supplied him with funds ample to pay the whole. It is incredible that the check given by Litchfield to Heiskell for \$2,280.65 was not applied to the payment of the execution of Heiskell, administrator, against the defendant, and that it was not paid out of the check which Litchfield had received two days before from the defendant. And it being for so many dollars and so many cents implies that it was for whatever was due upon the execution; otherwise it would have been given for a round sum, and it tends to support the affirmation of the defendant's answer, that he had paid \$700 before. And this conclusion that the said check was in full satisfaction of the execution, is further confirmed by the fact that no other execution was afterwards issued or demand made for any balance, which certainly would have been done if the whole execution had not been satisfied by the check of \$2,280.65.

I am of opinion that the facts and circumstances as shown by the record, considered in connection with the staleness of the demand, and the delay in asserting the claim, though not entirely satisfactory, do raise a preponderating presumption in support of the
412 sworn *affirmation of the defendant in his answer—that he has paid the debt,

and that there is no error in the decree dismissing the plaintiff's bill. For the foregoing reasons, I am of opinion to affirm the decree of the circuit court, with costs.

Decree affirmed.

413 *Davis & als. v. Franke.

July Term, 1880, Wytheville.

Absent Moncure, P.

1. **Assault and Battery—Trespass on Case—Damages—Evidence.**—In an action of trespass on the case for assault and battery, the defendant, under the general issue, may give in evidence matters which merely go to the *quantum* of damages, by way of palliating the offence.

2. **Same—Same—Provocation—Evidence.***—While it is true, that where the defendant in such action relies upon provocation as a defence, he is limited to such recent acts as will raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff; yet where the plaintiff makes the offensive acts or declarations committed or said by him, long anterior to the assault, a part of the *res gestae*, by repeating or alluding to them at the time, in a manner which indicates a repetition, renewal of, or persistence in them, they are admissible in evidence on behalf of the defendant; and this is so, even where one of the acts of the plaintiff was a libel against the defendant, for the publication of which the defendant had already recovered damages.

3. **Same—Same—Same—Same.**—In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them.

4. **Witnesses—Impeaching—Practice.†**—Where the object of testimony offered is to impeach a witness by proof of statements previously made inconsistent with his testimony on the trial; or to discredit him, by proof of an attempt to fabricate testimony; the foundation for such impeaching or discrediting testimony must be first laid by an examination of the witness sought to be impeached, with reference to such inconsistent statements or improper conduct, and these rules are as applicable where a plaintiff is the witness sought to be impeached as in other cases.

414 *5. **Same—Same—Evidence—Admissibility.**—A witness is asked if he knew the general character of the plaintiff for truth and veracity? and replies, that he had known him six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged. That he had never heard plaintiff's character called in question. This was proper evidence to go to the jury.

6. **Same—Same—Same—Same.**—A plaintiff, for the purpose of sustaining his character for truth

and veracity, introduced a witness who had lived near him, and who testified that he had never heard anything against his veracity until this and a former suit by one of the defendants against plaintiff had been instituted. On cross-examination, defendant asked witness, "if he had not heard a number of plaintiff's neighbors testify in both suits that they were acquainted with plaintiff's character for truth and veracity; that it was bad, and they would not believe him on oath?" The answer to this question was, on motion of the plaintiff, properly excluded from the jury.

This was an action of trespass on the case in the circuit court of Smyth county, brought by H. G. Franke against William M. Davis, D. T. Davis, J. K. Davis and N. T. G. Fair, to recover damages for an assault and battery made upon him by the defendants. Issue was made up on the plea of "not guilty"; and on the trial of the case, the jury found a verdict in favor of the plaintiff for \$3,500; upon which the court entered a judgment against the defendants, except Fair, with interest from the date of the judgment, and costs. And the defendants obtained a writ of error.

On the trial the defendants took five bills of exception to rulings of the court excluding evidence offered by them.

After the plaintiff had offered evidence to prove that the assault was made upon him by the defendants, on the 4th of October, 1875, at a warrant trying before James V. McDonald, a justice of the peace, in which J. K. Davis and William M. Davis and the plaintiff were the parties; the defendants offered in evidence in *mitigation of damages a postal card which had been sent through the mail by the plaintiff to the justice, about the case of William M. Davis against him then pending before the justice, a short time previous to the assault. The postal card is not in the record, but there is sufficient evidence, it was very offensive. And the defendants also offered to read to the jury for the same purpose a publication in the *Marion Herald*, made by the plaintiff against said defendant William M. Davis, several months previous to the assault, as follows:

"Having been asked by a number of persons if I had accused W. M. Davis of swearing falsely, I will state that I did say that it was proven that he had given false and incorrect evidence in a certain controversy, and that I said so to his face before witnesses; and that he was trying (while a justice of the peace) to collect money from me unlawfully; and to all whom it may properly concern the proof will be furnished.

"H. G. Franke."

July 6th, 1875.

It appeared that the day had been fixed for the trial of a warrant between J. K. Davis and the plaintiff, and for hearing two applications by Franke for new trials in cases between William M. Davis and himself, and after the case of T. K. Davis v. Franke was concluded, the question of granting new trials in the two cases of William M. Davis v. Franke, came up on the application of Franke; and Davis brought forward witnesses to im-

**Res Gestae*.—As to what is admissible as part of the *res gestae* in an action for assault and battery, see *Ward v. White*, 86 Va. 212, citing the principal case; 2 Am. & Eng. Enc. of Law pp. 996, 998.

†*Witnesses—Impeachment of—Laying Foundation*.—See 4 Min. Inst. (2nd Ed.) 775, 776; *Unis v. Charlton*, 12 Gratt. 494; *State v. Goodwin*, 32 W. Va. 177, 10 Enc. of Pl. & Pr. 281.

peach the character of said Franke for truth, to overthrow his affidavit for a new trial; when Franke asked for time to get witnesses to sustain his character, he saying in reply to an imputation cast upon him by J. K. Davis he had established his good

418 *character by a number of the best men in the county not long since, and could say that some others had not, but failed. Then J. K. Davis said: "I suppose you have allusion to that publication in the paper, and card"; to which Franke made no reply, and immediately thereafter William M. Davis commenced to strike him with a switch, and J. K. Davis struck him about the same time.

The defendants then offered in evidence the said postal card and publication in mitigation of damages; but the court excluded the evidence, and the defendants excepted. This is their first exception.

In the further progress of the trial, the defendants asked the witness who had spoken of the postal card, to what postal card he referred; without asking its contents; but the plaintiff objected to the witness answering the question; and the court sustained the objection, and refused to permit the witness to answer; and the defendants excepted. This is defendants' second exception.

The grounds of the other exceptions are stated in the opinion of Judge Staples.

J. P. Sheffey and F. S. Blair, for the appellants.

J. H. Gilmore, for the appellee.

STAPLES, J. The authorities are generally agreed that in an action of trespass and assault and battery the defendant may under the general issue give in evidence matters which go merely to the quantum of damages by way of palliating the offence. Where the defendant relies upon provocation it must be so recent as to raise the presumption the assault was committed in heat of blood excited by the conduct or declarations of the plaintiff. The rule which confines the

417 defendant *to proof of recent provocations received from the plaintiff is subject to modifications which more or less qualify the rule according to the particular circumstances of each case. In *Fraser v. Berkely*, 32 Eng. C. L. R. 658, it appeared, that the assault was made three or four days after the publication of the libel. Lord Abinger said the law would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation that is matter of mitigation. He further said, that in the case before him as the blood has had time to cool, the parties, if death ensued, would be guilty of murder. The provocation three days before would not have availed them for going deliberately three days after to take their vengeance. At the same time he said "it appears to me too severe to say you should not look at the cause which induced the assault." In other cases it has been held that although a considerable time may have elapsed between the provocation and the date of the assault,

if the provocation was communicated to the defendant immediately preceding the assault it is admissible in evidence. *Gaither v. Blowers*, 11 Mary'd R. 536.

And so where the acts done or words spoken some time previous to the assault are a part of a series of provocation repeated and continued up to the time of the assault, they may be received. *Stetlar v. Nellis*, 60 Barb. R. 524; 42 How. Prac. R. 103.

In *Rawlings' case*, 1 Leigh 581, the general court while declaring that the rule in civil and criminal cases is the same, and that acts of provocation received so recently the blood has not had sufficient time to cool are only admissible in mitigation of damages, seemed to concede that where at the time of the assault allusion is made to the provo-

418 cation previously given, *the evidence is admissible as explanatory of the nature of the assault; provided the connection between it and the antecedent provocation plainly appears. In *Field on Damages*, § 116, it is said, that generally where vindictive damages for willful injuries to the person are claimed, the defendant shall not be restricted to matters which took place at the very time of the injury complained of. But he has a right to show the jury the true relation of the parties, and the facts and circumstances relating to the act, in order that they may determine how far the act was wanton, vindictive or malicious, or how far it is extenuated. See also *Dolan v. Fagan*, 63 Barb. R. 73.

It would seem to be clear, therefore, that the rule which restricts the proof to acts of recent provocation is not at all infringed by evidence of acts or declarations long anterior to the assault, when the plaintiff himself makes them a part of the *res gestæ* by repeating or by alluding to them at the time, in a manner which indicates a repetition or renewal of, or persistence in, the offensive act or declaration. An allusion to an insult previously given may justly exasperate as much as the insult itself. The fact that the defendant has before submitted in silence to an indignity may but serve to give the subsequent allusion the sharper sting. When that allusion is made in an offensive manner, no other conclusion can be drawn than that a renewal or repetition of the original offense was intended. At all events where there is doubt as to the meaning of the party, it is a matter peculiarly proper for the jury to determine whether the defendant in making the assault was acting under the provocation then received.

In the case before us several of the witnesses concur in saying that the plaintiff just before the affray, said he had proved a good character by a number of citi- 419 zens, *which he could say some others had not: thereupon one of the defendants, J. K. Davis, remarked to the plaintiff—I suppose you refer to that postal card, or as others have it, to that publication in the paper—and card; to which the plaintiff made no reply: and immediately thereafter William M. Davis, another of the defendants, commenced striking the plaintiff with

the switch. After this and other testimony was adduced the defendant offered to read to the jury two libellous communications written by the plaintiff, injuriously reflecting upon the character of the defendant William M. Davis. One of these communications written upon a postal card was addressed to the justice of the peace before whom there were pending warrants between these parties. It does not appear when this card appeared. Defendants offered to show it was a short time previous to the assault. The newspaper publication appeared two or three months before the assault. On the one side it is insisted that the plaintiff had no reference to the previous publication; that his language was not susceptible fairly of any such construction; that the defendants had previously conspired to attack the plaintiff, and the alleged provocation that day was a mere pretext, and had nothing to do with the attack. On the other hand it is insisted, that the plaintiff must have referred to the previous publication, for when he was charged with having done so, he did not deny it, and he was careful not to deny it when he was examined as a witness in this case; that William M. Davis so understood the allusion, and the silence of the plaintiff when charged with it, justified him in so understanding and acting upon it. And furthermore that there is not a scintilla of evidence even tending to show any conspiracy or preconcerted purpose among the defendants to attack the plaintiff that day; and if William M. Davis had any such design he had obviously abandoned *it, for he was apparently in a good humor, and trying to settle and adjust all matters of difference, until the plaintiff made the allusion to the libellous publication already referred to. And then it was he commenced the attack. It must be admitted there is a good deal of evidence in the record to support this view. At all events amid such a conflict of testimony the question was peculiarly proper for the consideration of the jury. If the plaintiff did in fact allude to the alleged libellous communications, and was so understood by the defendant William M. Davis, and the latter in making the attack was prompted by what he might justly consider a repetition of the insult or an offensive reference to it, it was necessary and proper that these communications should be laid before the jury, that they might understand the nature of the provocation under which the defendant acted.

It has been justly said that the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence, has its inseparable attributes and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances constituting a part of the *res gestæ* may always be shown to the jury in connection with the principal fact. In *Rawson v. Haigh*, 2 Bing. R. 104,

9 Moore R. 217, S. C., Mr. Justice Parke said, it was impossible to tie down to time, the rule as to declarations, and that if connecting circumstances exist, a declaration may even at a month's interval form part of the whole *res gestæ*. 1 Wharton on Evidence, sec. 589, 583, and cases cited. And when an altercation grows out of an offensive allusion to a previous declaration *or communication, it is absolutely essential to the purposes of justice, the nature of the communication or declaration should be known as explanatory of the conduct of the parties.

It has been further said that the defendant William M. Davis has already recovered judgment against the plaintiff on account of the publication of the alleged libels, and now to permit him to rely upon the same matter in mitigation of damages, would amount in effect to double satisfaction. In the first place there is nothing in the present record showing any such recovery or even the institution of any such action. This court of course cannot take notice of the mere suggestions of counsel on that subject. But even if it appeared that the defendant had recovered judgment for the alleged libel that fact would not of itself preclude him from relying upon it in the present action. Suppose he has recovered damages for the libel, why may he not show he acted under the same provocation in making the assault. It is a matter for the jury, who having all the facts before them may graduate their damages accordingly, and do justice between the parties. Even though he recover

damages for the libel, he has still the right to show the attack was not wanton. The rule seems to be that where the libel is the subject of a cross-action and recovery, the defendants ought not to derive much advantage from it in mitigation of damages. As in other actions of tort no inflexible rule can be laid down, where so much depends upon the character of the libel, the nature of the assault, and the conduct of the parties.

It is clear therefore that the circuit court erred in rejecting the evidence set out in the first bill of exceptions, unless indeed that evidence was inadmissible upon another ground now to be stated. And that is in a joint action of trespass against several defendants, it *is not competent to show a provocation received by one of them. It is insisted that in a joint action the jury must always assess joint damages, whether the defendants plead jointly or severally; and in such case the plaintiff is entitled to damages against the most culpable. And further, inasmuch as the malignant motive of one of the defendants cannot be made the ground of aggravating the damages against the other defendant, the converse of the proposition must be true—that a provocation received by one cannot be relied upon to shield the others who acted without excuse or provocation.

The correctness of these propositions need not be controverted here. The enquiry still arises, how are the jury to determine who is

the most culpable unless they have all the evidence before them. The defendant who has received the greatest possible provocation may to all appearances be the most culpable in the assault. If all the proof of the provocation received by him is excluded, the jury must of course graduate their damages by their estimate of his guilt, although there are the strongest mitigating circumstances in his favor. Let us take the present case as an illustration. Let us suppose the defendant William M. Davis made the most violent attack on the plaintiff—all proof of provocation being excluded he of course must be considered the most culpable, and the jury would be told they must assess the damages with reference to his guilt. And yet he may have acted in heat of blood excited by the most malignant assault upon his own character, or upon the reputation of a wife or daughter. All this is to be excluded from the jury according to the learned counsel for the plaintiff. And thus all the defendants are to be punished for the supposed guilt of one of them who is in fact the least guilty. It is very true

the defendant who acted without provocation *cannot take shelter behind him who acted under provocation. Each one of them and all of them must be held liable for what was done by each and the aggregate damage done by all; but that is no reason for allowing the plaintiff to recover vindictive damages for the assault of one of them provoked by his own conduct.

It is also true, as stated by counsel, that the plaintiff cannot rely upon the malignant motives of one of the defendants making the assault. The reason is obvious—the plaintiff may sue all jointly or each one separately. If he wishes to show peculiar grounds of aggravation against one of the defendants, he ought to bring his separate action against him. By joining the others he waives any special grounds of action peculiar to one. With the defendants it is altogether different. They have no choice in the matter. The plaintiff has the right to join them in the same action; but they ought not to be thereby precluded from showing any matter which in effect constituted the *res gestæ*, and which may serve to explain the true relation of the parties to each other. It often happens as otherwise that the assault is made by one of the defendants under provocation recently received, and that others unite with him without his consent and without any sort of premeditation or understanding. To deprive him of the right to show under such circumstances the ground upon which he acted, and to visit upon him all the consequences of a wanton and malicious assault, would be to sacrifice the soundest rules to the merest technicalities. If the defendants have deliberately conspired beforehand to attack the plaintiff in revenge for some previous insult to one of them, the result might be very different. But these are matters justly within the province of the jury—a tribunal by its very nature and constitution peculiarly adapted to pass upon such

*questions. As already intimated, I think the circuit court erred

in excluding the evidence set out in the first bill of exceptions.

The second bill of exceptions involves substantially the same matters as the first. What has been already said renders unnecessary any further discussion of that point. For the reasons already stated, I think the circuit court ought to have permitted the witness to answer the question propounded by defendant's counsel.

Before passing from this branch of the case, it is proper to notice the fact that the postal card is not incorporated in either of the bills of exception. This was plainly a mere inadvertence. There is enough in the record to show the character of this communication, and that it contained injurious reflections upon the defendant, Wm. M. Davis, and enough to show it was proper for the consideration of the jury. It is, however, not at all material, because the newspaper publication is a part of the bill of exceptions, and its exclusion is sufficient to reverse the judgment.

It is stated in the third bill of exceptions, that the defendant introduced a witness Samuel Green, a man of color, and asked him to state of some time previously, the plaintiff approached the witness in regard to the present case and made any request that the witness would testify for him, and the witness was requested to state the time, place and circumstances of the conversation; and the defendant announced that their object was to discredit the plaintiff who had testified in the cause, by showing that the plaintiff had attempted to fabricate testimony. If it be conceded that the evidence was proper for the purpose intended, it is clear that no foundation had been laid for its introduction. The plaintiff being introduced as a witness, and the object being to discredit him as such, the same rules are applicable to him that apply to any

other witness. *Where the object is to impeach the credibility of a witness by proof of statements previously made inconsistent with his testimony in the trial, the foundation for the impeaching testimony must first be laid by an examination of the witness with reference to such inconsistent statements. It is said that common justice requires that by first calling his attention to the subject he should have opportunity of making any proper correction, as well as of explaining the nature, circumstances and design of what he is proved elsewhere to have said. The same principle must govern where the object is to discredit the witness by proof of an attempt to fabricate testimony. Indeed wherever the object is to prove hostile declarations or acts, the witness must first be cross-examined as to such declarations, or acts, so that he may have an opportunity for explanation. 1 Wharton on Evidence, §§ 555, 566; *Unis et als. v. Charlton's adm'r*, 12 Gratt. 484. I think therefore the court did not err in rejecting the evidence set out in the third bill of exceptions.

It appears from the fourth bill of exceptions, that the plaintiff introduced a witness

who was asked if he was acquainted with the general character of the plaintiff for truth and veracity; to which the witness replied he had known the plaintiff for six or seven years, at Sulphur springs ten miles from Marion and at Marion, and that he knew the plaintiff's general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged; that he had never heard plaintiff's character called in question, &c. The defendant moved the court to exclude this answer, upon the ground that no proper foundation was laid for the introduction of the testimony. The court, however, overruled the motion, and the defendant excepted. It will be observed the witness does

not say he never heard the plaintiff's character *for veracity discussed, or made the subject of conversation; but that he never heard anything alleged against it, or even called in question. But although a man's character may not be discussed, it may nevertheless be well known to his neighbors. Possibly in many cases the highest tribute that can be paid to the witness is that his reputation as a man of veracity is never called in question, or even made the subject of conversation in the community where he resides. When therefore the witness states that he knows the reputation of the person as a man of veracity, his competency to testify and the weight otherwise due to his testimony, are not at all lessened by the fact that he never heard the character of such person called in question, or made the subject of special conversation and discussion. The fourth bill of exceptions therefore presents no ground of error.

It appears from the fifth bill of exceptions that the plaintiff, for the purpose of sustaining his character for truth and veracity, introduced a witness, who testified that he lived in the neighborhood of the plaintiff, and had never heard anything said against him as a man of veracity until the suits of *Davis v. Franke* and the present suit were instituted. Upon cross-examination the defendant asked the witness if he had not heard a number of the plaintiff's neighbors testify in both suits that they were acquainted with plaintiff's general character for truth and veracity among his neighbors; that it was bad, and they would not believe him on oath. To the answering this question the plaintiff objected—the court sustained the objection, and the defendants excepted. If the object of the defendants in asking the question, was to impeach the plaintiff's character as a man of truth and veracity, the question was clearly inadmissible, for it proposed to extract from the witness what

a number of persons *had said about his character on a particular occasion, which was altogether indefinite, and might mean two or a dozen. The true enquiry is what is the general character of the witness for truth and veracity? The common opinion, that in which there is general concurrence, is what is wanted in such cases, forming the general reputation or character

of the person whose veracity is assailed.

On the other hand, if the object was to discredit the witness under examination, or to test his accuracy and means of observation, the question was equally inadmissible. For the witness had just said in effect that the plaintiff's character had been called in question on the trial of the suits, and the defendants' question was therefore but a repetition of the witness' statement, in the form of an interrogatory; and was obviously but an adroit attempt to get from the witness what certain persons had stated on a particular occasion in derogation of the plaintiff's character. The effect of the question was not to test the accuracy of the witness or his means of observation, but to bring into the cause statements made by other witnesses on the trial of other suits as proof of general character. I think therefore the circuit court did not err in excluding the answer to the question set out in the fifth bill of exceptions. This disposes of all the questions arising upon the record, and the result is the judgment must be reversed, the verdict set aside and a new trial awarded.

CHRISTIAN, ANDERSON, and BURKS, Js., concurred in the opinion of Staples, J.

The judgment was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript *of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in refusing to admit the evidence offered on the part of the plaintiffs in error as mentioned in their bills of exception No. 1 and No. 2 respectively; and that there is no other error in the said record. Therefore, it is considered by the court that, for the error aforesaid, the said judgment of the said circuit court be reversed and annulled, and that the plaintiffs in error recover of the defendant in error their costs by them about the prosecution here of their said writ expended. And this court proceeding now to render such judgment in the cause as the circuit court ought to have rendered, it is further considered that the verdict of the jury therein be set aside and a new trial had; in which, should occasion arise, the circuit court shall proceed in conformity with the foregoing opinion and judgment of this court, which is ordered to be certified to the said circuit court of Smyth county.

Judgment reversed.

*Carter & als. v. Robinett & als.

July Term, 1880, Wytheville.

Absent *Moncure, P.* and *Burks, J.**

1. Evidence—Admissibility of Improperly

**Moncure, P.*, had left the court as before stated, and the case was argued before Judge *Burks* had been able to get to the court.

Authenticated Deed.—If a deed not properly authenticated is admitted to record, a copy of the deed from the record is not competent evidence.

2. Same—Admissibility of Improperly Authenticated Power of Attorney.—In 1792 a power of attorney authorizing the attorney to convey land, was admitted to record on the certificate of a notary public of its execution. At that time there was no statute of Virginia authorizing the admission to record of a power of attorney on such a certificate; and a copy of the power from the record is not competent evidence.

3. Action in Ejectment—Effect of Possession under Claim of Title—Case at Bar.—Plaintiffs in ejectment claim under a possession taken by D in 1792 under a claim of title, and a continued, uninterrupted, notorious, possession by parties claiming under D, the party first taking the possession. The defendants entered upon the land only a few years before the action was commenced, not even under color of title, and they seek to set up an outstanding title in another; and for this purpose rely upon a deed executed in 1792 by S, the original patentee of the land, containing 10,000 acres, including the land claimed by the plaintiffs, and is a part of a tract of 340,000 acres conveyed by S to his grantees, excepting in the conveyance 50,000 acres, which he had sold to D. **Held:** That after the long possession by D and those claiming under him, although the language of the exception may not amount to a conveyance of the land to D, as against S if he or persons claiming under him were the parties, a conveyance to D would be presumed; and so it will be as against these defendants.

430 *This was an action of ejectment, brought in December, 1874, in the circuit court of the county of Wise but afterwards transferred to the circuit court of Scott, by Dale Carter against William M. Greer, Friel Robinett and eight other persons, to recover a tract of four thousand and nine hundred acres of land lying in the county of Wise. The original declaration contains but one count in which the plaintiff claims that he was possessed of the said land—setting it out by metes and bounds. In March, 1876, an amended declaration was filed, containing three counts. In the first Dale Carter and James Campbell, plaintiffs, claim to have been possessed of the land. In the second Dale Carter claims, &c. And in the third James Campbell claims, &c.

In the progress of the cause the plaintiff Dale Carter, died, and the suit was revived in the name of his heirs. And when the case was ready for trial all the parties, except the defendant William W. Greer, agreed to dispense with a jury and submit the whole matter of law and fact to the judgment of the court: and the court rendered a judgment in favor of the defendants. And thereupon the plaintiffs, Carter's heirs and James Campbell

***Deeds—Admitting to Record.**—The leading case is cited to support the proposition that the admission of a deed to record is a ministerial act. *Paul v. Baugh*, 85 Va. 955; 2 Min. Inst. (4th Ed.) 960; 20 Am. & Eng. Enc. of Law 557.

Recitals in Deed as Evidence.—The principal case was followed in Virginia, &c., *Co. v. Fields*, 94 Va. 113.

applied to a judge of this court for a writ of error and supersedeas; which was awarded. The case is sufficiently stated by Judge Anderson in his opinion.

Burns, for the appellants.

Hagan, for the appellees.

ANDERSON, J. The plaintiffs in one of the counts in the declaration claim the land in controversy in the name of Dale Carter's heirs. In another count they claim it in the name of James Campbell, and in **431** *another count they claim it in the names of Carter and Campbell jointly. If they have shown good title in either they are entitled to recover.

We will consider the title of James Campbell. He is invested with whatever title was held by Francis De Tubeuf of the elder: provided Francis and Alexander De Tubeuf, who claimed by inheritance from him, were his sons and heirs; for whatever title they had is traced by regular conveyance from them through various successions which it is unnecessary to detail, to the said James Campbell. That they were his sons and heirs, we think is well established by reputation.

De Tubeuf, the elder, claimed to hold ten thousand acres of land, by a conveyance from Richard Smith, who held it under a grant from the Commonwealth.

The plaintiffs, as we have seen, having traced their title to the land in controversy, which is 4,900 acres, part of the aforesaid tract of 10,000 acres, to De Tubeuf the elder, in order to trace his title back to the Commonwealth, offered in evidence attested copies of the following papers:

No. 1. A deed from Richard Smith for the said 10,000 acre tract, bearing date November 8, 1792, purporting to have been executed and acknowledged for him and in his name by Charles Higbee, his substituted attorney.

2. A power of attorney from Abram Lott and Joseph Higbee, bearing date October 11, 1792, with a certificate of acknowledgment by a notary public of Pennsylvania, residing in Philadelphia, whose official character and duly executed certificate of acknowledgment is certified by two notaries public of Philadelphia; and,

3. A power of attorney from Richard Smith, the patentee of the 10,000 acres, to the said Lott and Joseph Higbee, giving **432** them full power and authority *jointly or severally in his name, and for him, to grant, convey, or sell and change with the said De Tubeuf all his right, title and property in or to a certain tract or parcel of land of 10,000 acres, situate in Russell county in the state of Virginia granted to him by the commonwealth of Virginia by patent bearing date the 14th of March, 1783, (No. 16,) and which patent, he says, is hereto annexed; and in his name and for him, to sign, seal, to execute and deliver any deed or other assurance for effectually transferring and assuring to the said De Tubeuf, his heirs, &c., all his right, title, and interest as aforesaid, with power also to appoint or substitute an attorney or attorneys un-

der them for the purposes aforesaid, &c.; which power is attested by two witnesses, and by a notary public who testifies, in effect, that he was present and saw the said Richard Smith sign, seal, and deliver the said power of attorney in the presence of the two witnesses, and that the names of the said Richard Smith and of the two witnesses who hath subscribed as witnesses are in their proper handwriting respectively.

These papers, with the certificates annexed to them, were ordered by the general court, at a court held at the capital, in the city of Richmond, on the 10th day of November, 1792, to be recorded, together with the patent; and attested copies from the record were offered by the plaintiffs in evidence. To which the defendants objected.

The admission of a deed to record, it has been held by this court, is a ministerial act, though done in open court; and if not in conformity to law the recordation is void, and a certified copy of the deed is inadmissible as evidence. We can find no statute which was in force when the foregoing writings were admitted to record by the general court which authorized the recording of a power of attorney upon an acknowledgment *before a notary public as the substituted power of attorney to Charles Higbee was acknowledged. It would seem, therefore, that a copy of it was not admissible in evidence. But it may be doubted whether it is not too late after this lapse of time to question the authority of the agent who undertook to convey the land. See 1 Greenlf. Evi., chap. 4, p. 27.

It is more than probable that De Tubeuf with his two sons, and other relatives emigrated from France to this country not many years after the establishment of its independence, and that he came to Virginia where he had relatives residing, and became an adopted citizen of the State; and that he purchased a tract of ten thousand acres of land upon the Clinch and Guests rivers, in the county of Russell, from Richard Smith, the patentee, upon which he settled, with his two sons, then half grown boys. There is evidence of his having purchased other lands, adjoining the ten thousand acres, amounting in all to 50,000 acres from the same vendor, who was the owner of a vast area of country, in that county, of which the fifty thousand acres were not the one-seventh part.

The said tract of ten thousand acres was granted by the Commonwealth to the said Richard Smith, by patent bearing date the 14th of March, 1788. There can be no doubt, from what appears on the face of this record, that De Tubeuf, the elder, with his two sons, settled upon this tract of land, perhaps as early as 1794, or '5, under a claim of purchase from the said Smith, which was acknowledged by him years afterwards in solemn form, and that he resided upon it, and exercised ownership over it as long as he lived; and that he was murdered upon it. His sons, one of whom was then grown, or nearly so, after the murder of their father—how soon does not appear; but perhaps in the course

of a year or two—removed to Petersburg, *Virginia, and entered into business there, in partnership with their relation Thomas Loraine, who resided in France, and never lived in this country.

There is no evidence in this record that any claim of title was ever made to the said tract of land, by any one, adversely to the heirs of the elder De Tubeuf, or that any one ever took possession of it, or of any part of it, adversely to their claim of title, until entry was made upon it by the defendants, a few years before the institution of this suit. And they do not pretend to have entered under any claim of title.

In fact no question was ever raised as to the title of De Tubeuf the elder, or of his sons by descent from him, so far as this record shows; but they seem to have been regarded and recognized without question as the owners of the land: and as early as the 20th and 23d of August, 1803, only about four years after the death of their father, who is reputed to have been murdered in 1799, they executed to Campbell & Wheeler, separate deeds of mortgage, each conveying his undivided moiety—Francis De Tubeuf, by his deed of all the lands in Virginia which descended to them from their father, and Alexander A. De Tubeuf, of all the lands situate in the county of Russell whereof his father died seized in fee simple, or to which he was entitled, to secure a large debt which was due them from their firm, and which doubtless, was contracted while they were doing business in the city of Petersburg. Alexander had previously returned to France, and executed his said deed in that country, which, with his acknowledgment, properly certified by the Maire of Alias and authenticated, was recorded in the office of the general court of this State; where the deed of his brother Francis, was also recorded, by order of said general court, upon a proper certificate of acknowledgment.

After which the said Francis *also returned to France, where they both lived until death.

There had been no abandonment of the land by the De Tubeufs, or surrender by them of the possession to any one, when they left it, and afterwards engaged in business in Petersburg. There was no one in possession, or claiming the right of possession adversely to them, to whom they could have surrendered; and the execution of these deeds was an assertion of their possession and title entered of record. In fact they and those who claim under them, have never been out of possession. They have never been ousted of the actual possession; and no one has ever held possession of any part of the land adversely to them, until the entry by the defendants on part of the land, a few years before the institution of this suit; and that entry it seems, was not under a claim or color of title. It is certified by the judge who tried this cause, that "the defendants on their part proved that some of the land withheld by them had long been cleared and used; other portions only for a short time; that some of the defendants had been in posses-

sion for six years; some since 1863; and others not so long. And the defendants then offered, as their own evidence, the grant to Richard Smith No. 16, for 10,000 acres of land, which is hereinbefore set out in the plaintiffs' evidence. And this was all the evidence introduced or offered by the defendants." It is not shown that the lands which had been cleared and used a long time had ever been occupied adversely to the plaintiffs' claim of title, or that they had not been cleared and used by some of those under whom the plaintiffs claim. They might have been cleared and used by De Tubeuf himself, or his servants, or by the agents or servants of Campbell & Wheeler, both of whom, as well in all probability as the persons by whom

the work was done, are dead and
436 *could not testify in this cause. The defendants show no possession in themselves, or either of them, even if it were under a claim or color of title, which could bar the recovery of the plaintiffs. They gave in evidence the patent of Richard Smith, under which the plaintiffs claim, but do not offer a particle of evidence to connect themselves with it.

The plaintiffs in contemplation of law, have been in the actual uninterrupted possession since the settlement on it by De Tubeuf the elder, under a claim of title, about eighty-five years ago, until the defendants entered upon it; and during that period their title has been recognized in two or three protracted suits, and the land has been twice sold, under decrees of different courts, once by a decree of the superior court of chancery for the Wythe district, and at another time by the circuit court of Norfolk city, consistently with, and in recognition of the title under which the plaintiffs claim. The first sale was publicly made by the marshal of the court, on the 2d of July, 1822, before the front door of the courthouse of Russell county, after the sale had been advertised for six weeks in a public newspaper published in Abingdon, and posted for the same length of time at the front door of the courthouse in the said county of Russell, where the lands lay, which sale was confirmed by a decree of the said superior court of chancery, and a deed ordered to be made to the purchaser by said court.

The second sale was made by John Bickley, of Russell county, as a special commissioner appointed for the purpose, by the circuit court of Norfolk city, on the 3d day of June, 1856, by virtue of a decree of said court, before the front door of the courthouse of Russell county, after having given thirty days' public notice of said sale by advertisement in newspapers and by posting the notice at the

437 front door of the courthouse, *at which sale James Campbell aforesaid, became the purchaser; which sale was confirmed by said court, and a deed made to the said Campbell by Bickley the commissioner, pursuant to its decree. This sale and conveyance was not in conflict with the title which vested under the previous sale, and the decree in confirmation thereof, but in recognition of the same, and in fact the title which vested

in the purchaser, was the title of De Tubeuf the elder, derived through the hereinbefore mentioned deeds of his sons, and the sale made under a decree of the superior court of chancery aforesaid, and the confirmation thereof by a subsequent decree which directed the marshal to convey the title to the purchaser; which conveyance was not made in consequence of the death of the marshal; and was made to James Campbell, who had acquired the rights of the purchaser at the first sale, by a commissioner appointed by a decree of the circuit court of Wythe county, specially appointed for the purpose, to which court the papers and cause had been transferred on the abolition of the district court.

In all these proceedings in court, and out of court, continuing during a period of thirty-five years, from 1821, the title of De Tubeuf the elder, to the ten thousand acres of land, four thousand nine hundred acres of which is claimed in this suit, under his title, is not only publicly recognized and asserted, but enforced; and yet in that long lapse of thirty-five years, during which period these suits were being prosecuted, although such publicity had been given to the proceedings, not one person has ever come forward to dispute that title, or to claim title in himself, or to interfere with the control and disposal of the land by the plaintiffs and those under whom they claim or to interrupt their possession. We have here a continual claim of title,

recognized by the courts, and continu-
438 ously *asserted in the face of the world, and undisturbed possession for eighty-five years, except by the defendants in his suit by their recent acts. And they set up no title in themselves, but rest upon an outstanding title in Richard Smith, adverse to and paramount to the title of the plaintiffs, with which they do not profess to connect themselves.

The plaintiffs contend that Richard Smith could not set up a title adverse to them, and therefore that the defendants cannot set up such title in Smith. And in support thereof gave in evidence a deed from the said Richard Smith to John Warden, Jeremiah Warden and John Head Warden, bearing date the 29th of May, 1806, in which deed he describes a tract of 348,723 3-4 acres of land, which he had surveyed, having been previously admitted a citizen of the United States, and which he had divided into lots of 1000, 5000 and other quantities of acres, for each of which he obtained separate patents. The lands lying in the county of Russell in Virginia on Clinch river and Guests river, which flows into Clinch, and other water-courses mentioned; also other tracts of land which he had subsequently surveyed and patented; for a more particular description of which, he refers to the several patents recorded in the Virginia general land office—all of which lands except as thereafter excepted, he grants, bargains and sells and conveys to the said Wardens and their heirs. Then follows one of the exceptions in the following language: "Provided always, and expressly reserving out of this present grant and conveyance a certain tract or parcel of land con-

taining fifty thousand acres or thereabouts, situated at or near the junction of the Clinch and Guests rivers, and bounding on each of these rivers, already sold by the said Richard Smith (to) P. Francis De Tubeuf, his heirs and assigns." The said patent of 10,000

439 acres *claimed by the plaintiffs in this suit, must be covered by the said fifty thousand acres, which is described as "situated at or near the junction of the Clinch and Guests rivers and bounding on each of these rivers." (Both lie north of Clinch river.) Because the boundary of the 10,000 acre patent claimed by the plaintiffs is described as beginning at the mouth of Big Toms creek, where it empties into Guests river, at four buckeyes and maple and white walnut; thence running down Guests river along the several meanders thereof and binding on the same 1,192 poles to the mouth thereof, where it empties into Clinch river. Thence up Clinch river on the north bank thereof and along its several meanders and binding thereon, 2,786 poles to the mouth of Lick creek, where it empties into the Clinch river; thence N. 23 W. 897 poles to two white oaks standing in the line of No. 2, of 1,500 acres; then with its line and the line of Nos. 22 and 23 of five thousand acres each, to the beginning. These are all evidently some of the lots or divisions, as well as the tract of 10,000 acres, claimed by the plaintiffs in this suit, which is numbered 16, of the 348,723 acres for which he had obtained separate patents. He admits in solemn form, that he had sold 50,000 acres, which we see necessarily embraces the 10,000 acres now in dispute, to the elder De Tubeuf, his heirs and assigns, which he expressly reserves from the grant and conveyance he made to the Wardens. Would not the said Richard Smith and all other persons claiming by, through or under him, by that solemn avowal and admission be forever estopped from setting up any claim against De Tubeuf and those claiming under him, to the said ten thousand acres, part of the 50,000 acres which he had acknowledged under his hand and seal he had sold to De Tubeuf, his heirs and assigns,

and which he expressly reserved for 440 him? And if so, *the said Richard Smith, his heirs and assigns, could not be held to have title to the said tract of 10,000 acres, part and parcel of the 50,000 acres, which he, by solemn acknowledgment under his hand and seal, had sold to De Tubeuf, and reserves to him, his heirs and assigns, and cannot be relied on by the defendants as an outstanding title in Richard Smith or his heirs.

But whilst it cannot be so relied on by the defendants, it may be said that still the copies of unrecorded or illegally recorded deeds cannot be given in evidence by the plaintiffs. That may be conceded; but here an obligation is shown on part of Richard Smith, by his own acknowledgment, to convey to De Tubeuf, his heirs or assigns, the land in dispute, if it is not an acknowledgment that he had conveyed it. But although it may not be an acknowledgment of a conveyance, and no actual conveyance has been shown, after

such a lapse of time in ejectment the court would, under all the circumstances of the case, instruct the jury to presume that a conveyance had been made. And if the court should so instruct the jury in a case where the court is in the place of a jury, and discharging its functions, it ought so to presume itself. And especially when the defendants sets up no title of his own, but seeks only to defeat the plaintiff's right by showing a better outstanding title in a third party, who himself would be estopped to claim title against the plaintiffs. Whilst we are of opinion, therefore, that the court did not err in excluding the copies of the powers of attorney aforesaid from the evidence, upon the ground that they were not copies of valid records, we are of opinion that it did err in giving judgment for the defendants. It should have given judgment for the plaintiffs. We are of opinion, therefore, to reverse the judgment of the circuit

441 court, and *to enter judgment for the plaintiffs for the 4,900 acres of land.

CHRISTIAN, J. concurred in the opinion of Anderson, J.

STAPLES, J. dissented.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in finding for the defendants in error instead of finding for the plaintiffs in error (except James Campbell), on the evidence certified in the record; therefore it is considered by this court that, for the error aforesaid, the said judgment of the said circuit court be reversed and annulled, and that the plaintiffs in error (except James Campbell) recover of the defendants in error their costs by them about their said writ of error here expended, except so much of said costs (to be taxed by the clerk of this court) as was occasioned by copying into the record any document more than once. And this court, proceeding now to render in the premises such judgment as the said circuit court ought to have rendered, is of opinion that the defendants (except William M. Greer as to whom the case has not been submitted to the court) are guilty, and the plaintiffs (except James Campbell) have title in manner and form as the plaintiffs in their declaration against the defendants have complained, and that the damages to the plaintiffs (except James

Campbell) by occasion thereof, be assessed at one cent, *besides their costs.

Therefore it is considered by the court that the plaintiffs (except James Campbell) recover against the defendants (except the said Greer, as to whom, for the cause aforesaid, no judgment can yet be given) the lands in the declaration mentioned, in fee simple, together with their damages assessed as aforesaid, and their costs by them about their suit in this behalf expended. And the plaintiffs (with said exception) may have against the said defendants (except said

Greer as aforesaid) their writ of possession accordingly. Which is ordered to be certified to the said circuit court of Scott county. Judgment reversed.

443 *The Bland and Giles County Judge Case.

July Term, 1880, Wytheville.

Absent *Moncure, F.* and *Anderson, J.*

1. **Judges—Election—Commencement of Term of Office.**—In December, 1874, E was elected by the legislature judge of the county courts of G and B counties, and on the 12th of the same month commissioned as such; the commission stating that he was elected to fill the unexpired term of his predecessor. In December, 1879, W was elected judge of the same counties, and commissioned as such on the 20th of the same month. Without objection on the part of E, W entered, at once, upon the duties of the office, and E qualified as an attorney and practiced in both of the courts over which W presided, until the April term, 1880, when the court of appeals, having decided, that the terms of all the county judges in Virginia, whether elected to fill vacancies or not, commenced on the 1st day of January next following their appointments, and were for the full term of six years, as fixed by the Constitution, E appeared and protested that he was the lawful judge. This claim W refused to recognize, principally on the ground that E, by acquiescing in the assumption of the office by W, and becoming a practicing attorney in his court, held an office incompatible with the office of judge, and by this conduct had forfeited and abandoned his said office. On *quo warranto* by E against W—**Held:** E was entitled to the office, and the fact that he only yielded to the legislative and executive construction of the Constitution, until the question was settled by the supreme court, was no abandonment or forfeiture of his office.

2. **Attorney—Not an Officer.**—An attorney at law is not an officer.

3. **Public Office—How Terminated.**—An office is terminated *proprio vigore*, by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined *ipso facto* by the occurrence of the cause.

There must be a judgment of amotion after

444 judicial ascertainment of the fact, which may be by indictment or information, by writ of *quo warranto*, or by impeachment.

4. **Quo Warranto.**—The writ of *quo warranto* is not abolished in Virginia, and the circuit courts have jurisdiction of the same.

5. **Appeal—Waiver in Trial Court—Effect.**—W having waived the filing of an information in the court below, cannot be heard to complain of any irregularity on this ground in the appellate court.

6. **Same—Continuance—Practice.**†—A motion for a continuance, is one addressed to the *sound*

***Judges—Election—Term of Office.**—See Meredith, *Ex parte*, 33 Gratt. 119 and note. The principal case was cited by Lacy, J., in his dissenting opinion in Coleman v. Sands, 87 Va. 689, in reference to the tenure of office of a county judge. See 4 Min. Inst. (2nd Ed.) 227 et seq.

†**Continuance—Refusal to Grant as Error.**—Cited in Kesse v. The Border Grange Bank, 77

discretion of the trying court, under all the circumstances of the case, and its action will not be reversed by the appellate court unless it appears plainly erroneous.

This was a writ of error to a judgment of the circuit court of Giles county on a writ of *quo warranto* by George W. Easley against Robert Wylie, to obtain possession of the office of judge of the county courts of Bland and Giles counties. The circuit court rendered a judgment of ouster against Wylie; and he thereupon applied to a judge of this court for a writ of error; which was awarded. The case is fully stated by Judge Christian in his opinion.

Crockett & Blair, for the appellant.

Williams, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The record in this case discloses the following facts: In December, 1874, Hon. Geo. W. Easley was elected by the legislature judge of the county courts of the counties of Bland and Giles. He was commissioned by the governor on the 12th day of December, 1874. In the month of December, 1879, the Hon. Robert Wylie was elected by the legislature county judge of the same counties, and

445 was commissioned by the governor *on the 20th December, 1879. Under this latter commission Judge Wylie qualified, and proceeded to hold the county courts of Giles and Bland without any claim upon the part of Judge Easley that he was entitled to the office until the following April; and Judge Easley, during that time, was a practicing attorney in the county courts of Giles and Bland. At the April term of the county court of Giles county, Judge Easley (who up to that time had set up no claim to the office, though present when Judge Wylie opened his first court) appeared in the county court of Giles and offered a protest in the following words, which was spread upon the records of that court:

"In Giles County Court, 20th April, 1880. "Be it remembered, that on this day Robert Wylie, claiming to be the rightful judge of the county court of this county and of the county of Bland, took the bench, and was proceeding with the opening of the court; whereupon, George W. Easley appeared in person, and suggested that on the — day of December, 1874, he was duly elected judge of the county courts of Bland and Giles

Va. 129, to support the proposition that motions for continuance are addressed to the sound discretion of the trial court, and a judgment will not be reversed on appeal for refusal to grant a continuance unless such refusal was clearly error. See also 4 Min. Inst. (2nd Ed.) 969; Hewitt's Case, 17 Gratt. 627; Harman v. Howe, 27 Gratt. 676; Russell's Case, 28 Gratt. 930; Walton's Case, 32 Gratt. 855; Myster's Case, 79 Va. 5; Milstead v. Redman, 3 Munf. 219; Brooks v. Calloway, 12 Leigh 466; Spengler v. Davy, 15 Gratt. 381; Holt v. Comm., 2 Va. Cas. 156; Schonberger v. Comm., 86 Va. 489; Norfolk, &c., R. Co. v. Shott, 92 Va. 45; Davis v. Walker, 7 W. Va. 447; Wilson v. Kochlein, 1 W. Va. 145; Mar-met v. Archibald, 37 W. Va. 778.

counties, and was commissioned as such by the governor of the State of Virginia on the — day of December, 1874, as appears by the said commission and the order of qualification; that by virtue of said election, commission and qualification he is advised that he is now the rightful judge of said courts, and demanded of the said Robert Wylie, now sitting as judge, that he should vacate the position now claimed by him as judge of said courts, desist from his effort and proceeding to open said court, and permit him, the said George W. Easley, without further interruption to enter at once upon the discharge of the duties of said office, which he, the said George W. Easley, claims he is
 446 entitled to under the law as *settled by a decision of the supreme court of appeals of this State in a case recently decided by said court; and that the said Easley presented no other authority for assuming the bench than the above statement of facts, which demand was refused; and thereupon the said Geo. W. Easley protested against the said Robert Wylie assuming to discharge the duties of judge of said court; but the said Wylie, claiming to be the rightful judge, proceeded to open and hold said court, and the said protest is, on application of said Easley, spread upon the record."

It is further shown by the record, that on the 3d day of May, 1880, the said George W. Easley filed his petition in the circuit court of Bland county, in which, after setting forth the grounds of his claim to the office of judge of the county court for the counties of Giles and Bland, he prayed that a rule should be issued against the said Robert Wylie to appear before said court and show cause why leave should not be given him to file an information in the nature of a writ of quo warranto at the relation of petitioner, to determine and test their respective rights in the premises to said office.

Upon regular proceedings taken upon this petition, and upon "facts agreed" at the bar, it was adjudged and so ordered by the circuit court, "that the said Geo. W. Easley is entitled to the office of judge of the county courts of Giles and Bland counties, and to discharge the duties and receive the emoluments thereof; and that the said Robert Wylie did intrude into, before the filing of petitioner's petition, and now occupies said office, against the wishes and to the prejudice of the rights of said Geo. W. Easley; and now occupies and holds the same contrary to law; and that the said Robert Wylie be ousted and removed from said office, and that the said Geo. W. Easley
 447 be restored thereto: *and that writ issue upon this judgment to remove and oust said Wylie from, and to reinstate and restore said Easley to said office." And it was further ordered, "that the said Geo. W. Easley recover of the said Robert Wylie his costs in and about this action."

To this judgment a writ of error was awarded by one of the judges of this court.

Four grounds of error are assigned here, to this judgment, all of which will be no-

ticed—but not in the order of assignment in the petition.

For convenience they may be stated as follows:

1st. "That the circuit court erred in refusing a continuance of the respondent's case."

2d. "That the circuit court had no jurisdiction to hear and determine the case."

3d. "That the commission of said Easley on its face invested him (only) with the remainder of the term of office of Judge P. W. Thacker which expired on the 31st December, 1879."

4th. "That conceding the said Easley's commission to have been unexpired at the beginning of petitioner's term, yet the agreed facts show a total forfeiture and abandonment of said office by acquiescence in and recognition of, petitioner as the rightful judge; also by qualifying as an attorney and practicing as such in both petitioner's said courts, a position, trust or office wholly incompatible with his now pretended judgeship, and is one of the means by which the office might have been forfeited and terminated."

As to the first error assigned, to-wit, that the circuit court refused to grant a continuance of respondent's case, it is sufficient to remark, that it has been repeatedly declared by this court, that a motion for a continuance is a motion addressed to the sound discretion of the court of trial under all the circumstances of the case; and though an appellate court will supervise the *action
 448 of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action is plainly erroneous. *Hewett v. Commonwealth*, 17 Gratt. 627; *Roussell's case*, 28 Gratt. 930.

We cannot say that the action of the circuit court in this case, in refusing to continue the case on motion of respondent was plainly erroneous. On the contrary there was a manifest propriety under the circumstances, that there should be a prompt and speedy trial of the question involved. It was a question, to test the title to the office of county judge. It was important to the interests of the community and to the proper administration of public justice that this question should be promptly and speedily adjudicated, in order that it might be known and determined who was the lawful and rightful judge of the county court of the counties of Giles and Bland. The only ground of continuance urged was that the counsel for respondent had not time to consult authorities and prepare for his defence. This was no valid excuse, especially in this case, where the precise question raised by the pleadings had been recently determined and definitely settled by this court.

The court is therefore of opinion that the circuit court did not err in overruling the motion of the respondent for a continuance.

The second ground of error as to the jurisdiction of the court is not well taken.

The writ of quo warranto is a common law writ, never abolished by statute, and still exists in Virginia. The jurisdiction of the courts on proceedings by writ of quo warranto

or by information in the nature of a writ of quo warranto, was fully recognized by this court in the recent case of *Royall v. Thomas*, 28 Gratt. 130.

It was objected however that in this case the information was not filed by the Commonwealth, but that the proceedings

449 *Easley. Now the record shows, that the very careful and accurate judge of the circuit court, upon considering said petition and answer of respondent Wylie, directed that an information should be filed; but Wylie by his counsel waived in open court the filing of any information. But for this waiver, no doubt, an information in proper form, in the name of the Commonwealth would have been filed at once. Having waived it in the court below he cannot be heard to say, in the appellate court, that the proceedings were irregular because the information was not filed.

3d. The third ground of error assigned, to-wit: "That Easley was elected to fill an unexpired term, and that his term of office therefore expired on the 31st December, 1879," is not well taken.

The identical question raised by this assignment of error was decided by this court in the Prince William County Judge Case, in April last, at Richmond, and not yet reported, in which it was held that all judges elected to fill vacancies, hold their offices for the full constitutional term, and not for unexpired terms of their predecessors. It is not necessary or proper to enter again upon the discussion of this question. It is sufficient to refer to the able and exhaustive opinion of Judge Staples in that case as conclusive of this case. It perfectly covers the case before us, and must rule it. Indeed, it is admitted by the learned counsel for the plaintiff in error that the decision of the Prince William Judge Case is conclusive of this case; but they rely mainly on the 4th assignment of error, which will now be considered.

4. The fourth assignment of error, to-wit: That Easley had abandoned and forfeited his office of county judge of Giles and Bland by becoming an attorney and practitioner at the bar of those courts is also not well taken, and cannot be sustained.

450 *An office is determined proprio vigore by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined ipso facto by the occurrence of the cause. There must be a judgment of amotion after a judicial ascertainment of the fact; which may be by indictment or information, by writ of quo warranto, or by impeachment. See 2 Minor's Inst., p. 27, and authorities there cited. But it has been held by this court and by the supreme court of the United States that an attorney-at-law is not an officer, so that the argument of the learned counsel for the plaintiff in error and the authorities cited by him as to the incompatibility of the two offices has no application in this case.

In the case before us if proper proceedings

had been taken against Judge Easley because he held "the incompatible trust or office of attorney" as charged, there never could have been upon the facts of the case a judgment of amotion. He neither forfeited nor abandoned his office by failing to protest at once against the incompetency of Wylie or by becoming an attorney and practitioner in his court. He simply yielded for the time to the executive and legislative construction of the Constitution. But as soon as the court of appeals had given its construction to the provision of the Constitution he promptly asserted his rights and maintained them in accordance with that construction. Certainly no court under the circumstances could have rendered a judgment of amotion.

Upon the whole case we are of opinion that there is no error in the judgment of the circuit court and that the same must be affirmed.

Judgment affirmed.

451 *Simmons v. Simmons' Adm'r.

July Term, 1880, Wytheville.

Absent *Moncure*, P.

1. **Agents—Accounting—Bill by Principal's Administrator.**—A bill in equity will lie, by an administrator of a principal, against the general agent of his intestate for a discovery and an account of the transaction of the latter with his principal.

2. **Appeal—Exceptions to Commissioner's Report—Review.**—The answer of a defendant in which no reference is made to a commissioner's report, will not be regarded as an exception to said report; and where there are no errors on the face of the report, and no exceptions taken thereto in the court below, they cannot be taken for the first time in the appellate court.

3. **Pleading and Practice—Plea Filed to Answer—Harmless Error.**—With the answer of a defendant a bond of the plaintiff's decedent is filed. The plaintiff filed no replication, but pleaded *non est factum* to the bond filed with

*Principal and Agent—Accounting—Equity Jurisdiction.—*Huff v. Thrash*, 75 Va. 546, citing principal case; *Vilwig v. B. & O. R. Co.*, 79 Va. 449, citing principal case.

†Appeal—Commissioner's Report—Exceptions—Practice.—Reports not excepted to in the lower court, cannot be impeached before the appellate court in relation to matters which may be affected by extraneous testimony. *Liberty Sav. Bank v. Campbell et al.*, 75 Va. 534, citing principal case; 4 Min. Inst. (2nd Ed.) 1386, 1387, and cases cited; *Brewis v. Lawson*, 76 Va. 36; *Wimbish et ux. v. Rawlins' Ex'or et al.*, 76 Va. 48; *Universal L. Ins. Co. v. Binford et al.*, 76 Va. 103; *Morrison's Ex'or et al. v. Householder's Adm'r et al.*, 79 Va. 627; *Ashby v. Bell's Adm'r*, 80 Va. 811; *Nickels v. Kane's Adm'r*, 82 Va. 309; *McComb v. Donald's Adm'r*, 82 Va. 903; *Cralle v. Cralle*, 84 Va. 198; *Robinson v. Allen*, 85 Va. 721; *White v. Johnson*, 2 Munf. 285; *Evans v. Shroyer*, 22 W. Va. 584; *Still v. McClintic*, 11 W. Va. 399; *Sandy v. Randall*, 20 W. Va. 251. The principal case was distinguished in *Kyle v. Conrad*, 25 W. Va. 772.

‡Pleading.—As to what denial is requisite under Code of 1873, ch. 167, §§ 38, 39, where the bill or

the answer. On the evidence being heard, the court below decided that the bond was not the deed of the plaintiff. **Held:**

While it was irregular and improper to have allowed a plea to have been filed to an answer, and the proper course was, for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit, putting in issue the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet, as the plea, which was sworn to, can be now treated as an affidavit, as the parties took issue on it, and testimony, and the appellant has not been prejudiced by the irregular proceedings and trial on said plea as such, the decree will not now be reversed for such irregularities, substantial justice having been done between the parties.

4. Witnesses—Competency—Interested Party.—A witness who was not a party to the contract or transaction, which is the subject of investigation, is not disqualified on "account of interest only; although one of the original parties to such contract or transaction be dead, insane, or incompetent to testify by reason of infamy, or any other legal cause, and for that reason the other party is rendered incompetent to testify.

5. Same—Same—Appeal.—Objection to the competency of a witness cannot be taken for the first time in the appellate court.

This was a suit in equity in the circuit court of Floyd county, brought in October, 1874, by Montague H. Simmons, administrator of Delila Simmons, deceased, against Otey T. Simmons, to have an account of his agency in the management of her property. The bill charged that Delila Simmons, who was then quite old and somewhat infirm, and uneducated, by a regular power of attorney appointed Otey T. Simmons her agent to transact her business; that said agency continued until the death of said Delila Simmons in June, 1870; that as such agent Otey T. Simmons possessed himself of a large amount of personal property of said Delila Simmons which he sold and disposed of, &c., and the bill proceeds to set out different articles of property as corn, cattle, hogs, wheat, one horse, and other articles; and then charges that he took charge of and sold other property of Delila Simmons to a large amount, which plaintiff was unable to specify particularly, and that he had collected a considerable amount of rents for and due her in money, in grain and other property.

other pleading alleges the making, endorsement, assignment or acceptance of any writing, see *Coles et ux. v. Hurt*, 75 Va. 380, citing leading case.

Equity Pleading—Want of Replication.—Where defendant has taken depositions as if there had been a replication, the decree shall not be reversed for want of a replication. Code 1873, ch. 177, § 4; *Jones v. Degge*, 84 Va. 685; *Kern, Barr & Co. v. Wyatt & Co.*, 89 Va. 885; 4 Min. Inst. (2nd Ed.) 1330 *et seq.*

***Witnesses—Interest—Competency.**—A party in interest and on the record is not incompetent to testify in relation to a contract to which he is not a party, though one of the parties to the contract is dead, and the other party to the contract is incompetent to testify. *Knick et al. v. Knick*, 75 Va. 12, citing leading case; 4 Min. Inst. (2nd Ed.) 766; *Hall v. Rixey*, 84 Va. 790.

And he charges that Otey T. Simmons made no settlement with Delila Simmons on account of said agency in her lifetime, and has refused to settle with the plaintiff since her death, or to exhibit an account of his transactions as such agent. And he prays for a discovery from said Otey T. Simmons of his transactions as said agent; and that he be compelled to settle his account, and pay to the plaintiff whatever he is due on account thereof; and for general relief.

453 *The bill was taken for confessed as to the defendant, and by a decree in December, 1874, Commissioner Morgan was directed to take and report the account of Otey T. Simmons, as attorney in fact and agent for Delila Simmons.

The commissioner returned his report in April, 1875; by which he charged Otey T. Simmons as of 1868 for property of Delila Simmons taken and sold by Otey T. Simmons, as shown by an account filed by Delila Simmons' administrator \$870. The commissioner states that the plaintiff took the depositions of several witnesses before him, which prove the account to such an extent that he considered it proper to charge the defendant with the whole amount. And he says the defendant produced no vouchers for disbursements made by him, and no statement of his transactions, nor anything whatever relating to transactions before the commissioner. The depositions referred to were returned with the report.

After the report of the commissioner was returned Otey T. Simmons filed his answer among the papers in the cause. He says the power of attorney was given in 1862, and returned to Delila Simmons previous to 1867. As to some of the articles mentioned in the bill he says he has no recollection. As to others he paid for them; and as to others he admits having received them. He says that at the beginning of the late war Delila Simmons, his mother, was an old widow, and had no one with her but two small negroes, neither of whom was able to labor; that she had but little, save a poor farm and a little stock; that he had to live with his mother during the first year of the war, as she was afraid to live alone; that during the whole of the war he had many things to do for his old mother; that he paid her taxes, and on a number of occasions paid other sums of

454 money for her. In fact he *to a very great extent supported his mother and the two negroes during the war. He also says that on the 23d of April, 1870, he made a full, fair, complete and honest settlement with his mother, and she fell in debt to him in the sum of \$247.50, and executed her bond for the same, which he exhibits as a part of his answer. And he says that in May, 1857, his mother executed to himself and R. M. Simmons a bond for \$15 as executors of T. W. Simmons, deceased, and that he accounted with the estate for the same. And he exhibits it as a part of his answer.

At the August term, 1875, the plaintiff, instead of filing a replication to the answer, filed a plea denying that the bond for \$247.50 filed with the answer, was the bond of

Delila Simmons, or was executed by her. And this plea was sworn to by the plaintiff.

The cause came on to be heard on the 5th of August, 1875, upon the papers formerly read, the report of Commissioner Morgan, the answer of the defendant, filed in the papers, exhibits filed therewith, the plea of non est factum of complainant, tendered to one of the bonds filed with defendant's answer, the objection of the defendant to the reception of said plea, and depositions of witnesses. On consideration of all of which, and there being no exceptions to Commissioner Morgan's report, the same is confirmed; and the court overrules the objection of the defendant to the filing of plaintiff's plea aforesaid, and allows the same to be filed. The decree then proceeds to state that after the court had allowed the plaintiff's plea to be filed, and his answer filed among the papers had been treated as the defendant's answer, he had tendered as his answer in the cause, the paper B sworn to before J. P. Jett, on the 5th of August, 1875, and asked leave to file the same; which was refused by the court. This paper B is substantially the same as the answer before

455 filed. *Defendant then asked leave to withdraw the bond to which the plea of non est factum was allowed, so far as the same is filed with the first answer as a set-off; which was refused by the court; and he was allowed until the next term to take issue on the plea of non est factum.

The cause came on again to be heard upon the papers formerly read, general replication to the plea of non est factum, and depositions of witnesses, when the court held that the bond for \$247.50 was not the deed of Delila Simmons, and decreed that the plaintiff recover of the defendant Otey T. Simmons, the sum of \$870 with interest from the 1st of April, 1870, and his costs, subject to a credit of \$15, with interest thereon from the 15th of November, 1857, the bond of Delila Simmons to Otey T. Simmons and R. M. Simmons filed with defendant's answer. And thereupon Otey T. Simmons applied to a judge of this court for an appeal, which was allowed. There was an objection taken in this court to the testimony of three witnesses introduced by the plaintiff, who were the sons and a son-in-law of Delila Simmons.

Taylor & Phlegar, for the appellant.

William Terry and J. L. Tompkins, for the appellee.

BURKS, J., delivered the opinion of the court.

The objection under the first assignment of error by appellant, who was defendant in the court below, that the complainant's only remedy for the grievances set out in the bill was in a common law forum, is not well founded.

The bill was filed to have a discovery, account and settlement of the transactions of the defendant as general agent for several years. It is not the case of a single money demand, which might conveniently and should be enforced in a court of law, nor of mutual demands merely,

of which equity would take cognizance (2 Rob. Prac., Old Edn. 4), but it is a case involving a trust, where the fiduciary character of the employment imposed upon the person employed the duty of keeping accounts and preserving vouchers. It is well settled that equity has jurisdiction in such a case. *Zetelle v. Myers*, 19 Gratt. 62; *Coffman v. Sangston*, 21 Gratt. 263; *Thornton v. Thornton*, 31 Gratt. 212.

The account sought by the bill was taken and stated by a commissioner under the order of the court. His report was confirmed, and the decree complained of was based on that report. Objections to the decree for alleged errors in the report, not appearing on the face of it, to avail in this court, must be founded on exceptions to the report taken in the court below.

There are no errors on the face of the report, and no exceptions to it were taken below. Reports not excepted to cannot be impeached before an appellate tribunal in relation to matters which may be affected by extraneous testimony. A different rule would lead in practice to surprise of parties litigant, and often result in great mischief and injustice. 2 Rob. Prac. (Old Edn.), 383 and cases there cited; *Peters v. Neville's Trustee*, 26 Gratt. 549; *Cole's Committee v. Cole's Adm'r*, 28 Gratt. 365, 370.

It is contended, however, for the appellant, that his answer to the bill operated an exception to the report which had been previously filed. Certainly it is not the proper function of an answer to draw in question and test the correctness of a commissioner's report made in the progress of the cause. If it be admissible in any case to incorporate exceptions to such report in the answer, they must at least have all the requisites of such exceptions taken and filed in the usual way.

457 *Exceptions to a master's report are said to be in the nature of special demurrers, and the party objecting must point out the error, otherwise the part not excepted to will be taken to be admitted. 2 Dan. Chanc. Prac. (4th American Edn.), 1316, note 4 and cases there cited. In all cases where exceptions are necessary at all, they should specify with reasonable certainty the particular grounds of objection relied on, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide. *Crockett v. Sexton*, 29 Gratt. 46.

Appellant's answer is directed only to the bill. Some of the allegations it admits in whole or in part; some it denies; while others are left unnoticed and unanswered. It presents no objections to the commissioner's report—makes no complaint of it—specifies no errors. It does not even allude to it, directly or indirectly. So far as appears, neither the court, the parties opposite, nor their counsel, were given to understand that it was intended or considered as an exception to the report. Hence the recital in the decree, that there were "no exceptions." For an appellate court to treat such an answer as an exception would be giving license to parties to set traps for their unwary adversaries.

It is needless, therefore, to inquire in this case whether the answer to the bill was responsive or not, or how far and in what respects it was responsive, or whether the evidence was sufficient to sustain the commissioner's report, as it is manifest from a mere glance at the record that the conclusions reached by the commissioner might have been varied by extrinsic proof, which might have been adduced if exceptions had been filed.

It is also contended for the appellant that it was error in the court to confirm the 450 commissioner's report *before deciding the issue made on what is called the plea of non est factum. It was certainly error to allow any such plea to be filed. When the defendant filed his answer, if the complainant deemed it sufficient, he should have taken issue upon it by general replication; or, if he chose to incur the hazard of so doing, he might have had the cause set for hearing on the bill and answer without replication; or, if there was new matter in the answer making it proper, he might have filed a supplemental bill. One or another of these methods he was bound to pursue. He had no right to file a plea to the answer. A plea (in a technical sense) of the complainant to defendant's answer is an anomaly in the equity practice. If he had filed a general replication, it would have been a general denial of the truth of the defendant's answer, and of the sufficiency of the matter alleged in it to bar the complainant's suit, and an assertion of the truth and sufficiency of the bill. Story's Eq. Plead., § 878. Under such replication alone, it would have devolved upon the defendant to prove the execution of the bonds filed with his answer and relied on as set-offs, but for the statute, Code of 1873, chap. 167, § 39, which provides that "where a bill, declaration, or other pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the answer, plea, or other pleading which puts it in issue."

The effect of this statute was to relieve the defendant in this case from proving the execution of the bonds referred to, unless the replication was attended with the affidavit provided by the statute.

Unless therefore the complainant intended to admit the execution of the bonds, it behooved him to put in the replication (if not dispensed with by subsequent proceed-

459 ings) *with the affidavit required. No formal replication was filed, but the failure to file it will be regarded in this court as immaterial, the defendant having proceeded to take depositions as if there had been a replication. Code of 1873, ch. 177, § 4. See *Cocke v. Minor*, 25 Gratt. 246. When therefore the paper, called a "plea," was tendered, it might and should have been received and treated as an affidavit merely (for it was sworn to) and not as a plea. It seems, however, the defendant took issue upon it as a plea; both parties took evidence touching the matters involved, and the court determined the question in issue. This was an irregular proceeding; but if the

appellant was not prejudiced by it, he cannot successfully complain of the irregularity. The statute last cited (Code of 1873, ch. 177, § 4), expressly provides that a decree shall not be "reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." We are of opinion, that the appellant was not prejudiced, either by the confirmation of the report, reserving the issue as to the bond (no exceptions having at any time been filed to the report), or by the mode in which the execution of the bond was put in issue. Treating the "plea" as an affidavit, the mode of determining the matter in dispute would have been the same in substance as that pursued, namely, the decision of the matter by the court on depositions taken on both sides.

The onus was on the appellant to prove the execution of the bond. If he established it satisfactorily, he was entitled to the benefit of the fact so established notwithstanding the confirmation of the report, as the question as to the bond was left open by the decree confirming the report. If he failed 460 in his proof, there *was no error to his prejudice in confirming the report to which he never accepted. The circuit court was of opinion, that he did so fail; and we are disposed to concur in that opinion. At all events, we cannot say from the record, that he erred in his judgment, and as the question decided was one of fact, we cannot overrule the decision unless we were convinced, as we are not, that substantial error was committed.

Objection was made in argument, to the competency as witnesses of William T. Lester, R. M. Simmons, and Montague Simmons, whose depositions were taken on behalf of the complainant. Two of these witnesses testified, after the confirmation of the report, touching the question reserved as to the execution of the bond.

It would seem to be a sufficient answer to this objection, that it does not appear that it was first made in the court below. Notwithstanding some expressions in decided cases, which seem to concede that objections to the testimony of a witness on the ground of his incompetency may be properly made in this court although not made, or considered, or passed upon in the court below, we are of opinion, that such objections, unless first made in the court below, cannot be relied on here, for the reason that if allowed, parties might be taken by surprise. If made in the court of original jurisdiction: First. The incompetency might in some cases be removed by release or otherwise; Second. If not removed and the witness be excluded, the loss of his testimony might perhaps be supplied by other evidence.* See what was

*NOTE BY THE JUDGE.—A decision of this court to the same effect was rendered several years ago, as I am informed by Judge Staples, who delivered the opinion, which was not reported (though a report

461 said by Judge *Moncure in *Fant v. Miller & Mayhew*, 17 Gratt. 187. Also *Beverly v. Brook & als.*, 2 Leigh 425; *Hord's adm'r v. Colbert & als.*, 28 Gratt. 49, 54, 55, 56; *Statham & als. v. Ferguson's adm'r & als.*, 25 Gratt. 28, 38.

But even if the objection had been made in the circuit court, it would have been without effect. The witnesses, although they may have had an interest in the result of the suit, were not parties to the contract or transaction which was the subject of investigation. Disqualification on account of interest is removed by the statute, and if the interested witness was not a party to the contract or other transaction which is the subject of investigation, his interest merely does not disqualify him, though one of the original parties to the contract or transaction, the subject of investigation, be dead, insane, or incompetent to testify by reason of infamy, or any other legal cause, and for that reason the other party is rendered incompetent to testify. Code of 1873, ch. 172, §§ 21, 22. The contract or transaction, the subject of investigation in this case, was wholly between the appellant and the complainant's intestate. It is not pretended, that either of the witnesses was a party to such a contract or transaction.

The correctness of the above construction of the statute, if not directly and expressly determined in any previous case, is a necessary deduction from the construction given to the same statute in the numerous decisions of this court heretofore made, many of which are reported. *Mart's ex'ors v. Mart's heirs*, 25 Gratt. 361, is very nearly, if not quite, a case in point.

The refusal of the court to permit the appellant to file a second answer to the bill was not assigned as error either in the petition for appeal or in the oral argument at bar. It is plain, that there was no error in such refusal, and it is therefore deemed unnecessary to notice it further.

462 *For the reasons stated, we are of opinion, that there is no error, to the prejudice of the appellant, in the decree appealed from, and that it should be affirmed. Decree affirmed.

463 **Asberry's Adm'r v. Asberry's Adm'r & als.*

July Term, 1880, Wytheville.

Absent *Moncure*, P. and *Anderson*, J.

I. E, administrator of A, sells the assets, and B makes purchases for upwards of \$1,000, and gives his bond to E with sureties for his purchases. B is the guardian of J, one of the distributees of A, and upon a settlement between E and B, E receives the receipt of B as guardian of J for \$1,000 for so much of B's purchases at the sale. J dies and R, his

was ordered), the manuscript having been lost or mislaid by some means or other.

Since the above was written, I have seen the case of *Baxter v. Moore*, 5 Leigh 219, in which the decision was the same way on the very point now raised in argument here.

administrator, sues E for J's share of the estate of A. HELD:

1. *Fiduciaries—Trust Funds—Duty as to.*—The duty of every fiduciary is to keep the trust fund separate from his own property or money; and to apply it in a due course of administration, or to invest it securely for the benefit of the parties entitled.

2. *Same—Same—Misapplication—Particeps Criminis.*—A party who consents or unites with a fiduciary in a misapplication of the trust funds, or in any other act contrary to the duty of the fiduciary, becomes a *particeps criminis*, and will be held liable accordingly.

3. *Same—Same—Same—Same—Knowledge.*—E knew the guardian was using the ward's money in paying his own debt; and he knew, or must be held to know, that the guardian was thereby misapplying the funds, and committing a breach of trust.

4. *Same—Same—Same—Same—Liability.*—Though E may have acted in good faith, without a suspicion of anything improper in the transaction, the law stamps it as fraudulent, however innocent the intention of the parties; and E is not entitled to a credit for the \$1,000, thus receipted for by B as guardian of J.

II. *Rights of Creditor Having Recourse against Two Persons.*—R as administrator of J brought an action against B, who was insolvent, and his sureties in his official bond to

464 recover the *amount due from B, and this action was pending when the decree was made in the case in equity. HELD: A creditor having two different remedies, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. And the administrator of J cannot be delayed by a protracted controversy with the sureties of the guardian; he has his right of action against the party who was concurred in the breach of trust committed by the guardian, and therefore incurs the like liability.

*Guardian and Ward—Duty as to Deposits.—See also *Whitehead v. Whitehead*, 85 Va. 879.

†*Same—Misapplication of Funds—Particeps Criminis.*—It has been long settled that whenever a fiduciary does any act in violation of his duty or commits a breach of trust, that he and all who wilfully and knowingly aid him in the execution of these purposes, are, in the eyes of the law, participants in the offence, and all stand upon the same footing. *Boisseau v. Boisseau*, Guardian, 79 Va. 73, and see cases cited; 1 Min. Inst. (4th Ed.) 480, 481; 4 Min. Inst. (2nd Ed.) 1369; *Broadus et al. v. Rosson et al.*, 3 Leigh 12.

‡*Same—Same—Liability.*—The conversion by a guardian to his own use of a bond of his ward makes such bond the property of the guardian, and irrevocably so, in the option of his ward, and renders him liable for the amount thereof. *Burwell et al. v. Burwell's Guardian*, 78 Va. 574, and see cases cited.

Same—Same.—The court will not allow, much less aid, a guardian to apply the estate of his wards to the discharge of his individual indebtedness. *Dobyns & Davis v. Rawley*, 76 Va. 537, citing principal case.

§*Equitable Jurisdiction and Relief—Double Remedy—Single Satisfaction.*—A creditor having two different securities, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. *Carter v. Hampton's adm'r et al.*, 77 Va. 631, citing principal case.

This was a suit in equity in the circuit court of Roanoke county, but afterwards transferred to the circuit court of Bedford, brought by some of the children of Joel Asberry, deceased, against John M. Evans his administrator, and Lewis W. Richardson, administrator of John G. Asberry, another son of Joel Asberry, for a settlement of said Evans' administration account, and a distribution of the estate. The accounts were referred to a commissioner, who made his report, in which he stated the account of the administrator with each of the distributees, bringing John G. Asberry indebted to the administrator \$494.01; and there was a decree for this amount against said administrator in favor of Evans.

Richardson, as administrator of John G. Asberry, then, by leave of the court, filed a bill to review this decree; in which he stated that the account of the administrator Evans, with John G. Asberry contained one item of \$1,000, as paid by Evans to John G. Asberry's guardian, William L. Bernard. That in fact Bernard had purchased at a sale of the assets of Joel Asberry, by Evans as his administrator, upwards of \$1,000, for which he gave his bond with sureties; and when it fell due, he had given to Evans his receipt for said sum of \$1,000, as guardian of John G. Asberry; which Evans had received as a payment of so much of his debt. And he insisted that this was not a valid

465 *payment, and Evans was not entitled to a credit for the amount in his settlement with John G. Asberry.

Evans in his answer, states that he paid Bernard, the guardian of John G. Asberry \$1,000, by the bond of Bernard, which he held as administrator of Joel Asberry, which was well secured.

The account was referred to the commissioner, who made his report accompanying it with a special statement made at the instance of the plaintiff, which, excluding any credit to Evans for the payment to Bernard of \$1,000, found a balance against him of \$962.33.

It appears that at the time this suit was pending, Richardson, as administrator of John G. Asberry, had brought an action at law against Bernard, who had become insolvent, and his sureties in his guardian's bond; the object of which was to recover the amount for which Bernard had given his receipt to Evans; and when the cause was about to be heard Evans moved the court to continue it until the next term. But the court overruled the motion. He also asked leave to file an amended answer, not to introduce any new grounds of defence, but to state more fully the facts in relation to the settlement with Bernard. But the court refused to permit the amended answer to be filed.

The cause came on to be heard on the 13th of September, 1878, when the court, being of opinion that the delivery of the bond of William L. Bernard to him by John M. Evans, administrator of Joel Asberry, was a mere colorable proceeding between them to misapply the money due from the said Evans

to the said John G. Asberry, the ward of the said Bernard, to the private debt of the said Bernard to the said Evans; and the said misapplication being with the full knowledge and active participation of said Evans, cannot avail as against the said John G. Asberry, or his administrator, therefore was no valid payment of

466 *the distributable share of John G. Asberry in the estate of Joel Asberry, the said bond being due from said Bernard in his individual character to the said Evans, administrator of Joel Asberry, and that it was a collusive transaction between the said Bernard and said Evans, doth allow the same, and doth disapprove of the report of Commissioner Palmer as to the two items of six hundred and sixty dollars and ninety-three cents, and three hundred and thirty-nine dollars and seven cents, credited in said report to the said John M. Evans, administrator as aforesaid, as being paid to the said John G. Asberry.

And the court approving the special statement of said commissioner made at the instance of the complainant, doth adopt and confirm the same, and doth adjudge, order, and decree that the defendant, John M. Evans, late sheriff of Roanoke county, and as such administrator of Joel Asberry, deceased, do, out of the assets of his intestate, if so much he hath, and if not, then out of his own estate, pay to the complainant, L. W. Richardson, administrator de bonis non of John G. Asberry, deceased, the sum of nine hundred and sixty-two dollars and thirty-three cents, with interest thereon at the rate of six per centum per annum from the 1st day of April, 1875, till paid, and his costs expended by him in the prosecution of this suit.

And it being represented to the court that a suit at law is pending in the circuit court of Roanoke county for and in behalf, and at the relation of the said John G. Asberry's administrator against the said William L. Bernard, and his securities on his guardian bond, to recover the amount of the alleged payment of one thousand dollars by the said Evans to the said Bernard by setting off the individual debt to said Bernard, to him as aforesaid, and that the said Bernard is insolvent, and his securities are resist-

467 ing a recovery on *the said guardian's bond in the said action upon the ground that the application of the amount due by the said Evans to the ward of the said Bernard to the private debt of the guardian to him, was no payment for which the securities of the said guardian were bound for the one thousand dollars so misapplied. The court doth therefore further order and decree, that the said administrator of the said John G. Asberry, deceased, do permit the said Evans to prosecute the said action at law in his name, but at the proper costs and charges of the said Evans, to recover the said alleged payment of one thousand dollars, if the said securities on the said guardian's bond shall be held to be liable for it. But, on the motion of the said John M. Evans, it is ordered that the execution of this decree be

suspended for sixty days to enable him to apply for an appeal, upon his entering into bond with sufficient security in a penalty of one thousand dollars, conditioned according to law; and at his instance the court doth certify that several days after his motion for a continuance had been overruled, and after the court had announced its opinion and was about to enter up its decree in the case, the said John Evans, upon his own affidavit, moved the court for leave to file an amended and supplemental answer and a demurrer to the bill; which motion the court rejected and overruled. And thereupon Evans applied to a judge of this court for an appeal and supersedeas; which was awarded.

D. B. Strouse, for the appellant.

Hansbrough, for the appellee.

STAPLES, J., delivered the opinion of the court.

The questions involved in this case lie within a narrow compass and are of
 468 easy solution. The record *shows that John M. Evans was the administrator of Joel Asberry, and as such made sale of the estate, or part of the estate, of his intestate. At that sale William L. Bernard became a purchaser of some of the property to the amount of a thousand dollars or more, and executed his bond to the administrator for the purchase money. At the time of these transactions or afterwards Bernard was the guardian of John G. Asberry, one of the distributees of the estate of Joel Asberry. His distributive share in that estate in the hands of Evans was not less than a thousand dollars. In this estate of things it was agreed between Evans and Bernard that the money due the ward in the hands of Evans as administrator should be appropriated to the payment of Bernard's individual debt to Evans contracted in the purchase of the property. This arrangement was consummated, and Bernard as guardian, receipted to Evans for the amount due his ward as having been actually paid by Evans to him. The question before us is, whether this is a valid payment, sufficient to exonerate Evans from liability to the ward or his estate? The learned counsel for the appellant, in his argument here, insisted that if Evans had paid to Bernard the \$1,000 due, the said Bernard might have become the borrower of the money and used it in the payment of his debt to Evans, and the transaction would be perfectly valid. And this being so, it was unnecessary for the parties to go through with the useless ceremony of paying over the money, and then paying it back again.

If the learned counsel's premises are correct, his conclusion cannot be questioned. But it is true that a guardian has the right to appropriate his ward's estate to the payment of his own debts? It is certainly well settled that an administrator or executor
 469 cannot so use the assets, unless under very peculiar circumstances, *as where he is legatee or distributee, or otherwise in advance to the estate. The use of the assets by the personal representative

for his own private purposes, or for the payment of his own debts, is necessarily a misapplication of trust funds, and a breach of trust. When he so appropriates the money of the estate he thereby becomes a borrower, throwing upon his cestui que trust, and upon the sureties on his official bond, all the risks of his continued solvency. The duty of every fiduciary is to keep the trust fund separate and distinct from his own property or money, and to apply it in a due course of administration, or to invest it securely for the benefit of the parties entitled. By so doing it can be identified and followed in the event of his death or insolvency. When, however, the fiduciary uses the trust money for his private purposes, the fund is forever gone, and the cestui que trust must incur all the hazards of the fiduciaries' insolvency. These are elementary principles; and it is a matter of some surprise they should have been so earnestly controverted at the bar. They apply to all fiduciaries, having trust funds in their hands, whether executors, administrators or guardians.

It is no less firmly established that a party who concerts or unites with a fiduciary in a misapplication of trust funds, or in any other act contrary to the duty of the fiduciary, becomes a particeps criminis, and will be held liable accordingly. And the reason is, that the party receiving the assets in payment of a private debt necessarily has notice that the fiduciary is guilty of a misapplication. If, says Vice Chancellor Leach, the nature of the transaction affords intrinsic evidence that the executor in the mortgage or sale is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from
 470 the executor to *the mortgagee or purchaser, there such mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged of the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor. 1 Lomax on Ex'ors and Adm'rs, 565-6; Pinckard v. Woods, 8 Gratt. 140.

In the case before us it was the duty of Evans, as administrator, to pay over to Bernard, as guardian, the distributive share of the ward, and it was the duty of Bernard to invest the fund to the best advantage. If the guardian, after receiving the money had wasted or misapplied it, parties dealing with him in ignorance that it was trust property, would of course not be responsible. But Evans knew that the guardian was using the ward's money in paying his own debt: and he knew or must be held to know that the guardian was thereby misapplying the funds, and committing a breach of trust. The learned counsel says that Evans acted in entire good faith, without a suspicion of anything improper in the transaction. It may be so. It is wholly immaterial. The law stamps the transaction as fraudulent, however innocent the intention of the parties—not actual fraud in this case, but fraud in law arising from a misapplication of

trust funds. And this is what was meant by the learned judge of the circuit court in saying it was a "collusive transaction." But even if as counsel contends, the learned judge had declared the transaction actually fraudulent, it is a matter of no sort of importance. We are not dealing with the reason of the court, but with its decree.

It appears, however, that the ward having died his administrator has brought suit at law, on the guardian's bond against the sureties—the guardian himself being insolvent. At the time the decree in the

471 case *before us was rendered, the action at law was still pending, and undetermined. It is insisted, that the administrator having made his election to pursue the guardian and his sureties, cannot now proceed against Evans; and at all events the chancery court ought to have stayed its hand until the result of the action at law is determined. In the first place the rules of law in regard to the election of remedies have no application to the case. A creditor having two different securities, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. According to the views already presented Evans having in his hands funds belonging to the ward, or to his administrator, is primarily bound for them, the guardian being insolvent. And so far as this doctrine carried, if the sureties of the delinquent fiduciary are compelled to make good the loss, they will be substituted to all the rights of the legatee or distributee against the party uniting with the fiduciary in the breach of trust. It was so held by this court in *Pinckard v. Woods*, 8 Gratt. 140. Without undertaking now to decide whether that rule will apply in the present case, it is sufficient to say the administrator cannot be delayed by a protracted controversy with the sureties of the guardian—he has his right of action against the party who has concurred in the breach of trust committed by the guardian, and therefore incurs the like liability.

The appellant, Evans, has less ground of complaint, because the circuit court, by its decree of 13th September, 1878, has provided that the appellant may prosecute the action at law against the sureties of the guardian in the name of the administrator to recover the alleged payment of one thousand dollars "if the said sureties are justly liable for the amount."

472 *It only remains to notice the alleged error of the circuit court in refusing permission to the appellant to file his supplemental or amended answer.

The learned counsel for the appellant admits that this answer sets up no new matter, "but is only a little more full upon the points raised in the bill." What good, then, was to be derived from it? Had it been filed it would not in the slightest degree change the aspect of the case or the result. If, therefore, any error was committed, as there was not in refusing permission to file the answer, the error was without prejudice to the appellant.

For these reasons we are of opinion the decree of the circuit court is right, and must be affirmed.

Decree affirmed.

473 *Johnson's Ex'or v. Nat. Exchange Bank, Richmond.

September Term, 1880, Staunton.

Absent *Moncure*, P.*

1. **Tenants in Common—Effect of Decree against One on Rights of Other.**—J's devisees and W are tenants in common of a hotel property, and J's executor and W agree to sell the property at public auction; the deferred payments to be secured by separate bonds to each for his half of the purchase money, with a lien retained on the real property. The sale is made and W becomes the purchaser, but refuses to execute the contract. J's executor sues W for specific execution of the contract, and there is a decree in 1868 in his favor for specific execution, a personal decree against W for the amount due, and for a sale of the whole property. Before the decree W sells and conveys his moiety of the property to M who pays the purchase money. Upon a bill by the judgment creditors of M to subject his moiety of the property to the payment of their debts—*Held*: W bought at the sale but J's moiety of the property, and the lien of J's executor's decree only extends to that moiety, though the whole property was sold under the decree.

2. **Decrees—Delay in Recording—Time of Taking Effect.**—The decree of J's executor was left with the clerk of the county court to be docketed on the 4th of February, 1870, but was not then put upon the docket. In July, 1870, the decree was found in the office and was then docketed, but was dated February the 4th. In May of the same year W conveyed a tract of land to T and C in trust to secure a debt to G, which was recorded. *Held*: The decree was not duly recorded until July, and the deed to T and C had preference of satisfaction out of the land.

3. **Principal and Agent—Notice to Agent—When Binding.**—Though T, the trustee, had been the judge who made the decree against W, yet he stating in his answer, and also in his deposition,

474 *that he had no recollection of the decree when the deed was made and recorded.

Held: In order to affect the creditor by the previous notice or knowledge of his agent or trustee, of the existence of a prior unrecorded lien on the real estate which is conveyed for his security, it is necessary that the notice or knowledge should have been given or imparted to the agent in the same transaction, unless one transaction is closely followed by and connected with the other. In this case the evidence does not establish notice.

This was a creditor's suit in the circuit court of Rockbridge county in May, 1869, by The National Exchange Bank of Richmond against W. W. Major, J. G. Steele executor

*Judge *Moncure* was too unwell to attend at this term of the court at Staunton, and therefore it will not be necessary to note his absence in each case.

†See 2 Min. Inst. (4th Ed.) 957, 972, 977, 980; 1 Min. Inst. (4th Ed.) 232.

of George W. Johnson, deceased, G. A. White and others, to subject the real estate of said Mayor to the payment of his debts, and especially a judgment rendered against him in favor of the plaintiff for the sum of \$703.76 with interest and costs, in the circuit court of the city of Richmond in November, 1868, and docketed in Rockbridge county court in March, 1869. The only questions involved in this case relate to the property called the Lexington hotel, in the town of Lexington, and a tract of land in the said county called the Hart's bottom.

In relation to the first named property there had been three suits pending, two of them since 1866, one of those by Johnson's ex'or v. White, and the other by White v. Johnson's ex'or, and the third since 1868, by C. F. O'Ferrall v. Johnson's ex'or; and they had been consolidated.

The material facts as they appear in the record are: On the 16th of January, 1864, Jacob Thomas and wife conveyed the one undivided one half of the Lexington hotel property to G. W. Johnson and G. A. White jointly. On the same day A. J. Thomas and wife conveyed the undivided half of the same property to G. W. Johnson; and on the 18th of August, 1864, G. W. Johnson 475 *conveyed to G. A. White one undivided one-fourth of the same.

G. W. Johnson having departed this life, his executor J. G. Steele, on the 17th of February, 1866, entered into a written contract with G. A. White, by which they agreed "to sell the property in the town of Lexington owned jointly by the said White and the estate of George W. Johnson, dec'd, commonly known as the Lexington hotel, with the furniture and other property attached to said house,* * * at public auction without reserve, on the following terms, viz: 1st. \$4,500 of the purchase money shall be required cash in hand or within sixty days from the sale; out of the same Wm. Pole is to be paid the sum of \$1,300, which has been paid by him to the said White for said furniture and other personal property; one-half of the residue to be paid to the said G. A. White and the other half to the said J. G. Steele executor of G. W. Johnson, dec'd. 2d. The residue of the purchase money to be paid in three equal annual instalments, bearing interest from the day of sale; separate bonds to be given for the deferred instalments in equal moieties to G. A. White and J. G. Steele ex'or of G. W. Johnson, dec'd, with undoubted personal security—or if the purchaser elect, secured by lien on real estate; and in either case with the additional security of a lien retained on the real property. The prior liens on the real estate to be paid by J. G. Steele ex'or of G. W. Johnson, dec'd, out of his moiety of the first deferred instalment."

The sale was advertised, and the terms of the sale were set out in the advertisement as provided in the agreement; and at the sale, which was made on the 20th of March, 1866, White became the purchaser at the price of \$32,000, which, after deducting the \$1,300 to

be paid to Pole, gave to the share of 476 Johnson's *estate \$15,350. White refused to take the property, and in the same year Steele, as executor of Johnson, filed his bill in the circuit court of Rockbridge for a specific performance of the contract of sale; and at the April term, 1868, of said court, there was a decree for the specific execution of the contract of sale, and a decree against White for \$10,766.66, the amount then due and unpaid on account of his purchase of said property, and commissioners were appointed to make sale of the property.

In the mean time, viz., on the 19th of September, 1867, White entered into an agreement with Charles T. O'Ferrall and William Major, by which he sold to them the Lexington hotel, with all the appurtenances thereto, with all his right, title, and interest in and to said property, with the personal property in said hotel, in consideration of the sum of \$32,000, to be paid by the delivery to White of his bonds held by Major given for the purchase of the Hart's bottom estate. And these bonds were delivered by Major to White.

And it was agreed between the parties that the said O'Ferrall and Major were to arrange with the executor of G. W. Johnson's estate for the settlement of all claims held by said estate against the hotel property, amounting to \$16,000, with whatever interest might accrue thereon. And in pursuance of this agreement White and wife, by deed bearing date the 1st day of October, 1867, conveyed to O'Ferrall and Major the property conveyed to him by the deeds hereinbefore referred to, and also any other or further right, title, and interest of any kind or nature whatever held or claimed by him. But the deed specially provides that the said G. A. White only grants, conveys, and assigns to the parties of the second part his own individual interest in said hotel property and its appurtenances; and that said parties of the 477 second part are to purchase *from the executor or other legal representatives

of the late G. W. Johnson, and at the proper cost of the said parties of the second part, such undivided interest as said executor, &c., may hold or claim in the said hotel property and its appurtenances: it being the true intent and meaning of the parties of the first and second part that the latter are to take all the rights, title and interest of said G. A. White in said property with the like advantages and burdens as the same were held by said White; and with full right, if they see proper, to ratify the alleged sale of March 20th, 1866, of said hotel property, and to settle and pay off the claim of said G. W. Johnson's estate, in and to the said hotel property as if said sale for \$32,000 had been regular and valid and binding on all the parties interested therein.

On the day of the agreement between Major and O'Ferrall and White, there was an agreement between O'Ferrall and Major, providing how O'Ferrall shall pay Major for his half of the purchase money, and for conducting the hotel in partnership.

On the 7th of February, 1868, Steele as executor of Johnson entered into an agree-

ment with O'Ferrall, in which after reciting the sale to White, and the amount coming to Johnson's executor on that sale and the time of payments, and that O'Ferrall and Major had purchased the Lexington hotel from White, O'Ferrall undertook to pay to Steele, executor of Johnson, the full amount due from said White on the purchase aforesaid in three annual payments each bearing interest from the 26th of March, 1868. And Steele bound himself to forbear to execute any decree which might be obtained at April term next or any succeeding term of the circuit court of Rockbridge, against said White for the specific execution of the said contract of sale of the Lexington hotel by the sale of the property under said decree so long as the said O'Ferrall made no default

478 *in the payment of said instalments of purchase money. And on the same day there was another agreement between O'Ferrall and Major, providing that if O'Ferrall shall fail to pay to Steele the instalments of purchase money and Steele shall enforce his decree for a sale of the property, O'Ferrall's interest in the property shall cease to the extent of the purchase money unpaid by him, and that the same shall invest in said Major subject to the lien of said decree. There were other provisions in the agreement not necessary to be stated.

Steele proceeding to have his decree of April 20th, 1868, enforced by a sale of Lexington hotel, O'Ferrall filed a bill to enjoin the sale, and the two cases of Johnson's ex'or v. White & als., and O'Ferrall v. Steele, ex'or, &c., coming on to be heard together on the 25th of September, 1868, the court decreed that O'Ferrall should be permitted to execute the bonds as provided in his agreement with Steele; but if he should fail to give the bonds, or should fail to pay them as they fell due, the injunction should stand dissolved as the act of that day, and the commissioner should proceed to sell said Lexington hotel property, under and in accordance with the decree of the 20th of April, 1868.

O'Ferrall did not comply with the decree, and there was a sale of the Lexington hotel property, which was purchased by William W. Major. He failed to comply with the terms of sale; and on 17th of April, 1869, there was a decree for the sale of the same property; and there seems to have been two other sales of said Lexington hotel under decrees of the court, for a failure to comply with the terms of sale. The last of these sales was made in August, 1871.

In January, 1874, the National Exchange bank filed an amended bill in the cause, in which the proceedings in the several causes is set out, and it is stated that

479 *Major having paid to White the whole of the purchase money for White's half of the Lexington hotel property, Major was entitled to that half, free from any lien for the amount due to Johnson's executor under his decree against White, and that it was liable to satisfy the debts of Major. The bill further stated that the decree in the case of Johnson's ex'or v. White having been

docketed on the 4th of February, 1869, it was a lien upon the real estate of White. That White by deed dated the 20th of May, 1870, had conveyed the Hart's bottom tract of land, which White had purchased from Major, to Hugh W. Sheffey and Edmund Coffin to secure a debt of White to Walter Gurnee for \$15,000; and that deed being subsequent to the docketing of the decree of Johnson's ex'or v. White, said decree was a prior lien upon said land, and said executor should be required to proceed first against said land for the relief of the Lexington hotel, or the creditors of Major should be subrogated to his rights; and Gurnee and the said trustees were made defendants with the other parties in the cause.

Steele answered the bill, insisting that under the title held by Johnson and White, and the terms of sale of the property as agreed on by himself and White, and the various decrees and proceedings had in the causes, the lien of his decree extended to the whole property.

Gurnee and his trustees answered, declaring that they had never heard of the decree in the case of Johnson's ex'or v. White when the deed was made to secure Gurnee, or when it was put upon record on the 20th of May, 1870. That they had examined the docket of judgments and decrees in the county court of Rockbridge, with the help of the clerk of the court, with great care, and that there was no such decree upon the docket at that time. And the depositions of *said Sheffey and Coffin were taken, in which they made the same statements. And Mr. Sheffey stated that he had no recollection at the time of the execution of said deed of ever having heard of said decree. And the only fact from which such notice or knowledge might be inferred is, that at the time of the decree of April 20th and September —, 1868, were made, Mr. Sheffey was the judge of the court and pronounced the decrees.

As to the putting the decree upon the docket, it appeared that it had been delivered to the clerk on the 4th of February, but was not put upon the docket, the clerk having been removed from his office a short time afterwards; and it was afterwards found in the clerk's office, and at the instance of the counsel of the executor of Steele it was put upon the docket between the 4th of July and the 1st of August, 1870. though the entry was dated the 4th of February. the day it was brought to the office.

On the 17th of July, 1874, the two cases of the National Exchange Bank of Richmond v. Major and others and Johnson's ex'or v. White and others came on to be heard together, when, among other things, the court held that the lien of the decree of Johnson's ex'or v. White only extended to the moiety of the Lexington hotel, owned by Johnson's estate, and that Major having paid all the purchase money to White for his moiety of said property, he was entitled to it, and it was liable to satisfy his creditors. And as to the Hart bottom land, the decree of Johnson's ex'or v. White was not docketed ac

cording to law until after the deed from White to secure Gurnee was recorded, and that neither Gurnee nor said trustees had notice of said decree. And thereupon Johnson's executor applied to this court for an appeal; which was allowed.

481 *John W. Daniel, for the appellant.
J. R. Tucker and Wm. A. Anderson, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is an appeal by Joseph G. Steele, executor of George W. Johnson, deceased, from a decree of the circuit court of Rockbridge county, pronounced at its July term, 1874, in a cause in which The National Exchange Bank of Richmond was complainants, and Joseph Steele, executor as aforesaid, and others were defendants, which came on and was heard together with the consolidated causes of George W. Johnson's executor against G. A. White, and White v. Johnson's ex'or, and Charles T. O'Ferrall v. Johnson's ex'or.

The questions raised upon this appeal, by the assignment of errors, in the petition, and by appellants' counsel in argument, are: First. Did Johnson's executor have a lien upon the whole of the Lexington hotel property, for the purchase money due him?

George W. Johnson in his lifetime, and G. A. White were the owners of the property—each being owner of an undivided moiety. Whether they were joint tenants or tenants in common, or joint tenants of a part, and tenants in common of the residue, by the death of Johnson his part vested in his devisees, and the property was held in common by them, and G. A. White, each entitled to an undivided moiety. They had neither unity in interest, time or title, but only in possession. As tenants in common they held by several seizins. They had several titles but unity of possession. One joint tenant may alien to a stranger, and his alienee, and the other joint tenant, will be tenants in common. Joseph G. Steele, as executor, was authorized by Johnson's will to sell, with the con-

482 sent of his *wife, and G. A. White.

Johnson could give him no authority to sell other than his own interest. He could not authorize him to sell White's interest, which was an undivided moiety. He could only authorize him to sell his own. White and Steele, executor of Johnson, agreed to sell the whole together, on the following terms: Four thousand five hundred dollars to be paid in cash in hand, or within sixty days from the day of sale; out of which William Pole was to be paid \$1,300, due him for furniture and other personal property; the residue of cash payment to be paid in equal moieties to White and Johnson's executor; the residue of the purchase money to be paid in three equal annual instalments, to bear interest from the day of sale; separate bonds to be given for the deferred instalments in equal moieties to G. A. White and J. G. Steele, executor of G. W. Johnson, deceased, with undoubted personal security, or if the purchas-

er elect, secured by lien on real estate, and in either case with the additional security of a lien retained on real property sold.

This agreement seems to have been entered into in contemplation of a sale to a third party. But G. A. White being the highest bidder, at the sum of thirty-two thousand dollars, became the purchaser. What was sold? In fact only the undivided moiety of Johnson's estate; and that was subject to the prior liens on the hotel, which were to be paid by J. G. Steele, executor, out of his moiety of the first deferred instalment, as stipulated in the agreement. It was in effect a sale to White of only Johnson's moiety. If the sale had been carried out, he would have paid Steele a moiety of the purchase money after deducting \$1,300, to be paid to Pole, and to have required that so much of it should be applied to the payment of the prior liens upon the Lexington hotel, as was

483 necessary to satisfy *and discharge them, and would have received a conveyance from the executor Steele of Johnson's moiety of the property, which would have invested him in severalty with title to the whole property, without any further grant or conveyance. He could not sell and convey his own property to himself. As tenant in common he was already seized of the title, and held the possession promiscuously with Johnson's devisees, and when he acquired the title of his co-tenants to their individual moiety, he was seized of the whole in severalty. A sale and conveyance to him of his moiety was unnecessary to invest him with the title and possession, and Johnson's executor was invested with no power or authority to sell it or convey it to him. He had only authority under the will of Johnson to sell and convey the Johnson moiety, and he and White had mutually agreed to unite in the sale of their respective moieties. If they had sold to a third party Johnson's executor and White would have been bound upon his compliance with the terms of the sale, to convey to him their respective interests; that is each of them to convey an undivided moiety in the whole. Johnson's executor could only have conveyed his interest, and White could only have conveyed his interest. Neither could have conveyed the interest of the other, because they were invested with no title to it. They agreed to unite in the sale—that is each one to sell his interest, whereby the purchaser would be invested with the whole. It seems they did not find a third party to purchase, who was willing to give as much for the property as White bid. No objection seems to have been made by the executor to White's bidding, and he became the purchaser from the executor, of Johnson's moiety—which was all he had a right to sell—and the executor insisted upon his taking it under

his purchase. And being the owner **484** himself of the *other moiety, White became the purchaser of Johnson's moiety only, and that was what was sold, and a lien upon that, was the additional security, which, by the terms of the agreement, Johnson's executor was entitled to retain.

If personal security had been given, separate bonds for the deferred instalments were to be given in equal moieties, and even if a third party had become the purchaser, the security would have been to each one, for the proportion of purchase money due him, for his moiety of the property. And as White was the purchaser in reality and effect, only of Johnson's moiety, he could only have been required to give security, in the bond to be executed to Johnson's executor, for the purchase money due him for his undivided moiety. He could not be required to execute bonds to himself with personal security, for his undivided moiety; or if he elected to give security on real estate, it could only be given to secure what was due from him for Johnson's moiety, which he had purchased. He could not be required to give it to himself for purchase money for his moiety of the property, which he did not owe. And consistently with the idea of separate interests, which pervades the whole instrument, each one could retain a lien on only what he sold, and what he only could convey, and especially is it so, when White, one of the tenants in common, became the purchaser, which could only be of Johnson's moiety, on which only his executor could retain a lien, being the only real property actually sold. For these and other reasons, which might be given, the court is of opinion that Johnson's executor has not a lien upon the whole of the Lexington hotel property, for the purchase money due him from G. A. White; but only upon the undivided moiety belonging to Johnson's estate. The first question is therefore answered in the negative.

485 *The second question, If he did have such lien, was it binding as against Major, the purchaser from White? needs no answer, as he had no lien as against White, on his moiety which he sold and conveyed to Major. At the date of White's sale and conveyance to Major, Johnson's executor had no personal decree against White. He did not obtain his personal decree until the 20th of April, 1868. White was not then the owner of a moiety of the Lexington hotel property. He had before that, to-wit, on the 1st of October, 1867, conveyed it to O'Ferrall and Major, and had received payment in full from Major, and the deed of conveyance was of record. At the date of the personal decree he had no interest in the hotel to which the executor's lien thereof could attach.

With regard to the third question, "If such lien bound Major, did it bind his judgment creditors?" we need only remark, that as it did not bind Major, it could not bind his judgment creditors.

The fourth question raised by appellant's counsel upon the assignment of errors is, Did the judgment of Johnson's executor against White bind his Hart's bottom place as against Sheffey and Coffin, trustees, and Gurnee, beneficiary in the deed of April 20, 1870, from White?

Johnson's executor obtained a personal decree against White on the 20th of April, 1868, just two years prior to the date of the deed of trust referred to in the question.

But that decree had not been duly docketed according to law, and could not bind creditors and subsequent purchasers without notice. In *Vest v. Michie*, 31 Gratt. 151, we held that whilst the fact of notice may be inferred from circumstances, as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear **486** as to fix upon him the *imputation of mala fides; and this is well supported by authorities which are cited. We also cite approvingly, 2 Minor's Inst. 887, 2 Ed. where the author says: "The effect of the notice which will charge a subsequent purchaser for valuable consideration and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is, therefore, never to be presumed, but must be proved, and proved clearly. A mere suspicion of notice, even though it be a strong suspicion, will not suffice."

In this case it is not pretended that Gurnee, the creditor secured by the deed of trust, had notice or knowledge of the prior judgment or decree against White, the grantor in the deed of trust, in favor of Johnson's executor. But it is contended that one of the trustees had notice or knowledge of said decree, because he was the judge who pronounced the decree and had written an opinion, which was filed with the papers in that cause, which showed that he was familiar with the whole case. It may be conceded that notice to the trustee was in effect notice to the creditor secured by the deed of trust. But, as was held by this court in *Morrison v. Bauseman & Co. and als., Moncure*, P. delivering the opinion of the court, 32 Gratt. 225, 229, "if a trustee in a deed of trust to secure a debt had notice or knowledge of the existence of a judgment against the grantor in the deed of trust at a time anterior to the execution of the deed of trust, but have no remembrance of such existence at the time of such execution, the trust creditor will not be at all affected by such anterior notice or knowledge on the part of such trustee." In that case it appeared that the trustee, Newman, about a year before the execution of the deed of trust to him and Trout, had notice or knowledge of the existence of said judgment. He was then writing in the clerk's office of the court

487 *which rendered the judgment, and as deputy or assistant of the clerk, made a copy of it, and signed the clerk's name to it for the creditor. There was no evidence that he remembered the fact at the time the deed of trust was executed, except what might be presumed from the fact of his having made a copy of it. Upon his examination as a witness, he could not say that he had any recollection about it one way or the other at the time the deed of trust was executed. In that case it was held that the proof of notice was insufficient.

In this case Judge Sheffey, who was made a party, in his answer, says, respondent had no notice whatsoever of any judgment or decree in said transaction; neither did he

think of any such judgment or decree, or that the same was in existence at the time he was so engaged as counsel for G. A. White, and when said deed was executed and recorded. His deposition was also taken in the cause, and is to the same effect. In the cause above cited, Judge Moncure deduced from the authorities "that if an agent, before the commencement of his agency, receive notice of an unrecorded lien on real estate, of which his principal afterwards becomes purchaser, such notice of the agent will not be imputable to the principal, unless there be very strong evidence, that at the time of the purchase, the agent remembered the fact that he had received such notice."

In order to affect the creditor by the previous notice or knowledge of his agent or trustee, of the existence of a prior unrecorded lien on the real estate which is conveyed for his security, it is necessary that the notice or knowledge should have been given or imparted to the agent in the same transaction, unless one transaction is closely followed by and connected with the other. 2 Lead. Cases,

Part I., p. 134, and the authorities
488 *cited. This principle seems to be supported by reason as well as authority. It is not reasonable to hold that a man will recall facts which came to his knowledge in the discharge of his duties as a clerk, or a judge of a court, or a solicitor or counsellor, when years afterward he may be called on to act in a different transaction, and in a different capacity as agent or trustee for another, so as to affect that other, for whom he has become an agent or trustee with notice of such fact. The court is of opinion that there is not sufficient proof of notice to Gurnee, or his trustees, of the existence of the judgment lien of Johnson's executor to give effect over the deed of trust upon the Hart's bottom place.

The fourth and last question, "should Johnson's executor be compelled to exhaust the lien against Hart's bottom before proceeding against the hotel?" need not be considered inasmuch as after satisfying the preferred lien of the deed of trust, there will be nothing left upon which it can act.

This disposes of all the points of error made by appellant's counsel in his ingenious and able argument, and upon the whole the court is of opinion to affirm the decree of the circuit court.

Decree affirmed.

489 *Rosenberger v. Keller's Adm'r & als.

September Term, 1880, Staunton.

Sale of Real Estate—Breach of Warranty—Right of Vendee to Equitable Relief.—

K's administrator files bill against R to subject land to satisfy a judgment for purchase money of land conveyed by K to R, with covenant against encumbrances. R answers claiming that there were encumbrances on the land, arising out of a previous division of a larger tract, when it was provided that the owners of other parcels of the land should have the right to use water out of a well on the lot

sold to him, and also to pass along a lane through his land. This partition was made in 1833, and R had never heard of these encumbrances until since this suit was brought in 1875, and R asks his answer may be taken as a cross-bill, and his damages may be ascertained by a jury. Upon demurrer by the plaintiff—*Held*:

1. The easements never having been used, and R not having suffered any injury from them, he is not entitled to relief in equity.

This was a suit in equity in the circuit court of Shenandoah county, brought by John Keller's administrator to subject the land of William Rosenberger to satisfy a judgment for \$850, with interests from the 1st of February, 1869, and \$28.43 costs, which the plaintiff had recovered against the defendant Rosenberger for the balance of the purchase money of land which Keller in his lifetime, had sold to Rosenberger. Rosenberger answered the bill admitting the judgment, and that it was for the purchase money of the land, and was unpaid except as to the sums of fifty dollars and twenty dollars; but insisting that Keller had conveyed to him by deed with covenant
490 against encumbrances; *and he alleged there were encumbrances arising from parties holding other lands with certain rights to take water from his well, and pass over his land to their other land. And he prayed that his answer might be taken as a cross-bill, and the plaintiff might be required to answer it.

Keller's administrator demurred to the cross-bill, and also answered, and the cause coming on to be heard, the court sustained the demurrer and dismissed the cross-bill; and referred the cause to a commissioner for an account of the liens upon the defendants land, and its annual and fee simple value. And on the coming in of this report there was a decree for the sale of the land; and an appeal to this court. The only part of the decree of the court below considered by this court is that in relation to the decree upon the demurrer to the cross-bill; and the facts are stated in the opinion of Staples, J.

M. Walton and Williams & Bro., for the appellant.

S. S. Turner, for the appellee.

STAPLES, J. The original bill in this case was filed to enforce the lien of a judgment recovered by the appellee against the appellant, for the balance of unpaid purchase money due upon the sale of a tract of land made by John Keller, the appellee's intestate. The appellant filed an answer which he asked might be treated as a cross-bill, and it was so treated in the court below. To this bill, the appellee demurred, the demurrer was sustained, and the bill dismissed. From that decree an appeal was taken to this court. In passing upon the questions arising in the case, we must of course, take all the material averments of the bill to be true.

- 491 *The facts appear to be, that upon the death of George Koontz, in 1833, his real estate was divided among his four children and heirs. The commissioners who

made the partition, designated the four tracts or parcels as lots Nos. 1, 2, 3, 4. In making the partition, they assigned to the owners of lots Nos. 1 and 2, the privilege of getting water from the well on lots Nos. 3 and 4, and the use of the lanes running from the main road across the tract, on both sides, to get to their wood land, and to drive the stock of each lot respectively to the water.

In the year 1837, William Koontz, the owner of the tract known as lot No. 4, conveyed it to John Keller, and in the year 1860, John Keller conveyed it to the appellant, by a deed with covenants of general warranty, of quiet possession, and that the premises are free from incumbrances.

The appellant in his bill, avers that since the rendering of the judgment against him, and indeed since the institution of this suit, he has ascertained that his vendor John Keller did not have a good and perfect title to the land, for the reason that the tract so conveyed is charged and burdened with certain water rights and privileges in favor of other parties, of a character extremely detrimental to the use and value of the same. That the tenements known as lots No. 1 and No. 2, have been sold in sundry parcels, to different purchasers, and that the injury to the appellant's land and the depreciation of its value, has increased, and will continue to increase in proportion to the number of subdivisions and families located upon the same, the number of stock owned by them, and other circumstances attending the ownership of said parcels entitled to such privileges.

He further avers that said circumstances so seriously affect and interfere with the ownership of the land, as to induce him to desire the rescission of the contract, **493** *and the return of his money, subject to any proper deductions for rent, &c., and if that cannot be properly done, he prays an issue to ascertain his damages growing out of the breach of warranty, and that the same may be set off against the claim of the appellee.

This is the whole case made by the bill, so far as is material to the present enquiry.

Taking every allegation of the bill as true, the question is, whether the appellant is entitled to relief, upon his own showing?

It will be observed, the appellant does not aver any eviction or disturbance of his possession, or the exercise of the water rights and privileges by the owners of lots Nos. 1 and 2. The appellant does not even allege a claim asserted on their part to the exercise of such rights and privileges, or any action pending or threatened to enforce the same. From the silence of the bill on this point, it is a matter of great doubt whether indeed there has ever been any such exercise of the water privileges as would amount to a disturbance, during the time the land was owned by John Keller, from 1837 to 1860. Certainly there was nothing of the kind from the year 1860, down to the time of the institution of this suit in 1875.

If the owners of the dominant tenements had exercised, or claimed to exercise, the alleged water privilege, whilst the appellant has been in possession, it is impossible to

suppose he could have been ignorant of the fact. It is equally impossible to suppose that any damage or even inconvenience results from an easement the existence of which was unknown to the owner of the servient tenement for fifteen years, and the enjoyment of which, it does not appear has ever been asserted or insisted upon, and may never be insisted upon. The sole question therefore

is whether the mere existence of the **493** easement of encumbrance is *such a breach of covenant as entitles the appellant to stay the collection of the purchase money, and to demand an enquiry of damages by a court of equity?

There is no doubt, a covenant against encumbrances is broken immediately upon the execution of the deed, if there be an existing encumbrance upon the property. Nor is the covenantee compelled to wait until he is ousted or disturbed in his possession. Where the encumbrance is in the nature of a mortgage, or other security for money, the covenantee may himself pay it off, and call upon the covenantor for compensation. But if the encumbrance has not been paid off, and no eviction or disturbance has taken place, the covenantee can recover nominal damages only; for he may never be disturbed in his possession. 2 Lomax Digest 352, side p. 271; Rawle on Covenants of Title 89, 93. On the other hand, if the encumbrance be of such a character, that it cannot be removed by the covenantee, as in the case of servitude or easement, he may sue on the covenant for damages; but if he has not been disturbed, or sustained some real injury from the easement, his damages will be merely nominal.

As was said by Judge Woodward, of the supreme court of Pennsylvania, in *Beaupland v. McKeen*, 4 Casey R. 130, "It is a delicate matter to interfere between vendor and vendee; for in determining the possibilities of an eviction we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly he has no rights, as would appear the moment he attempts to assert them; or if he have rights, it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land on which so unsubstantial a cloud rests, and also the money he agreed to pay as the price of the property."

494 *And so, in the present case, it may be as stated by the circuit judge, the several alienations of the lands Nos. 1 and 2, to different purchasers, in different parcels, may have operated to extinguish the encumbrance upon the lands of the appellant, and the right may never be asserted. However that may be, it is manifest, if the appellant is entitled to any recovery upon the facts set out in his bill, his recovery would be merely nominal damages, and no more.

The numerous adjudged cases on this subject will show that this court has gone very far in staying the collection of the purchase money for land upon proof of a defect of the title where no suit is pending, or

even threatened. But even here a distinction has always been made between an injunction to a judgment for the purchase money and an injunction to a sale under a deed of trust. In the latter case the court interferes the more readily upon the ground of removing a cloud upon the title, in order to prevent a sacrifice of the property; whereas, in a like case, the court will not interfere with the vendor in enforcing his judgment, since the doubt about the title may eventually turn out to be frivolous and groundless. *Miller v. Argyle's ex'or*, 5 Leigh 460, 508; *Koger v. Kane*. Ibid. 606.

But apart from all these considerations, the present bill is a mere suit for damages. It is true there is a sort of conditional prayer for a rescission of the contract; but by common consent this is abandoned as untenable, and the case therefore stands simply as an action for damages in a court of chancery.

In this respect, it is almost identical with that of *Robertson v. Hogshead*, 3 Leigh 667. In that case Judge Tucker said, (and the other judges concurred), "As the form of

proceedings then excludes the possibility of *rescission, the bill can only be looked on as a bill for an injunction to restrain the payment of an unpaid balance of purchase money, until a claim for unliquidated damages shall have been settled by an issue to be directed by the court. But it has long been settled that unliquidated damages cannot be set off in equity. *Duncan v. Lyons*, 3 John. Ch. R. 351; *Webster v. Couch*, 6 Rand. 519. The party aggrieved should have instituted the proper proceedings at law, and ascertained his damages, before he attempted to arrest the payment of the instalment of the purchase money remaining due."

These observations of Judge Tucker, apply with peculiar force to the present case. The only difference between the two cases is that in *Robertson v. Hogshead*, the controversy was between vendor and vendee, whilst here, the contention is between the vendee and the personal representative of the vendor.

It is suggested by counsel, that great injustice may be done in requiring appellant to pay over the purchase money whilst there is an incumbrance upon it, to the distributees of the vendor; and take his chances of recovering it back.

The bill, however, does not contain any allegation of insolvency, or any other equitable consideration justifying a court of equity in taking jurisdiction of the case, and awarding damages.

If the money should be paid over to the distributees of the vendor, it will be only upon the execution of refunding bonds to the administrator, which will afford ample security to the appellant.

For these reasons, and without going into a consideration of the other grounds of the circuit court, for its decision, we think that court did not err, in sustaining the demurrer, and dismissing the bill.

496 *But such dismissal ought to have been without prejudice to any action at law, the plaintiff may bring for damages

on account of a breach of contract, or any bill in equity, he may be advised to file upon a proper case for the jurisdiction of that court.

Decree affirmed, but without prejudice.

497 *Harman & als. v. Oberdorfer & als.

September Term, 1880, Staunton.

I. Deeds—Time of Taking Effect—Delivery.—A deed takes effect from its delivery; and such delivery, like any other fact, may be established, either by direct proof, or by circumstances.

II. Judgments—Order of Liability of Lots Conveyed by Debtor after Judgment.—

Without evidence of any preceding executory agreements between the parties, or any evidence of the time of the delivery of the deeds, except what may be inferred from their dates, P, a judgment debtor, by one deed (dated January 1, 1860, acknowledged February 1, 1860, and recorded April 13, 1860,) conveyed one tract of land to H, and by another deed (dated February 1, 1860, acknowledged February 1, 1860, and recorded February 24, 1860,) conveyed another tract to B. In proceedings to subject both tracts to the payments of judgments obtained against P, prior to either deed—Held:

1. The tract to B was the last aliened, and, therefore, under § 10, ch. 182 of the Code of 1873, first liable to satisfy the judgments.

2. **Deeds—Delivery—Presumption.**—If a deed has a date, the law intends it to have been delivered at the date; and when it is proved by witnesses, who say nothing as to the time of delivery, and is recorded, it stands recorded as a deed proved to have been delivered at its date. There is no distinction, in principle, between the presumption of delivery arising from the proof by witnesses, and the acknowledgment before a justice or notary.

III. Same—Effect of Failure to Record—Code Construed.—The provision of § 5, ch.

114 of the Code of 1873, that every deed, &c., "shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted

*The principal case was cited in *McLaughlin v. McGraw*, 44 W. Va. 723.

Deeds—Date—Delivery—Presumption.—A deed will be presumed to have been delivered on, and will take effect from its date but the presumption will yield to evidence to the contrary. *Raines v. Walker*, 77 Va. 92, and see cases cited; *Hardy, Tr., et al. v. Norfolk Mfg. Co. et al.*, 80 Va. 404; *Tate et al. v. Tate et al.*, 85 Va. 205, 214; *Ferguson v. Bond*, 39 W. Va. 564.

†**Judgments—Order of Liability of Real Estate.**—The law is now well settled that where land which is subject to the lien of a judgment or other incumbrance, is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of such alienations. This rule is not only established by the decisions of courts of equity but in Virginia it is prescribed by statute. *Whitten v. Saunders*, 75 Va. 563; 2 Min. Inst. (4th Ed.), 306-310, 383, 693; 4 Min. Inst. (2nd Ed.), 907; *Kenick v. Ludington*, 20 W. Va. 567.

‡**Statutes—Amendment.**—As to the Code of 1873, ch. 114, § 5, construed in the third headnote, see Code of 1887, ch. 109, § 2465, and Acts 1895-96, p. 842.

to record," &c., does not apply to purchasers of different tracts of land from "the same vendor, but refers only to "subsequent purchasers" of the same subject, as that embraced in the instrument declared to be void.

IV. Same—Date—Order of Liability.—Where several lots of land are sold on the same day, on the same terms, to several parties, all of whom are immediately put in possession under the same agreement, as to the deeds conveying the lots, and the trust deeds to secure the purchase money—although the deeds conveying them are really delivered and recorded at different times—they will all be regarded as "alienations," within the meaning of the statute (ch. 182, § 10, Code 1873), as of the same day (day of sale); and in subjecting them to the payment of a judgment docketed against a vendor at the time of the sale, each lot must bear its proportion, according to their relative values on the day of sale, and subjected in accordance with the principles of *Horton v. Bond*, 28 Gratt. 815.

This is an appeal from two decrees rendered by the circuit court of Albemarle county, Virginia. The facts of the case necessary for a proper understanding of the points decided, are as follows, viz:

John Vowles and Evan Sneed had recovered judgments against William B. Phillips, and had them duly docketed. The first was recovered at the October term, 1855, of Albemarle circuit court, and the second at the March term, 1856, of the county court. Phillips, the judgment debtor, died insolvent, but during his lifetime had made conveyances of sundry pieces of real estate, and among those conveyed by him, which were sought to be subjected to the payment of the said judgments, were—

1st. A lot of land conveyed to John G. Boatwright, by deed dated 1st February, 1860, acknowledged 1st February, 1860, and recorded 24th February, 1860, which was sold to and is now held by the appellee, B. Oberdorfer.

2d. A lot of land conveyed to John C. Hughes, by deed dated 1st January, 1860, acknowledged 1st February, 1860, and recorded 13th April, 1860.

499 *Hughes having died, James D. Jones, his executor, divided the lot of land conveyed to him by Phillips into five parcels; and having advertised them, sold them, in their numerical order, on the 11th November, 1871, (terms ten per cent. cash, balance in three, six, nine, twelve, and fifteen months, deeds to be executed, and trust deeds to be given on the property to secure the deferred payments).

Lot No. 3 was sold in regular order to M. Via, who failed to comply with the terms of sale, and afterwards it was taken by W. C. Payne on the same terms as the rest.

The deeds to all were dated, acknowledged and recorded as follows:

1st. Lots Nos. 1 and 3, to W. C. Payne, deed dated 11th November, 1871, acknowledged December 20th, 1871, and recorded August 23d, 1873.

2d. Lots Nos. 4 and 5, to William Dudley, deed dated 11th November, 1871, acknowl-

edged 2d December, 1871, and recorded April 15th, 1873.

3d. Lot No. 2, to Noah Jackson, deed dated 23d April, 1873, acknowledged 23d April, 1873, and recorded April 28th, 1873.

All the purchasers of these lots were put in possession on the day of sale; and it was agreed between them and Hughes' executor, that the deeds of conveyance should be executed, and the deeds of trusts given (and to save costs, all the deeds to be held by said executor), the deeds of conveyance to be delivered, when the parties respectively paid their purchase money, and he reserving the right to put the deeds of trusts, or any of them, on record when he chose. Accordingly, all of said deeds were executed November 11th, 1871, and held by said executor, except the deed to Jackson, who refused to comply with the terms of sale for some time, and hence his deed was not then executed.

500 *W. C. Payne subsequently sold lot No. 1 to A. P. Bibb, who sold to the appellant Charles H. Harman. He also, afterwards, sold No. 3 to the Albemarle tobacco warehouse company; which also bought Nos. 4 and 5 from William Dudley, No. 2 remaining in the possession of Noah Jackson.

On the 9th February, 1877, the circuit court decreed that the land conveyed to Hughes by Phillips, was liable to be subjected to the payment of the judgments, before that aliened by Phillips to Boatwright; and by a decree of May 22d, 1878, held, that the lots into which the land purchased by Hughes, and sold by his executor, had been divided, were liable in the following order—viz:

1st. Lot No. 3, now held by Albemarle tobacco warehouse company.

2d. Lot No. 1, now held by appellant, Harman.

3d. Lot No. 2, now held by Noah Jackson.

4th. Lots Nos. 4 and 5, now held by Albemarle tobacco warehouse company.

From these decrees, Harman, Payne, R. C. Vandegrift, and John L. Walters (the last two being interested in the distribution of the purchase money of that portion of the land claimed by Harman), obtained an appeal from one of the judges of this court

A. R. Blakey, Micajah Woods, and Mason Gordon, for the appellants.

Watson & Perkins, for the appellees.

BURKS, J., delivered the opinion of the court.

It is admitted by all parties that the judgments of Sneed and Vowles' executor are valid liens on the lands sold and conveyed by Phillips, after the recovery of the judgments, to John G. Boatwright, under whom the appellee Oberdorfer claims, and to John C. Hughes, under whom the appellants claim; and the controversy is as to the order in which these lands should be subjected to the satisfaction of said judgments.

The statute (Code of 1873, ch. 182, § 10)

provides, that "where the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it or any part of it has been aliened, as between the alienees for value, that which was aliened last shall, in equity, be first liable, and so on with successive alienations until the whole judgment is satisfied. And as between alienees who are volunteers under such judgment debtor, the same rule as to the order of liability shall prevail; but any part of such real estate retained by the debtor shall be first liable to the satisfaction of the judgment.

Of the lands sold and conveyed as aforesaid to Hughes and Boatwright respectively, which parcel "was aliened last?" is the first question; and its solution depends solely on the dates of the delivery of the several deeds of conveyance. There is no evidence of any preceding executory agreements between the parties.

A deed takes effect from its delivery, and such delivery may, like any other fact, be established either by direct proof or by circumstances. To enable us to determine when the deeds in question were delivered, we have in the record—and that is all we have to aid us—the deeds themselves, and the certificates of acknowledgment and admission to record. The deed to Hughes bears date on the first day of January, 1860, that to Boatwright on the first day of February, 1860; both were acknowledged by the grantor before the same justice of the peace on the same day (February 1, 1860), and the former was admitted to record on the

502 *13th day of April, 1860, and the latter on the 24th day of February, 1860. In the absence of any distinct and direct proof of the time of delivery, what are we to infer as to the time from these papers and their dates? It seems to us that in such a case the rule as laid down in *Harvey and others v. Alexander and others*, 1 Rand. 219, 241, must govern. In the opinion of the court by Judge Cabell, he said: "If a deed has a date, the law intends it to have been delivered at the date. When, therefore, a deed having a date is proved by witnesses who say nothing as to the time of delivery, and is thereupon recorded, it stands recorded as a deed proved to have been delivered at its date." And with this accords what was said by Judge Daniel, speaking for the court in *Rogers v. McCluer's adm'r and others*, 4 Gratt. 81, 83. We perceive no distinction in principle between the presumption of delivery arising from the proof by witnesses and the acknowledgment before a justice. Recordation is the object in both cases. But a deed delivered is valid between the parties without registration. It is only necessary to record it to secure protection against third parties—creditors and purchasers. A certified acknowledgment for this purpose is by no means inconsistent with a prior delivery, and is not, at all events, sufficient of itself to rebut the presumption arising from the date of the instrument. It may very well happen that a deed is delivered and accepted, either with an intention not to record it at all, or to have it acknowledged for that purpose at a future time.

We are of opinion, therefore, that upon the record before us it must be considered that the deeds to Hughes and Boatwright were severally delivered at their respective dates, and as the deed to the latter was last delivered, the land conveyed by it was "aliened last." The justice, in his certificate to Hughes' deed, *describes it by an improper date; but the error is corrected by the deed itself.

But it is contended for Oberdorfer, that even if the lands conveyed to Boatwright were the lands "aliened last," yet at the time of the alienation, the prior deed to Hughes had not been recorded—that Boatwright had no notice of it, actual or constructive—and as to him, that it was void under the fifth section of chapter 114 of the Code (1873). That section declares, that every deed (among other written instruments enumerated) conveying real estate "shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record," &c.; and it is insisted, that Boatwright, in his relation to Hughes, although they were purchasers of different parcels of land, was a "subsequent purchaser" within the meaning of this section and therefore as to him the deed to Hughes was void.

We cannot give our assent to this construction. By "subsequent purchasers" are intended, as we think, purchasers of the same subject embraced in the instrument which is declared to be void. This would seem to be the natural construction of the section considered alone, but it is strengthened by section 11 of the same chapter, which defines or explains the words "creditors" and "purchasers" as used in any previous section, and declares that they "shall not be restricted to the protection of creditors of, and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts." This section was reported by the revisors and its adoption recommended "to put an end to the judicial strife" exhibited in the decisions in *Anderson v. Anderson*, 2 Call. 198; *Pierce v. Turner*, 5 *Cranch. 154; *Land v. Jeffries*, 5 Rand. 211; *Thomas v. Gaines*, 1 Gratt. 347. See Report of Revisors, 615.

It will be observed, that the "purchasers" referred to in the latter part of the section, are "purchasers who, but for the deed or writing, would have had title to the property conveyed"—that is, purchasers and, of necessity, subsequent purchasers of the same property conveyed to a prior purchaser; and it would seem to be a fair inference that by "purchasers from the grantor" mentioned in that connection were in like manner intended subsequent purchasers from the grantor of the same subject conveyed by him to a previous purchaser.

Again, if the construction contended for by the learned counsel of Oberdorfer were sound, we should reasonably expect to find it recognized by some exception or modification engrafted upon the 10th section of

chapter 182 (already quoted), which fixes the order in which the aliened lands shall be subjected; but we there find no such exception or modification.

The conclusion is, that the land conveyed to Boatwright, now held by Oberdorfer, must be subjected to the satisfaction of the judgments before the land sold to Hughes can be resorted to for that purpose, and consequently that the decree of February 9, 1877, fixing a prior liability on the land last mentioned is to that extent erroneous.

The remaining questions relate to the order in which the land sold by the executor of Hughes is liable as among the several alienees. It appears, that it was divided and sold in lots or parcels, five in number. They were all advertised and sold by auction at the same place, on the same day, and on the same terms, and the sale was of all, one after another, in regular succession from No. 1 to No. 5. The terms were ten per cent. of the purchase money in cash for the residue

505 upon a *credit in instalments, the purchasers to give bonds, the lands to be conveyed and deeds of trust given on the same to secure payment of the bonds—the deeds of sale and trust deeds to be executed and remain with the vendor until payment and in the meantime to be recorded or not at his option. Payne, Jackson and Via, in the order in which they are named, each bought one lot, and Dudley the remaining two lots, the last sold. Payne, by consent of parties, was substituted as purchaser of the lot bought by Via: so that Dudley and Payne were purchasers, each of two lots and Jackson of one. The purchasers were at once let into possession under their respective contracts and they retained possession thereunder, the payments by the parties respectively being completed and the deeds delivered and admitted to record at different times.

Upon these facts and circumstances, we are of opinion that the sales made on the 11th day of November, 1871, must be regarded as "alienations" within the meaning of the statute as of that day, and the law in such a case taking no account of the fractions of a day, the alienations must be considered as all made at the same time. It is true, that to make a complete and perfect alienation of real estate, in the strict sense of that term, it is necessary at law that the title should be conveyed by a proper instrument; and in equity, that the purchaser should have the right to call for the title without condition. But we are not disposed to give to the terms "aliened," "alienees," "alienations," employed in the statute, a strict technical meaning. It was the purpose of the legislature in enacting the section (the 10th) before quoted, to adjust the equities inter se of several purchasers of different portions of real estate subject to a common lien, and on the recommendation of the revisors (Report, 918, 919), settle the law as to which there 506 had been some diversity in the *decisions of this court, in conformity with the opinion of a majority of the court, consisting of three judges, in *McClung v. Beirne*,

10 Leigh 394. These equities would seem to require that such a purchaser should be considered an "alienee" within the statute as soon as he makes a valid contract for purchase—a contract which a court of equity would enforce specifically, and which he in fact afterwards carries fully into execution. This construction is in harmony with the equitable doctrine, universally recognized and accepted, touching the relative rights and interests of vendor and vendee under a contract for the sale of real estate, based on the maxim that what has been agreed to be done shall be considered as done. That doctrine is thus stated by Mr. Justice Story: "In the view of courts of law, contracts respecting lands or other things, of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But courts of equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land even before the conveyance is made, and it passes by descent to his heir as land. The vendor is deemed in equity to stand seized of it for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust 1 Story's Eq. Juris., § 790.

Again, * * * "Where a contract is made for the sale of land, the vendor is, in 507 equity, immediately *deemed a trustee for the vendee of the legal estate; and the vendee is deemed a trustee for the vendor of the purchase money." *Id.*, § 1212. See, also 1 Sugden on Vendors, 175 (bottom page), and numerous cases cited in note.

Applying these equitable principles, as we think should be done, in the construction of the statute in question, we are of opinion, that the several purchasers from the executor of Hughes at the sale on the 11th day of November, 1871, became on that day and as at the same time "alienees" within the meaning of that term as used in the statute. The several contracts of the respective parties for the purchase were valid contracts—such as a court of equity would have specifically enforced and they were carried into effect by the parties themselves.

It follows, that after subjecting the land held by Oberdorfer to the satisfaction of the judgments, if any part of the judgments remain unpaid, such parts should be apportioned among the alienees from Hughes' executor according to the relative values of their respective lots on the day of sale (November 11, 1871), and each lot should be subjected in the manner indicated and on the principles applied as among co-sureties in *Horton & als. v. Bond*, 28 Gratt. 815, 825, 826, and as among devisees in *Lewis & als. v. Overby's adm'r & als.*, 31 Gratt. 601, 620.

The decree of the circuit court, rendered May 22, 1878, is in conflict with the foregoing view, and that decree and also so much of the decree rendered by that court February 9, 1877, as determines the liability of the land sold by Phillips to Hughes to be prior to that of the land sold to Boatwright and now held by Oberdorfer, must be reversed and the cause remanded for further proceedings 508 to be had therein, in order to a final decree, in conformity with the views expressed in this opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that of the lands in the bill and proceeding mentioned aliened by William B. Phillips, the lot sold to John G. Boatwright, and now held by the appellee B. Oberdorfer is liable to the judgments in the proceedings also mentioned, and should be subjected to the satisfaction of said judgments next after the lot aliened to Orange Patterson, and before the lot aliened to John C. Hughes should be resorted to for the satisfaction of said judgment: and that after the lot held as aforesaid by the said Oberdorfer shall have been subjected to the satisfaction of said judgments, for the residue of said judgments, if any, then remaining unsatisfied, the several lots or parcels of land aliened by the executor Hughes, are liable and should be subjected to the payment of said residue ratably, according to the respective values, of said lots on the 11th day of November, 1871, (the day on which they were sold by said executor), in the manner indicated and on the principles as applied between co-securities in *Horton & als. v. Bond*, 28 Gratt. 815, 825, 826, and as between devisees in *Lewis & als. v. Overby's adm'r & als.*, 31 Gratt. 601, 620: and that the decree aforesaid rendered by the said circuit court, on the 22d day of May, 1878, is wholly erroneous; and so much of the decree aforesaid rendered by the said circuit court on the 9th day of February, 1877, as is inconsistent and in conflict with the opinion hereinbefore 509 *expressed, is also erroneous: therefore it is decreed and ordered, that the said decree of May 22d, 1878, be wholly reversed and annulled, and so much of the said decree of February 9th, 1877, as is above declared to be erroneous, be also reversed and annulled; and that the residue of the last-named decree be affirmed: and that the appellants recover against the appellee B. Oberdorfer, their costs by them expended in the prosecution of the appeal aforesaid here: and this cause is remanded to said circuit court, with directions to order such accounts and take such further proceedings in the cause as may be necessary and proper, in order to final decree, in conformity with the views and opinion hereinbefore expressed. All of which is ordered to be certified to the said circuit court of Albemarle county. Decree reversed.

510 **McCraw v. Williams, Supt. Penitentiary.*

Estes v. Edmondson, Sheriff.

September Term, 1880, Staunton.

1. **Judges—Election—Commencement of Term of Office.**—B was elected in January, 1874, judge of the county court of Halifax and commissioned by the governor, and proceeded to act as such. HELD: His term of six years did not commence until the 1st of January, 1875, and continued until the 31st of December, 1880.
2. **Same—De Facto Officers—Validity of Acts.**—A was elected in January, 1880, judge of the county court of Halifax, and commissioned by the governor; and believing that his term commenced immediately he proceeded to hold the court and transact business. HELD: He was a judge *de facto*; and his judgments are valid and binding, as if he had been a judge *de jure*.
3. **Same—Election—Right to Office.**—B is entitled to the office until the end of his term, and the fact that he did not immediately proceed to oust A, but practiced as an attorney in his court, did not operate either as a surrender or forfeiture of his office.

These cases were heard together at Wytheville, but decided at Staunton. They are writs of habeas corpus; and the facts are stated in the opinion of Judge Christian.

E. Barksdale, Jr., and John Lyon, for the petitioners.

Henry Edmunds, for the officers.

CHRISTIAN, J. These two cases were heard together at the late session of 511 this court at Wytheville. They were proceedings instituted for the purpose of testing the question before this court, as to who is now and at the time the said proceedings were instituted, the lawfully qualified judge of the county court of Halifax county.

The first-named case (*McCraw v. Supt. of Penitentiary*) will be first disposed of.

The record in this case discloses the following state of facts. Celia McCraw was indicted by a grand jury in the county court of Halifax, for the murder of her infant child recently born. On the 27th April, 1880, she was tried in said court, found guilty of manslaughter, and the term of her imprisonment ascertained by the jury to be one year in the penitentiary. She was accordingly sentenced by the county judge, and sent to the penitentiary to serve out the term of her imprisonment. While confined in the penitentiary she applied to the Hon. Beverley R.

***Judges—Election—Term of Office.**—See the *Bland & Giles County Judge Case*, 33 Gratt. 443 and *note*; *Meredith, Ex parte*, 33 Gratt. 119 and *note*; *Jameson v. Hudson*, 82 Va. 279; 4 Min. Inst. (2nd Ed.) 227 *et seq.*

†**De Facto Officers—Acts of—Validity.**—The acts of one who is a *de facto* officer, as such, are valid and binding. *Roche v. Jones, Sgt.*, 87 Va. 484; *Maddox v. Ewell*, 2 Va. Cas. 59, as to who are, see *Dial v. Hollandsworth*, 39 W. Va. 9; *note*, 1 Mun. Corp. Cas. 222 *et seq.*

Wellford, for a writ of habeas corpus which was awarded. Upon the hearing of her case she was remanded to the custody of the superintendent of the penitentiary to serve out the term for which she was sentenced.

To this judgment a writ of error was awarded by one of the judges of this court.

I am of opinion that there is no error in this judgment.

The sole ground urged for the discharge of the prisoner, in her petition for a writ of habeas corpus, and in argument here, is that she was convicted in a county court held by E. W. Armistead, "who did unlawfully intrude himself into and usurp the office of county judge of Halifax county; and did unlawfully assume upon himself and undertake to hold a term of the county court of Halifax county:" at which term the prisoner was indicted, tried and convicted; and the petitioner insisted that her conviction

512 . and sentence to "the penitentiary was void, having been obtained before and pronounced by a judge having no authority to hold said court.

The circuit court of Richmond was clearly right in dismissing the petition and remanding the prisoner to custody.

At the time of indictment, trial, and conviction of the prisoner, Judge Armistead was certainly a judge de facto, holding his office under color of title. He was then in office by virtue of his election by the legislature and his commission by the governor. At that time there was no question as to his authority to hold the court, nor was there any person claiming and asserting title to the office into which he had been duly installed.

The record shows that on the 27th January, 1880, E. W. Armistead was elected by a joint vote of the two houses of the general assembly judge of the county court of the county of Halifax. That on the 9th day of February, 1880, he was commissioned by the governor "for the term of office prescribed by law;" that on the 20th day of February he qualified under this commission by taking the oaths prescribed by law, and on the 23d February had his commission and certificate of qualification recorded on the order book of Halifax county court; and on that day took his seat on the bench.

Under this state of facts it is plain that Judge Armistead was certainly exercising the duties of his office under color of the highest legislative and executive authority, and that all his acts, judgments, decrees, and orders, while so acting, were valid and binding, and cannot be enquired into; but must be recognized in all cases where the county court of Halifax has jurisdiction as a final determination of such cases, except when reversed on appeal or writ of error.

*513 This doctrine is well settled by the decisions of this court, as well as those of numerous cases, English and American, and approved by all text writers of acknowledged authority. See Griffin's ex'or v. Cunningham, 20 Gratt. 31, 43; Quinn v. Commonwealth, 20 Gratt. 138, 141; Bolling v.

Lersner, 26 Gratt. 36; Blackwell Tax Titles 92.

The distinction between an officer de jure, one who is de facto, and a mere usurper, is well known and clearly defined. An officer de jure has the legal title to, and is clothed with, all the power and authority of the office. He has a title against the world to exercise the functions of the office and receive the fees and emoluments appertaining to it. He is responsible to the government and injured parties when he abuses his trust or transcends his authority. But his acts within the scope of that authority cannot be questioned by the citizen or any department of the government.

An officer de facto is one who comes in by the power of an election or appointment, but in consequence of some informality, or want of qualification, or by reason of the expiration of his term of service (or it may be said also by entering upon the duties of his office before his term of service fixed by law begins), cannot maintain his position when called upon by the government to show by what title he holds his office. He is one who exercises the duties of an office under claim and color of title, being distinguished on the one hand from a mere usurper, and on the other from an officer de jure. A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; and his acts are void in every respect.

The following definition of Lord Ellenborough has been adopted by text 514 writers, as more accurate and *expressive than any other, is as follows: "An officer de facto is one who has the reputation of being the officer he assumes to be, and is yet not a good officer in point of law."

The rule which declares that the acts of an officer de facto are as valid and binding as if he were an officer de jure, is founded on the soundest principle of public policy, and is absolutely essential to the protection of the best interests of society. Indeed the affairs of society could not be conducted on any other principle. To deny validity to the acts of such officers, would lead to confusion and insecurity, in public as well as private affairs, and thus oppose the true policy of every well regulated State.

In the case before us Celia McCraw, the petitioner, held in custody of the Superintendent of the Penitentiary, was tried and convicted in a court of competent jurisdiction presided over by a judge who held his office under color of authority of his appointment by the legislature and commission of the governor. If he was not judge de jure at the time of the trial and conviction, he was certainly a judge de facto, and his judgment is as valid and binding as if he was judge de jure.

The case of Quinn v. The Commonwealth, 20 Gratt. (supra), is a case exactly in point. That case came before this court upon a petition for writ of habeas corpus, presented by the prisoner convicted of a felony and sentenced three years in the penitentiary by the hustings court of the city of Richmond

presided over by Charles H. Bramhall. The prisoner based his application for a discharge upon the ground, that the said Bramhall, who presided at the term of the said court at which prisoner was convicted and sentenced, being a military appointee of the Federal government *was not authorized to exercise the functions of a judge after the restoration of civil government in Virginia.

It was held that Judge Bramhall was a judge de facto, and his judgment valid and binding, and the prisoner was remanded to custody. Judge Staples in delivering the opinion of the court in that case, refers to two cases so apposite to this that I refer to them here, as being recognized as authority by this court. The one is *State v. Bloom*, 17 Wisc. R. 521, and the other *People v. White*, 24 Wend. R. 520.

In the first named case it was held that where a party was indicted, convicted and sentenced at a term of a circuit court held by a person who exercised the office of judge of said court under an appointment by the governor, without authority of law, there being no other person entitled to said office, the sentence was nevertheless valid and binding. It was so decided upon application for a writ of habeas corpus after a judgment of ouster had been pronounced against the judge, upon the ground that he had been so illegally appointed. In the other case (24 Wend. 520) it was said "that where an officer having an apparent authority to do the act, had rendered judgment between the people and the prisoner, neither party can in a collateral way call in question the title of the judge. The government may try the title by quo warranto, but until that is done his acts are valid and effectual so far as third persons are concerned."

After commenting upon these cases, Judge Staples refers to Griffin's ex'or v. Cunningham to show that, both the dissenting judges concurred with the majority in recognizing the principles which govern the acts of a de facto officer.

In *Bolling v. Lersner*, supra, Judge Moncure referring to the case of Griffin's ex'or v. Cunningham and *Quinn v. The Commonwealth*, shows that the court was unanimous *with respect to the doctrine herein declared, as to the validity of the acts of a de facto judge.

Guided by these authorities, and for the reasons already given, I am of opinion, that the trial, conviction and sentence of the petitioner Celia McCraw were valid and binding acts, and cannot be enquired into by this court or elsewhere; and that there is no error in the judgment of the circuit court of Richmond in remanding the prisoner to the custody of the Superintendent of the Penitentiary, and that the same be affirmed.

In the second case (that of *Estes v. Edmondson*, sheriff), the question is directly raised and must be decided by this court, who is now, and, was at the time these proceedings were instituted, to wit, on the 14th day of July, 1880, the lawfully constituted judge of the county court of Halifax county.

In deciding this question, it is not necessary to look to the ex parte affidavits filed with the record, or to consider at all the question argued at the bar, whether Judge Armistead the acting judge, is a party to this proceeding. The sole question we have to determine, is, whether, upon the conceded facts disclosed by the record, the petitioner who applied for, and was awarded a writ of habeas corpus from this court, is unlawfully held in custody. It matters not whether either of the parties claiming the office are made parties to this proceeding. This court has by the express terms of the Constitution original jurisdiction in cases of habeas corpus. Any citizen may apply to it directly for relief when imprisoned or detained in custody unlawfully. And this court upon the petition of the party invoking its original jurisdiction for a writ of habeas corpus, will only consider and determine the question whether the party in prison, or in custody, is lawfully, or was lawfully so held, or deprived of his liberty. The only necessary parties to *such a proceeding are the petitioner or petitioners, and the person, or persons, alleged to hold him, or them in such unlawful custody.

In the case before us, the party charged with exercising the unlawful custody, for which the petitioner has obtained a writ of habeas corpus, from this court, is Henry A. Edmondson, sheriff of Halifax, and he alone is a necessary party as respondent to the writ.

The writ in this case was awarded upon the petition of James P. Estes which alleged that on the 5th May, 1880, the Hon. William R. Barksdale late judge of the county court of Halifax county, delivered to the petitioner a writ of habeas corpus awarded by him, and directed to the sheriff of Halifax county, commanding him to produce before him, the said William R. Barksdale, at his office at Halifax courthouse, the bodies of certain parties naming them, with the cause of their caption and detention. That petitioner did not obey said writ, but endorsed thereon his refusal in the following words to-wit:

"I respectfully decline to obey the mandate of the within writ of habeas corpus, on the ground that Wm. R. Barksdale is not the legally qualified judge of Halifax county; but that E. W. Armistead is the legally qualified judge of said county.

"(Signed) Jas. P. Estes,
"Deputy sh'ff for Henry A. Edmondson,
sh'ff of Halifax county."

That thereupon the said William R. Barksdale imposed upon petitioner a fine of fifty dollars for his contempt in refusing to obey the mandate of said writ, and made out and signed an order of commitment in the following words:

*"For reasons appearing to me Jas. P. Estes is fined the sum of fifty dollars for his failure to obey the within writ of habeas corpus, by bringing the bodies of petitioners before me; and the said Estes is committed to jail, until said fine is discharged."

"(Signed) Wm. R. Barksdale.
"Judge of Halifax county."

Petitioner then alleges that under and by virtue of said order of commitment alone, H. A. Edmondson, sheriff of Halifax county, claims the right to detain him in custody. And then the petitioner, after detailing at length the reasons why William R. Barksdale had no authority to impose said fine, and order his commitment till paid, prays that this court may award a writ of habeas corpus directing the said sheriff to produce before this court the body of petitioner, with the cause of his caption and detention, that the same may be enquired into and petitioner discharged. The writ was accordingly awarded by this court, at its late session at Wytheville, returnable on the second day of August. On that day the respondent Edmondson made the following return to said writ:

"In obedience to the writ of habeas corpus hereto annexed, I have here now before this court, the body of James P. Estes named in said writ; and for cause of his caption and detention, say, that said Estes was taken, and is detained in custody, under and by virtue of an order of commitment made and signed by Hon. Wm. R. Barksdale, county court judge of Halifax county—a copy of which order and of the proceedings in which it was made, is herein filed as part of this return."

The respondent then states at some length the grounds upon which he recognized the authority, and *obeyed the order of Hon. William R. Barksdale, as the rightful and lawfully constituted judge of the county court of Halifax.

It thus appears that upon the petition for the writ of habeas corpus and the return of the respondent, the issue, and the sole issue, we have to determine upon the conceded facts in the record, is whether the petitioner is lawfully or unlawfully detained in the custody of the respondent. This question can only be solved by the further enquiry. Who was the lawfully constituted judge of the county court of Halifax county at the time Estes, the petitioner, was committed to the custody of the respondent? If at the time of said commitment Hon. Wm. R. Barksdale was the lawfully constituted judge, then Estes is lawfully in custody of the sheriff of said county, and must be remanded to said custody until he shall have paid the fine imposed on him for contempt. On the other hand, if Hon. E. W. Armistead was the lawfully constituted judge of said county court, then the commitment of Estes by Barksdale was void and a mere nullity, and the petitioner must be discharged.

We must, therefore, now determine upon the conceded facts in the record, and in the light of the decisions of this court, whether Barksdale or Armistead is the rightful and legally constituted judge of the county court of Halifax county.

The following facts are conceded: Hon. Thomas Leigh, judge of the county court of Halifax, died in December, 1873. On the 9th January, 1874, Wm. R. Barksdale was elected by the general assembly "to fill the vacancy" occasioned by Judge Leigh's death. Barksdale qualified under his commission on 15th

January, and on the 26th January, 1874, his commission and certificate of qualification was spread upon the order book of the 520 county court of Halifax, when *he took his seat on the bench of that court. From that day (to-wit: 26th January, 1874), until the 23d February, 1880, he continuously discharged his duties as judge of the county court of Halifax.

On the 27th day of January, 1880, E. W. Armistead was elected by the general assembly county judge of Halifax county. On the 9th February, 1880, he was commissioned by the governor "for the term of office prescribed by law." On 23d February he took his seat on the bench, and had recorded his certificate of qualification and commission.

At that time Barksdale made no objection by way of protest or otherwise, but resumed the practice of law in that court. Sheriff, clerk, and other officers of the court recognized the authority of Judge Armistead.

It was only after the decisions of this court in several cases construing the constitutional provisions relating to the terms of office of the county judges that Barksdale claimed that he was the lawfully constituted judge of the county court of Halifax, and exercised the functions of his office by issuing a writ of habeas corpus, which was the foundation of the proceedings now before this court in the present case.

These are the conceded facts in the case.

Looking to these facts and to the decisions of this court, I arrive at the following conclusions:

First. That although Barksdale was elected and commissioned to fill the vacancy occasioned by the death of Judge Leigh, he was, upon the true construction of the Constitution, entitled to fill the full term of the office of county judge. This question was determined, after elaborate argument and careful consideration, in the "Prince William Judge case"—Judge Burks not sitting—in which it was held by this court that under our Constitution a judge elected to fill an unexpired term, or vacancy occasioned

521 *by the death or resignation or removal of the incumbent, is in the office for the full term. It would be a work of supererogation to reproduce here the reasons and the authorities upon which this court founded its judgment in that case. I content myself with referring to the able and exhaustive opinion of Judge Staples, and the cases cited by him. That case has been recently (on our late session at Wytheville) recognized as binding authority by the unanimous voice of this court. (See Bland and Giles County Judge case, *supra* 443.)

These two cases affirm the proposition which I first lay down: That under the true construction of the Constitution a judge elected and commissioned to fill an unexpired term, is entitled to take the office for the full term.

Second. The question then recurs (Judge Barksdale being entitled under the decisions of this court to the full term though elected to fill the unexpired term of Judge Leigh).

when did Judge Barksdale's term of the office begin and when does it end?

It is proper to prevent any confusion or misconstruction of the several decisions of this court with respect to the county judges, briefly to refer to the cases already decided by this court. The first case before this court was that of the Henrico county judgeship. Waddill and Minor were the contestants for the office in that case:

Minor was elected in 1873. He went into office on the 1st January, 1874. His term of office being six years as prescribed by the Constitution, it ended on the 1st January, 1880. But Waddill having been elected in January, 1880, it was insisted that his term of office did not begin until 1st January, 1881, under that provision of the Constitution which declares that "the term of office of all judges shall commence on the first day of January next following their appointment;" *and it was contended by Minor's counsel that he must continue to hold the office until Waddill's term commenced to-wit, 1st January, 1881. The court held in that case that Waddill was the rightful judge of Henrico from the day he qualified under his appointment and commission. The case was argued before a court of three judges (Moncure, Anderson and Christian), and while they all agreed that Judge Waddill should at once enter upon the office, their conclusions were based upon essentially different grounds. Judges Moncure and Anderson were of opinion, that the term of office of Judge Waddill commenced on the 1st January, 1880, before he was elected. I was of opinion that under that provision of the Constitution which declares that "their (the judges) terms of office shall commence on the first day of January next following their appointment," Judge Waddill's term did not commence until 1st January, 1881. But I was of opinion that under that provision of the Constitution which declares that "judges and all other officers elected or appointed shall continue to discharge the duties of their office after their terms of service have expired until their successors have qualified," Judge Minor having been in the office for the full term of six years, could only hold the office until his successor qualified, and Waddill his successor having qualified, was at once entitled to the office.

I was further of opinion that while Waddill's term of office did not commence until the 1st of January, 1881, yet under that provision of the Constitution which declared (after fixing in all cases the period when the term of office should commence), that "they shall discharge the duties of their respective offices from their first appointment under this Constitution until their terms begin," he (Waddill) entered at once upon the office. See 32 Gratt. 779.

523 *The next case was what is known as the Manchester Judge case. In that case, Judge Clopton was elected judge of the corporation court in March, 1874. Judge French was elected by the legislature in January, 1880. The unanimous

opinion of this court, then consisting of four judges was, that Judge Clopton's term commenced on the 1st of January, 1875, and expired on the 31st of December, 1880; and that Judge French's term (he having been elected in January, 1880,) does not commence until 1st of January, 1881. This was the unanimous opinion of the court; but it is proper to say that Judges Moncure and Anderson concurred in the opinion upon the ground, that Judge Clopton was the first judge of the corporation court of Manchester, and that the provision of the Constitution above quoted applied to his case.

The next case we had before us was the Bland and Giles County Judge case.

In that case (Judge Anderson and Judge Moncure absent), it was held that Judge Easley, who was elected in December, 1874, was entitled to hold the office till the 1st day of January, 1881. Judge Wylie who was elected in December, 1879, and who was commissioned and qualified and took his seat on the bench of the courts of said counties, was removed upon writ of quo warranto, or proceedings in the nature of such writ by the circuit court of Giles upon the ground that the term of office of Judge Easley did not expire till the first of January, 1881; which was affirmed by this court.

It was thus definitely determined that under the true construction to be given to the provisions of the Constitution, that the terms of office of all the judges commence on the 1st day of January next following their appointment.

524 *These cases must govern the case before us. It is only necessary to refer to them as authority without repeating the reasons and authorities which controlled the judgment of the court in those cases. I will only quote a single paragraph from the opinion of the court in the Manchester case as conclusive of the case before us, as follows: "Now it must be conceded that the framers of the Constitution had the unquestioned right not only to fix the term of all officers elected under it, but also to declare at what time the terms of such officers should begin. This, the Constitution has declared in respect to the judges in plain and unequivocal terms using this emphatic language—"Their terms of office shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this Constitution until their terms begin."

As was said in that case, I think "there can be no mistake or difference of opinion as to the construction to be given to these plain words of the Constitution."

Upon the authority of these cases it is plain that Judge Barksdale having been elected and qualified as judge of the county court of Halifax in January, 1874, his term of office commenced, by the express terms of the Constitution, on the 1st day of January next following his appointment, to-wit, on the 1st day of January, 1875, and his term of office fixed by the Constitution being six years expires on the 31st December, 1880.

It also follows that Judge Armistead having been elected on the 27th January, 1880, his term of office does not commence until the 1st day of January, 1881.

It has been argued, that Judge Barksdale had abandoned and forfeited his office by yielding to the claims of Judge Armistead, and engaging in the practice of law
525 *in this court. Precisely the same point was made in the Giles and Bland County Judge case. But this court held that this was no abandonment or forfeiture of the office. See that case and authorities there cited as conclusive of the case before us.

Judge Barksdale, in making no protest or objection to the holding of the county court by Judge Armistead, and in becoming a practitioner as an attorney in that court, did not forfeit his office. He simply yielded for the time to the executive and legislative construction of the Constitution, which had been given by the election of Armistead by the general assembly, and his commission by the governor. But as soon as this court had determined the question that a judge elected to fill an unexpired term was in office for the full term, and had also declared when, under the true construction to be given to the Constitution, the terms of office of the county judges commenced and terminated, he at once asserted his rights by instituting the proceeding which forms the foundation of the case before us.

It follows from these views and the former decisions of this court, that when the petitioner Estes was committed to the custody of the sheriff by Wm. R. Barksdale, that he (Barksdale) was the lawfully constituted judge of the county court of Halifax county, and had authority to fine and commit the petitioner Estes for contempt. He must, therefore, be remanded to the custody of the sheriff of Halifax.

I am further of opinion, that although Hon. Wm. R. Barksdale is the lawfully constituted judge of Halifax county court until the 1st December, 1880, when his term of office expires, yet all the judicial acts of Judge Armistead heretofore done are valid and binding, having been done under color of authority conferred by the legisla-
526 tive and executive branches of *the government. He was a judge de facto, and his judgments, decrees, and orders must (when otherwise right and proper) be recognized as valid and binding.

The conclusion is, that the petitioner must be remanded to the custody of the sheriff of Halifax until he pays the fine imposed by Judge Barksdale for his contempt in refusing to obey his order.

ANDERSON, STAPLES, and BURKS, Js., concurred in the opinion of Christian, J.

The judgment was as follows:

This cause which is pending in this court at its place of session at Wytheville, having been heard but not determined at said place of session: This day came here the parties by their counsel, and the court having maturely considered the record and proceed-

ings in the case, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the petitioner, James P. Estes, is not illegally detained by the defendant, Henry A. Edmondson, sheriff of Halifax county, but is in the lawful custody of said respondent. It is therefore adjudged and ordered that the petitioner, the said James P. Estes, be remanded to the custody of said sheriff of Halifax county.

And it is further ordered that this order be entered on the order book here and forthwith certified to the clerk of this court at Wytheville, who shall enter the same on his order book.

Discharge refused.

527 *Harnsberger & als. v. Yancey & als.

September Term, 1880, Staunton.

I. Surety—Liability of Principal to Reimburse.—A principal for whom another, at his request, undertakes as surety, although such principal's name does not appear in the obligation, given by the surety, is as much bound to indemnify such surety, for what he pays on the obligation, as if his name appeared on it as principal; and the surety in such case is entitled by subrogation to enforce for his exoneration or indemnity all the rights, remedies and securities of the creditor against the principal debtor. And this rule is broad enough to include every instance where one pays a debt for which another is primarily answerable, and that should in equity and good conscience have been discharged by him.

II. Same—Appeal from Decree against Principal and Surety—Bond.—A decree was rendered against Y, a principal debtor, and M, his surety, on one bond; T, a principal, and W, his surety, on another; and said T, principal, and H, his surety on another bond—all given for deferred payments for purchases of land, part by Y and part by T. An appeal was taken by both principals and sureties from said decree, but the *superseas* bonds were only executed by T, one of the principals, and H, one of his sureties. The condition of the bond, as prescribed by the judge awarding the *superseas*, was to pay all "costs and damages according to law, and also any deficiency in the funds arising from the land sales decreed in meeting and discharging the sums decreed against the parties, respectively, in case the decree complained of be affirmed, or the appeal or *superseas* dismissed." The condition inserted in the bond by the clerk, was to "pay the judgment," in addition to that prescribed by the judge. On a suit on the appeal bond—**Held:**

1. The stipulations in the bond to "pay the judgment," and "also the deficiency" on the resale of the lands, "should be regarded as alternative provisions, intended to accomplish but one and the same object, namely, the satisfaction of the decree and the payment of costs and damages according to law.

2. The proceeds of these bonds when collected are applicable to the satisfaction of the decree appealed from, as reduced by the resales of the lands, apportioned amongst all of the parties against whom the decree was rendered, and H, a surety for T, a principal, now bankrupt, who

joined in the appeal bond, is not only entitled to his proportion of the fund arising from the judgment on the appeal bond, to be credited on the decree against him as such surety, but he and his co-obligors in the bond, who have satisfied the penalty, are entitled to indemnity from Y, one of the principals, for the portion credited to him as derived from the said bond; and are also entitled to contribution from W, as co-security on the original contract to T, for the amount paid by them on said appeal bond.

III. Same—Co-Sureties—Relative Rights.*

—If there are two parties bound as principal and surety for a debt, and a third party afterwards, at the request of the principal, binds himself as surety for the debt, the two sureties, in the absence of any agreement to the contrary, become co-securities, of the same principal, and this relation may be established by implication from circumstances, as well as by express agreement. But where there is a judgment against a principal and his surety, and a third party, at the instance of the principal, and for his sole benefit, and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment, and thus prejudice the rights of the first surety, the equity of the latter (first surety) is superior, and the second would not be entitled to contribution from the first; and, according to some authorities, the first would be entitled to indemnity from the second. This is not the case with Y and W in this case.

This is an appeal from a decree of the circuit court of Rockingham county. The facts necessary for a proper understanding of the case, so far as they are not stated in the opinion of the court, are these: On the

7th August, 1863, Messrs. Logan & 529 Yancy, as *commissioners of said court, sold to William B. Yancey about one-half of the real estate of which William B. Yancey, Sr., died seized and possessed, and to B. P. Teel the remainder. A large portion of the purchase money was paid down in Confederate bonds, but two instalments fell due in August, 1865, and August, 1867, respectively, and a contest ensued as to whether these contracts were to be discharged in Confederate or United States currency. William B. Yancey gave his bonds for the deferred instalments, with George W. Mauzy alone as surety. Those given by B. P. Teel were divided into two equal sets; on one set he gave James M. Weaver as surety, and on the other set H. B. Harnsberger.

On the 7th September, 1863, William B. Yancey, by separate and independent contracts, sold the land bought by him to C. M. Price and said B. P. Teel—Price giving as security to Yancey for the purchase money

one W. S. Miller, and Teel giving as surety one W. E. Sipes.

In the suits for the enforcement of the original contracts of Yancey and Teel, the circuit court, by decree rendered December 1st, 1868, held that they were to be discharged in United States currency, and decreed that Yancey and Mauzy, his surety, should pay to the commissioners of the court \$17,545.41, with interest from 7th August, 1864; that B. P. Teel and James M. Weaver, his surety, should pay \$8,814.87, and that said Teel and H. B. Harnsberger, his surety, should pay a like sum of \$8,814.87—both of these sums bearing interest from 7th August, 1864; and in default of payment, Charles A. Yancey was directed, as commissioner of the court, to proceed to resell the said lands.

From this decree, William B. Yancey, B. P. Teel, H. B. Harnsberger, J. M. Weaver, George W. Mauzy and Charles M. Price

530 applied for and obtained a writ *of supersedeas to the district court then held at Winchester, and Teel, Price and Harnsberger, three of the appellants, gave the supersedeas bond, required in the penalty of \$10,000, with J. M. C. Harnsberger, A. J. Johnson, Charles H. Sowers and R. S. Harnsberger as sureties, with condition to pay the judgment superseded, and "all such costs and damages as shall be awarded in case the said judgment be affirmed, and also any deficiency in the funds arising from the sales decreed." The district court affirmed the decree of the circuit court, and the appellants took an appeal to the supreme court, which affirmed the decree of the district court. The supersedeas bond in the supreme court was executed by B. P. Teel, Solomon Stover, Elizabeth Trundle and H. B., Robert S. and J. M. C. Harnsberger, in the penalty of \$10,000, and with like condition with that executed in the district court. (The condition required by the judge awarding the supersedeas is copied in the opinion of the court, and need not be repeated here.) Before the appeal to the district court was perfected, Charles A. Yancey, the commissioner, advertised, and was about to resell the land; but it being represented to him that the appeal had been applied for, and on a written application signed by Teel, Price, Sipes, Weaver and Miller, that the interest of the defendants would be promoted thereby, the sale was postponed. The appeals, on being perfected, were prosecuted in the names of all the appellants named in the petitions therefor. And after the final affirmation, and a resale by Charles A. Yancey of the real estate, the deficiency was decreed against each of the parties on their several obligations. H. B. Harnsberger paid the amount decreed against him as surety for Teel, who had become bankrupt (the amounts paid by other parties are fully stated in the opinion), when the commissioners, failing to realize the amounts 531 decreed against some of the *other parties, instituted suits at law on the two supersedeas bonds, and recovered judgments for the amounts of their penalties,

*Sureties—Subrogation to Rights of Creditor.—As to the right of a second surety who has become surety for the principal without the assent of the first surety, and has thereby prejudiced the latter's rights, see *Sherman's Adm'r v. Shaver et al.*, 75 Va. 1, citing the principal case; *Coffman v. Hopkins et al.*, 75 Va. 645; 3 Min. Inst. (2nd Ed.) 421, 422, 426.

See also 2 Min. Inst. (4th Ed.) 840, 841, where the Virginia cases dealing with the doctrine of substitution and subrogation are collected.

viz., twenty thousand dollars. On proceedings to enforce those judgments, the circuit court held, as stated in the opinion of Judge Burks, that "the legal effect of the super-sedeas bonds, was to substitute the obligors to the liabilities of the original debtors—of Yancey, the principal debtor, as well as of Weaver, the surety—and not only to preclude these obligors from all right to indemnity from the principal and contribution from the surety for whatever the obligors might be compelled to pay on the bonds, but also to require them to exonerate the principal and surety from all liability from any balance against them on the decree of December, 1868, after applying thereto the proceeds arising from a resale of the lands under that decree." From this decree, H. B. Harnsberger, Robert S. Harnsberger and Joseph M. C. Harnsberger obtained an appeal. The effect produced by the decree of December, 1868, against H. B. Harnsberger as original surety for B. P. Teel, and that against the obligors in the appeal bonds, by the decree now appealed from, is stated in detail in the opinion of Judge Burks, and is not, therefore, repeated here.

Sheffey & Bumgardner, for the appellants.
Charles A. Yancey, Richard Parker, C. T. O'Ferrall, J. S. Harnsberger, George E. Sipe and W. B. Compton, for the appellees.

BURKS, J. Under the decree of December 1, 1868, rendered in the consolidated causes of Yancey, receiver, *v.* Yancey & others, the same *v.* Teel & others, and Conrad's gdn. *v.* Conrads & others, the appellees, William B. Yancey and Bernard P. Teel, were the

532 principal *debtors; George W. Mauzy was the surety of the said William B. Yancey, and James M. Weaver and the appellant, H. B. Harnsberger, were the separate sureties of said Teel for equal amounts, and the lands ordered to be resold stood as a primary security for the payment of the sums decreed against the principals and their respective sureties. Weaver and Harnsberger, though bound for the same principal, were not bound for the same debt, but by different instruments for distinct portions of the same debt, and, as between themselves, under separate and distinct contracts. Although, therefore, they were sureties, they were not co-sureties. 1 Lead. Cas. Eq., (*Dering v. Earl of Winchelsea*), 108, side p., and cases there cited. That decree, on appeal to the district court, was there affirmed, and on a further appeal from that court to this, the decree of the district court was affirmed here. The relations of the original parties inter se under the decree remained the same after affirmation as before, unless they were altered, and except so far as they were altered, if altered at all, by the appeals taken and the appeal bonds which were given.

According to the view of the court below, the legal effect of the bonds was to substitute the obligors to the liabilities of the original debtors—of Yancey, the principal debtor, as well as of Weaver, the surety—and not only to preclude these obligors from all right to indemnity from the principal and contribu-

tion from the surety for whatever the obligors might be compelled to pay on the bonds, but also to require them to exonerate the principal and surety from all liability for any balance against them on the decree of December, 1868, after applying thereto the proceeds arising from a resale of the lands under that decree. This view resulted in the decree complained of in the present appeal.

The liability of the appellant, H. B. **533** Harnsberger, *as surety for Teel, under the decree of December, 1868, was for the sum of \$8,817.87, with interest from August 7, 1864. This was his only liability under that decree. The amount was subsequently reduced by the sale of the lands purchased by Teel to the sum of \$6,268.71, principal money, which was paid by said Harnsberger under a decree of the court, Teel (the principal debtor as to this sum) having become bankrupt. Of the obligors in the bonds, H. B. Harnsberger was the only one (except Teel) embraced in the decree of December, 1868. After the resale of the lands and application of the proceeds to the decrees, the receiver, by leave of the court, instituted actions at law on the appeal bonds and recovered the full amount of the penalties combined, \$20,000. Of this sum Stover and Trundle, who were sureties in the second bond, paid \$4,500 besides a portion of the costs, and the appellants paid the residue, \$15,500, of which the sum of \$5,000, though not actually paid down, was, under an arrangement between the parties, treated as paid. The net amount—\$19,500—after deducting cost of collection, was applied ratably to the decrees against Yancey and Weaver, excluding H. B. Harnsberger altogether, \$13,167.91 going to the benefit of Yancey, and \$6,432.09 to the benefit of Weaver. Thus, it is seen, that H. B. Harnsberger has been compelled to pay as surety for Teel, who is insolvent, upwards of \$6,000, and together with some of his co-obligors, \$20,000 in addition, all of which latter sum (less cost of collection) has been applied to the discharge pro tanto of the liabilities of the original debtors, and it is claimed that the parties who have thus suffered have no recourse either for indemnity or contribution against those debtors, and that this is a consequence of the peculiar conditions of the appeal bonds. It cannot be denied that the conditions of these bonds are singular **534** enough, *and they must, indeed, be very peculiar if they bring about the results deduced from them by the court below, and now contended for here by the learned counsel for the appellees.

We have only one of the bonds with the condition subjoined copied into the record, but it seems to be agreed, that the conditions of each bond, so far as it relates to the questions raised on the present appeal, is in substance the same. After the usual recitals, the condition runs thus: "If, therefore, the said B. P. Teel, Chas. Price, H. B. Harnsberger, J. M. C. Harnsberger, A. J. Johnson, Chas. H. Sowers and R. S. Harnsberger, shall prosecute the said suit with effect and shall pay the judgment aforesaid

and all such costs and damages as shall be awarded in case the said judgment be affirmed, also any deficiency in the funds arising from the land sales decreed, in meeting and discharging the sums decreed *vs.* the parties respectively in case the said decree complained of be affirmed or the appeal or supersedeas be dismissed, then the above obligation to be void, else to remain in full force and virtue."

Literally construed, this is an undertaking, in case the decree appealed from be affirmed or dismissed, not only to pay all costs and damages awarded and the amount of the decree appealed from, but "also" the "deficiency" mentioned. In other words, the obligors bind themselves to pay, on the happening of the contingency named, the whole of the decree with the costs and damages, and, in addition thereto, the deficiency in the land sales, that is, either to pay a portion of the debt twice to the creditor or once to the creditor and then again to the original purchaser of the land or their sureties. An interpretation that leads to such absurd consequences cannot be tolerated for an instant in any court, much less in a court of equity. Nor is the construction contended for by the appellees much less

535 *objectionable. Their contention, if I understood it, is, that the instrument binds the obligors to the payment of the decree, costs, and damages, and "also" to indemnify the original purchasers and their sureties against all loss on resale of the lands.

A sufficient answer is, the language employed does not reasonably admit of any such construction. There is not a word about indemnifying anybody and nothing from which an intention to indemnify can be justly inferred. If the design had been such as is supposed, other and very different terms would have been employed. A provision for indemnity, involving possible or probable results of so grave a character, would never have been couched in language so inappropriate, vague and indeterminate.

I think I have discovered the source of all the trouble and difficulty in this matter.

Recurring to the decree of December, 1868, it will be seen, that it was a personal decree against Yancey and his surety Mauzy for \$17,545.91 with interest from August 7, 1864, and against Teel and his sureties for equal parts of \$17,629.74 with interest from the same date. The principal of these combined sums with interest till the date of allowance of the appeal was upwards of \$45,000.

The decree, as before stated, also ordered a sale nisi of the lands to satisfy the sums decreed. An appeal bond with the usual condition to pay costs and damages and to perform and satisfy the decree in case of affirmance or dismissal, would have required a penalty of a very large amount, not looking to the land which stood as a primary security for the sums decreed. The learned judge, who awarded the appeal, therefore, in case of the appellants doubtless and seeing that it was only necessary to provide security by bond for the deficiency, if any, of the pro-

536 ceeds of the land sales to *satisfy the decree, directed a bond to be given with that condition only and in the comparatively small penalty of \$10,000, supposing that such penalty would be large enough to cover that deficiency.

The order allowing the appeal is in these words:

"1869, March 9th.

"Appeal and supersedeas allowed upon the petitioners or some of them, or some one for them, giving bond in the penalty of ten thousand dollars (\$10,000), with good security therein, conditioned to pay costs and damages according to law, and also any deficiency in the funds arising from the land sales decreed, in meeting and discharging the sums decreed against the parties respectively, in case the decrees complained of be affirmed on the appeal or supersedeas dismissed."

Comparing this order with the statute in relation to appeal bonds (Code of 1860, ch. 182, § 21), it will be seen, that the condition of the bond prescribed by the order follows the statute closely, except in the statutory requirement "to perform and satisfy the judgment, decree or order." This is wholly omitted and intentionally, no doubt, and the provision in regard to the "deficiency" is substituted for it. The provision in the order, if the penalty of the bond had been large enough, would have secured the satisfaction of the decree as certainly and as effectually as a condition would have done in the literal terms of the law. To be sure, if the order had been followed as it was written by the judge, the bond could not have been resorted to until the lands had been sold, but when sold and the proceeds applied to the decree, the "deficiency"—the residue of the decree not paid by the land sales—the term "deficiency," as here used, means nothing else—could have been made

by the receiver out of the obligors

537 in *the bond. The careful and skillful manner in which the order was drawn and the use of the very terms of the statute in the particulars wherein its provisions were intended to be literally pursued, forbid the supposition, that, when a most important provision is left out and another adopted in its place which was substantially its equivalent, such omission and substitution were not designed.

When the clerk however took the bond, in writing out the condition, instead of following the order of the judge, as he should have done, or, if he took upon himself the responsibility of departing from it, pursuing the terms of the statute alone, he attempted, it seems, to follow both and thus made the condition apparently incongruous—binding the obligors to pay the decree, as the statute requires, "and also the deficiency," &c., as the order directed. And out of this awkwardness or blunder, as I regard it, of the clerk in the discharge of a ministerial duty, has sprung the claim of the appellees Yancey and Weaver to indemnity or exoneration out of the proceeds of the appeal bond, which claim has been allowed them by the circuit court.

If the learned judge, who allowed the appeal, had in his order prescribing the condition of the bond pursued the statute literally, it would have been a condition only to pay costs and damages and perform and satisfy the decree, in case of affirmance or dismissal of the appeal. If such had been the condition and nothing more, in case of a breach, the proceeds of the land sales would have been first applicable to the satisfaction of the decree, and then the obligors would have been liable for whatever was not paid by the sales; that is, for the "deficiency." Now, the condition prescribed by the order was substantially the same thing, **538** namely, *to pay costs and damages and also the "deficiency in the funds arising," &c.

Looking then to the decree of December, 1868, and the order allowing the appeal, I think the condition of the appeal bonds (for in taking the second bond the terms of the first were followed) should be construed as designed to secure to the receiver the amounts decreed and costs and damages, and not to indemnify any party for loss which might be sustained on resale of the lands; and that the stipulations to pay the decree, costs and damages, "and also the deficiency" on resale of the lands should be regarded as alternative provisions intended to accomplish but one and the same object, namely, the satisfaction of the decree and the payment of costs and damages according to law.

In this view, even if the obligors in the appeal bonds be considered as primarily bound to the extent of the penalties and therefore entitled neither to indemnity from Yancey as principal debtor nor to contribution from Weaver as a co-surety, yet the proceeds of these bonds when collected by the receiver were applicable to the satisfaction of the decree of December, 1868, reduced in the amounts by the subsequent sale of the lands, and not less applicable to the sum decreed against H. B. Harnsberger than to the sums decreed respectively against W. B. Yancey and James M. Weaver, and the apportionment of the fund among the parties by Commissioner Daingerfield in statements 1 and 3 of his report, rejected by the circuit court, is in accordance with this view.

But I am of opinion, after the most careful investigation and upon mature reflection, that the appellant H. B. Harnsberger is not only entitled to his proportion of the fund arising from the appeal bonds to be credited on the decree against him as surety of

539 Teel as in statement No. 1 in the commissioner's report, *but he and his co-obligors in the bonds, who have satisfied the penalties, and are entitled to indemnity from W. B. Yancey as principal debtor for the portion of the fund credited to said Yancey in said statement, and that they are also entitled to contribution from James M. Weaver as a co-surety on account of the portion of the fund credited in said statement on the decree against him. Stover and Mrs. Trundle, who paid a part of the penalty of the second bond, although parties to the suit, seem not to have asserted any claim to repayment from

any one. It is said in the bill, that they paid under some arrangements with the appellants, the nature of which is not disclosed. So, the only parties seeking relief are the appellants (the three Harnsbergers), who together paid \$10,500 and arranged to pay the further sum of \$5,000, which for the purposes of this suit is to be considered as paid, making in all \$15,500 paid by them. A portion of this—about one-fourth part—is to be credited on the decree against H. B. Harnsberger, and the remaining portion (three-fourths) is applicable in the hands of the receiver to the decrees against Yancey and Weaver, the one-half to the credit of Yancey and one-fourth to the credit of Weaver.

A principal for whom another, at his request, undertakes as security, although such principal's name does not appear in the obligation given by the surety, is as much bound to indemnify such surety for what he pays on the obligation as if his name appeared in it as principal, and the surety in such case is entitled by subrogation to enforce for his exoneration or indemnity all the rights, remedies, and securities of the creditor against the principal debtor. Upon this principle the case of *Enders, &c., v. Brune*, 4 Rand. 438, was decided. And in applying the principle the rule is broad enough, it is said, to

include every instance where one pays **540** a debt for which another is primarily answerable, and that should in equity and good conscience have been discharged by him. 1 Lead. Cas., Eq., Part 1 (4th Amer. Edn.) 148, top p., notes to *Dering v. Earl of Winchelsea*, and cases cited.

And so, if there be two parties bound as principal and surety for a debt or other engagement, and a third party afterwards, at the request of the principal, bind himself as surety for such debt or engagement, the two sureties, in the absence of any agreement to the contrary, become co-sureties of the same principal and for the same debt or engagement. In either case, to establish the relation predicated, it is not necessary to show an express request by direct proof. Circumstances may be shown from which a request may be fairly and reasonably inferred.

But where there is a judgment or decree against a principal debtor and his surety, and a third party at the instance of the principal and for his sole benefit and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment or decree and thus prejudice the rights of the first surety, the equity of the latter is superior; and it seems to be well settled that in such case the second surety would not be entitled to contribution from the first, and there is much authority for the proposition that the first would be entitled to indemnity from the second. This principle has been applied to injunction bonds, bail bonds, prison-bonds, forthcoming bonds, and appeal bonds. *Langsford, ex'or, v. Perrin*, 5 Leigh 552; *Douglass v. Fagg*, 8 Leigh 558; *Givens v. Nelson's ex'or*, 10 Leigh 382; *Stout v. Vause*, 1 Rob. R. 169; *Robinson & others v. Sherman & others*, 2 Gratt. 178; *Bentley &*

others *v. Harris'* adm'r, Id. 357; *Leake v. Ferguson*, Id. 419; *Preston v. Preston & others*, 4 Gratt. *88; *Dering v. Earl of Winchelsea*, and notes, 1 Lead. Cas. Eq., Part 1 (4th Amer. Edn.) 156, 157, 158, 159, top p., and cases there cited.

The rule supposes that the first surety does not sanction the interposition of the second. It does not apply, therefore, "where the surety in the second bond becomes bound for a purpose in which both the principal and the prior surety concur, in which they both have an interest, and where the assent of the prior surety is expressly given, or is clearly to be inferred from the circumstances." *Hartwell v. Smith*, 15 Ohio N. S. 200, cited 1 Lead. Cas. Eq., Part 1, 158.

Although the appeal bonds in the present case suspended the execution of the decree as to all the parties, yet it sufficiently appears from the record as it seems to me, that H. B. Harnsberger with his co-obligors gave the bonds not merely for himself and in his own interest but also in the interest and behalf of all the appellants, including Yancey and Weaver, and with their sanction and approval.

First, as to Yancey. He with Weaver, H. B. Harnsberger, and others, stand as appellants on the record in the district court and in this court. They are named as appellants in both petitions for appeals, errors in the decree are assigned as by them, and their names are all signed to the petitions. The late John B. Baldwin, distinguished not less for his integrity as a man than for his ability and learning in the law, representing the firm of Baldwin & Cochran, was, it is said, the acting counsel for the appellants in both courts. It is not to be presumed, that in preparing the petitions and prosecuting the appeals, he would have used the name of any party without his authority. Besides, the appeals were pending in the two courts for more than four years, the parties in the meantime residing, it would seem, not remotely from each other, and although

542 *they must have known all about the appeals, it does not appear, that any of them ever pretended, that they were not really appellants as the record represents them to have been, until after the Harnsbergers filed their bill for relief in the court below. Again, it might seem from the statements of Yancey in his answer, that he was not interested in prosecuting the appeals or that his interest was to sustain the decree sought to be reversed, yet it distinctly appears by exhibit "S. S." that he was engaged in prosecuting the appeals, at least the appeal in the district court.

Second, as to Weaver. What has been said in regard to the petitions and the prosecutions of the appeals applies as well to him as to Yancey. As to his interest, it was precisely the same as Harnsberger's and he had exactly the same motives to appeal and prosecute the suits in the appellate courts as Harnsberger had. Both were sureties for the same principal, who was also one of the appellants and signed the bonds, and each was bound for the like amount. But in addition, the day on which the lands were to

be sold as advertised under the decree of December, 1868, to-wit, on the 10th day of March, 1869, which was the next day after the first appeal was allowed and before the appeal bond was given, Weaver united with others, some of whom were defendants and all of whom were interested, in a written request to the commissioner to postpone the sale, for the purpose, no doubt, of getting time to perfect the appeal by giving the bond required; "believing," as the writing states, "that the interest of the defendants will (would) be promoted by a postponement of the sale," &c.

These circumstances and others that might be mentioned convince me, that Yancey and Weaver co-operated with the other appellants in procuring and prosecuting the appeals, and although they did not sign the 543 *appeal bonds, still the bonds were given with their concurrence and as well in their interest and behalf as in behalf of the other appellants. In my judgment, they ought not to be allowed, upon any slight grounds, after taking with others the chances of success in the appellate courts, to cast upon their associates the whole burden of the loss arising from failure to prosecute the appeals with effect.

Yancey never ceased to be principal debtor for the amount decreed against him, and the obligors in the bonds, by virtue of their undertaking with his approval, because his sureties for said amount, and, on familiar equitable principles, are entitled to indemnity from him for whatever they paid for him on the bonds, and, by subrogation, to stand in the shoes of the creditor (the receiver) and enforce for their relief all the liens and securities of said creditor against said principal debtor.

While Weaver continued to be surety for the amount decreed against him and Teel his principal, yet by the execution of the bonds with his concurrence, the obligors (except Teel) became thereby not sureties for or instead of him but sureties with him, that is, co-sureties for the amount of the decree against him, and are entitled, not to full indemnity from him (as in the claim against Yancey) for what was paid by them on the bonds and applied to his relief on the decree, but to contribution of an equal share of what was so paid and applied; and to enforce such contribution (Teel being insolvent) they are entitled to the same rights and remedies, by subrogation against their co-surety, as a surety, under like circumstances, would be entitled to against his principal. *Robertson v. Trigg's adm'r & als.*, 32 Gratt. 76, 85, 86.

The appellants, it seems, are the only solvent obligors in the first bond, and 544 Stover and Trundle, their *only co-obligors (besides Teel) in the second, have paid their portion of the penalty of that bond under some arrangement among the parties, and, as before stated, do not seem to be claiming relief from any party in the cause, and no party appears to be seeking to hold them to further accountability. So that, the appellants, three in number, having contributed, as they state in their bill, in

equal portions to the discharge of the two bonds, are entitled to recover from Weaver the share, which he as co-surety was bound to contribute, of what was so paid by them and credited on the decree against him.

There is no occasion to consider the equities of the obligors inter se, as none such arise on the record, no controversy among said obligors being disclosed.

Upon the whole case, environed as it is with difficulties that have embarrassed and perplexed me not a little in my investigations, my conclusions are:

First. That the net amount of the whole fund arising from the appeal bonds is applicable ratably to the payment pro tanto of the amounts decreed against W. B. Yancey, James M. Weaver, and H. B. Harnsberger respectively, as shown by statements No. 1 and No. 3 of Commissioner Daingerfield's report.

Second. That deducting from said net amount the net sum paid by Stover and Trundle and apportioning the residue ratably among the said parties and applying the same in proper proportions to the decrees against them, the appellants are entitled to recover from Yancey the amount thus apportioned to him and to enforce the collection thereof by substitution to the decree of the receiver and all other securities he holds against said Yancey for the same.

Third. That of the sum thus apportioned to Weaver, the appellants are entitled to recover of him his contributory share thereof as co-security with them and
545 *any other solvent sureties who were bound with them, if any such there be, for said sum, and to be substituted to all the rights and remedies of the receiver against said Weaver for the recovery of the same.

H. B. Harnsberger having paid up the full amount of the decree against him as surety of Teel, after receiving credit for his portion of the fund from the appeal bonds, will be entitled to reimbursement for what he has overpaid on said decree. And so he and the other appellants are bound for the \$5,000 which has been treated as paid, though not in fact paid. These and other like matters can be adjusted in the decrees among the parties.

I have taken no notice of the questions in controversy between W. B. Yancey on the one side and his sub-vendees Teel and Price and their sureties Sipes and Miller on the other, because I do not perceive that these questions are properly here for decision on the present appeal, not having been adjudicated by the decree of the circuit court but expressly reserved by that court for future determination.

For the reason stated, I am of opinion, that the decree appealed from should be reversed and the cause remanded to the circuit court for proper accounts and further proceeding, in order to final decree, in conformity with the views and principles hereinbefore declared.

CHRISTIAN and ANDERSON, Js., concurred in the opinion of Burks, J.

STAPLES, J., dissented.

The decree was as follows:

This day came again the parties, by their counsel, and the court having maturely
546 considered the transcript of *the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record:

First. That the net amount of the whole fund arising from the appeal bonds in the bill and proceedings mentioned, is applicable ratably to the payment pro tanto of the amount decreed against the appellees, W. B. Yancey and James M. Weaver, and the appellant, H. B. Harnsberger, respectively, as shown by settlements Nos. 1 and 3 of Commissioner Daingerfield's report.

Second. That deducting from said net amount of the whole fund aforesaid the net sum paid by the appellees, Solomon Stover and Elizabeth H. Trundle, the residue should be apportioned ratably among the said parties—W. B. Yancey, James M. Weaver, and H. B. Harnsberger—in the ratio of the amounts decreed against them respectively; and the amount so apportioned to the said W. B. Yancey, the appellants are entitled to recover against him, and to enforce the collection thereof by substitution to the decree of the receiver (C. A. Yancey) and all other securities held by the latter against the said W. B. Yancey for the same.

Third. That of the sum thus apportioned to the said Weaver, the appellants are entitled to recover against him his contributory share thereof as co-surety with them, and any other solvent sureties, if any there be, who are bound with them for said sum, and to be substituted to all the rights and remedies of the said receiver against said Weaver for the recovery of the same.

Fourth. That the appellant, H. B. Harnsberger, having paid to the said receiver the full amount of the decree against him as surety of Bernard P. Teel, after receiving credit for his portion of the fund arising
547 *from the appeal bonds, is entitled to reimbursement for whatever he has overpaid on said decree. And so he and the other appellants are bound for the five thousand dollars (\$5,000) in the proceedings mentioned as arranged to be paid, but which has not in fact been paid. These matters should be adjusted in the decrees among the parties.

Fifth. That the question in controversy between the said W. B. Yancey on the one side, and his subvendees, Bernard P. Teel and Charles M. Price and their respective sureties, Henry E. Sipe and William S. Miller, on the other, are not properly before this court on the present appeal, not having been adjudicated by the decree of said circuit court appealed from, but expressly reserved by that court for future determination; and therefore this court expresses no opinion upon said questions.

Sixth. That the decree aforesaid, pronounced by the said circuit court on the 29th day of November, 1878, is in conflict with the opinion of this court hereinbefore expressed, and is erroneous. Therefore, it is decreed and ordered, that the said decree of the 29th day of November, 1878, be re-

versed and annulled, and that the appellants recover against the appellees, W. A. Yancey and James M. Weaver, their costs by them expended in prosecution of the appeal aforesaid here, and this cause is remanded to the said circuit court, with directions to that court to order such accounts and take such further proceedings in the cause as may be necessary and proper in order to final decree, in conformity with the opinion and principles hereinbefore expressed and declared. All of which is ordered to be certified to the said circuit court of Rockingham county.

Decree reversed.

548 *Ewing's Adm'r & als., v. Ferguson's Adm'r & als.

September Term, 1880, Staunton.

1. **Surety—Action against Heirs of.***—Parties having obtained decrees against their debtor M in a suit pending in the county court, and he having become bankrupt, may bring another suit in the circuit court against the administrator and heirs of his surety E, to subject the real estate of the surety to satisfy their debts.
2. **Same—Same—Nature of Bill.**†—Though the bill in such case only sets up their claims, and seeks payment of them, and does not purport to be a creditor's bill, it is to be so treated, and other creditors of E may come in by petition and be made parties plaintiffs in the cause, and there may be a decree for account of debts in the case.
3. **Same—Same—Amended Bill—Failure of All of Original Plaintiffs to Unite in—Effect.**—The bill having been dismissed on demurrer, but leave given to file an amended bill, the amended bill is not a departure from the original bill, because some of the original plaintiffs do not unite in it.
4. **Same—Same—Same—Effect of Amendment.**‡—The amended bill being filed in the name of some of the original parties and of the creditors who had come in by petition, and only setting out more fully the nature of their claims and the character of the bill as a creditor's bill, is not a departure from the original bill, but is a valid amended bill.
5. **Negotiable Notes—Limitation of Action—Effect of Decree.**§—One of the debts set up by one of the petitioning creditors was evidence by a negotiable note and to this debt the statute of limitations was pleaded. **Held:** The statute of lim-

*Distinguished in *Piedmont & A. L. Ins. Co. v. Maury et al.*, 75 Va. 508.

†**Equity—Creditor's Bill.**—A bill setting up complainant's claim only, and not purporting to be a creditor's bill may, nevertheless, be treated as such, and creditors may come in by petition as plaintiff, and a decree of accounts of debts may be entered which operates a suspension of all other suits of creditors, who must prove their debts under said decree. *Hurn v. Keller*, 79 Va. 418, citing principal case; *Rice v. Hartman*, 84 Va. 253, and cases cited; *Paxton v. Rich*, 85 Va. 378, and cases cited; 4 Min. Inst. (2nd Ed.) 1247, 1248.

‡**Same—Amended Bill—Effect.**—See 4 Min. Inst. (2nd Ed.) 1262 *et seq.*

§**Limitation.**—See *Jackson v. Hull*, 21 W. Va. 613; *Harvey v. Steptoe*, 17 Gratt. 289; *Houck v. Dunham*, 92 Va. 214; *Stephenson v. Taveners*, 9 Gratt. 398; *Craufurd v. Smith*, 93 Va. 630.

itations ceased to run against all debts of the debtor from the date of the decree for an account; and the note not having been barred at that date, the statute does not apply to it.

6. **Infants—Guardian ad Litem—Failure to File Answer.**||—The heirs of E being infants, though their guardian was a party and answered, they were entitled to be defended by a guardian

549 *ad litem*, and although one was appointed for them, and there *was a paper purporting to be an answer found among the papers of the cause, yet as it did not appear that it had been filed, it was error to decree the sale of the infant's land, without an answer filed by guardian *ad litem*.

7. **Surety—Duty to Exhaust Principal's Property before Proceeding against.**||—

The real estate of E had been purchased by him from M, the principal debtor in the claims set up against E's estate, and there were some grounds for supposing that at the time of the sale and conveyance to E, M had other unencumbered land which he afterwards sold. It was error to decree the sale of E's land to pay the debts of M, until a full enquiry was had whether there was not real estate held by M at the time of his sale to E which was primarily liable to pay these debts for which E was liable as M's surety.

In a cause depending in the circuit court of Botetourt, brought by Kyle's guardian *v. Kyle's heirs*, for the division of the estate of Robert Kyle, deceased, Fletcher H. Mays was appointed a commissioner to sell a house and lot and collect the purchase money; and the sureties on his bond given under this decree requiring him to give other security for their relief, Daniel P. Ewing became his surety in the new bond executed by him. Mays sold the house and lot, and paid over the first and second installments of the purchase money, to the parties entitled to it; but failed to pay over the third installment; and on the 8th of November, 1866, the court made a decree directing Mays to pay to each of the heirs of Robert Kyle, deceased, the specific sum which a commissioner had reported as due to each of them. Of these there were ten, and the amounts coming to each ranged from \$20.46 to \$163.67.

In February, 1873, Lucy Ferguson, Isabella Rowland, Elgeane St. Clair, Joseph F. Robinson, Lucian B. Robinson and Elizabeth Robinson, some of the said heirs of Robert Kyle, deceased, instituted their suit in equity in the county court of Botetourt against F.

550 H. Mays, James M. Figgatt, assignee in bankruptcy of *said F. H. Mays, Mollie J. Bayne (who was formerly Mollie J. Ewing), widow of Ewing, deceased, in her own right and as a former administratrix of said Daniel P. Ewing, de-

[Guardian Ad Litem—Scope of Authority.]—As to the powers of guardian *ad litem* of infant defendants, see *Daingerfield v. Smith*, 83 Va. 91.

The principal case is cited, to sustain the proposition that it is customary to appoint the husband guardian *ad litem* to an infant married woman, in *Alexander v. Davis*, 42 W. Va. 469.

‡**Equity—Liability of Surety.**—It is error to decree the sale of the surety's land before inquiry as to whether the principal has not land first liable. *Dillard v. Krise*, 86 Va. 410, citing principal case.

ceased, Henry C. Douthat, late sheriff of Botetourt, and as such administrator de bonis non of said Daniel P. Ewing, Cora Bell Ewing, Anna James Ewing, the last two infant children of Daniel P. Ewing, Charles Bayne, guardian for the said infant children, and the other heirs of Robert Kyle, deceased. In their bill they set out the fact of Mays' appointment as commissioner, and Daniel Ewing's suretyship; Mays' failure to pay over the third installment of the purchase money of the house and lot, and the decree against Mays, in favor of the plaintiffs; and they charge that they had received no portion of the said money, but that the whole of the several amounts so decreed to be paid to the plaintiffs by said Mays remained unpaid. They set out the suretyship of Daniel P. Ewing; and that since the said decree of the 8th of November 1866, Mays had been declared a bankrupt, and James H. Figgatt had been appointed his assignee. That Daniel P. Ewing died in 1862, and that his widow qualified as his administratrix; that in 1868 she settled her administration account, from which it appeared the whole personal estate had been administered; that she had married Charles Bayne, by which her authority as administratrix had terminated, and the estate was committed to Henry C. Douthat the sheriff of Botetourt, but that he had received no assets.

They further state, that Daniel P. Ewing died in the possession of a large and valuable estate, known as "Oakland," in the county of Botetourt, which he had purchased but a short time before his death from F. H. Mays, for \$10,000, the whole of the purchase money for which was fully paid—the larger

part by Ewing in his lifetime, and the remainder by his administratrix; *that the deed was not made for the said real estate until after his death, and bears date the 7th of May, 1863, by which Mays and wife conveyed the land to Cora Bell Ewing and Anna James Ewing, infant heirs of said Daniel P. Ewing.

The prayer of the bill is, that the court will grant the plaintiffs a decree against the estate of Daniel P. Ewing for their respective debts, as appears of record against the said F. H. Mays, for whom the said Daniel P. Ewing was security as aforesaid; and if the personal estate has been exhausted in the payment of debts, that the said real estate, or a portion of it, may be sold or rented, and that the proceeds arising from such sale or renting may be applied to the plaintiffs' debts.

On the 12th of May, 1873, Mollie J. Bayne, as late administratrix of Daniel P. Ewing, and Charles Bayne, in his own right and as guardian of Cora Bell Ewing and Anna J. Ewing, appeared and filed their demurrer and answer to the bill. They set out several causes of demurrer, 1st. To the jurisdiction of the court to try and decide this cause; 2d; That the case was in the circuit court of Botetourt, where all the rights of the parties had been passed upon; 3d. That the plaintiffs have a clear legal remedy in the

law court, &c., &c. The answer need not be stated. It was sworn to by Charles Bayne on the 8th of May, 1873.

On the 12th of May, the same day on which the answer was filed, Ellett & Drewry and H. & I. Guggenheimer presented their petitions to the court, claiming to be creditors of Daniel P. Ewing, and asking to be made parties plaintiffs in the cause, and that they might be allowed to participate in the results that may be secured therein on the usual terms; and that proper enquiry may be made of all outstanding unsatisfied debts of the said estate, &c. And the petitions were allowed to be filed.

552 *It appears that the debt of Ellett & Drewry was evidenced by a negotiable note dated January 17th, 1861, payable in four months, made by F. H. Mays and endorsed by Daniel P. Ewing, which had been protested for non-payment, and due notice given to the parties. That of H. & I. Guggenheimer was a judgment against Daniel P. Ewing recovered in August, 1861.

Douthat also demurred to and answered the bill. In his answer he says no assets of the estate had come into his hands; and he had been informed that Mrs. Ewing, the administratrix, had fully administered the personal effects of Daniel P. Ewing, and had settled her administration account.

On the 17th of July, 1873, B. M. Allen was appointed guardian of the infant defendants Cora Bell Ewing and Anna J. Ewing, and an order of account was made.

In August, 1873, the cause was transferred by operation of law, to the circuit court of Botetourt county; and on the 12th of March, 1874, came on to be heard on the demurrer of the defendants to the bill; when the court sustained the demurrer; and on motion of the plaintiffs they were allowed to file an amended bill.

At the May rules, 1874, an amended and supplemental bill was filed. The plaintiffs in this bill are Ellett & Drewry, H. & I. Guggenheimer, William B. Simmons administrator of Lucy Ferguson, whose death had been suggested in the previous proceedings, and Isabella Rowland, and the defendants were the same as in the former bill, except those of the heirs of Robert Kyle who were made defendants in that bill but were omitted in this. They refer to the original bill and its object, and the petitions of Ellett & Drewry and H. & I. Guggenheimer, and their being admitted parties plaintiffs, and the claims they set up in their petitions, and they refer to said petitions for a particular

553 *description of their claims, and ask that the same may be read as a part of this bill. They aver that Mays at the time of the instituting the original bill was, and is now insolvent, and any proceedings against him would be unavailing. They set out the administration on the estate of Daniel P. Ewing; the payment of the balance due on the land called Oakland by the administratrix; and its conveyance to his children, by which the personal estate of Ewing was exhausted. They aver that the object and purport of their bill aforesaid and petition was

to assert their claims to payment of their respective demands out of the real estate in the bill mentioned; that they have nothing to look to for payment of their demands except the said lands; that they can obtain no redress at law, and are wholly without redress save in a court of equity. They are advised that the real estate of every decedent is assets expressly by statute for the pro rata payment of all just debts of such decedent; they therefore pray that proper enquiry be directed as to all outstanding and unsatisfied demands against the estate of D. P. Ewing, deceased, and that the same be heard with the proofs, and so far as ascertained to be just that the said land be charged with the same, and that your orators' proceedings be treated as a creditor's bill for the settlement of D. P. Ewing's estate; that a guardian ad litem be appointed for the defendants Cora Bell Ewing and Anna James Ewing, the heirs-at-law of Daniel P. Ewing, who are infants. And that the court will direct payments of plaintiffs' respective debts, and to that end charge the same on the lands aforesaid; and for general relief.

At the July term of the court, the defendants moved the court to strike the amended bill from the file, because the same is improperly drawn and filed, and is a departure from the case stated, and the relief sought on the original bill. Whereupon the **554** court *being of opinion that said amended bill is proper, the same is allowed to be filed, and leave given to the defendants to file their answer.

Bayne and wife answered the bill, and insisted that as to the debts claimed by the plaintiffs as Kyle's heirs, at the time of that decree F. H. Mays owned a large property both real and personal, out of which said decree might have been easily made, and on which the same was a lien; and if they failed to make their money it was through their own culpable negligence. Mrs. Bayne says that during her administration on the estate of said Daniel P. Ewing, by advertisement and enquiry she sought to ascertain all the debts due from said Daniel P. Ewing at the time of his death, and was anxious and ready to pay the same having the means of payment, yet none of the debts now set up by complainants' amended bill were ever brought to her notice in any manner whatsoever, nor was she aware of their existence. As to the note set up by Ellett & Drewry she knows nothing of its origin or justness as a claim against her husband's estate; that it was never brought to her attention until it was set up in this suit; and she insists it is a stale demand which under the circumstances a court of equity will presume to have been paid; and especially after having slept upon their rights for more than ten years, and after having allowed the principal debtor Mays to become bankrupt; and she relies upon such presumption of payment, laches and staleness of the demand as complete bar to the recovery thereof.

F. H. Mays also answered the bill. As to the claim of Ellett & Drewry he relies upon the statute of limitations. He says that at

the time of the sale of the land to Ewing and the conveyance to his heirs, respondent was the owner of a large real estate that was in no way encumbered; some of **555** these lands he sold and *conveyed years after the sale to Ewing, and when he went into bankruptcy he surrendered several tracts or parcels of land in his schedules in bankruptcy, that were afterwards sold by his assignee.

There were several reports of debts due by D. P. Ewing, and among them all the debts claimed by the plaintiffs; though that of Ellett & Drewry was excepted to as barred by the statute of limitations, and that of H. & I. Guggenheimer as has having been paid; and it was objected that the decree directing the account should have directed the commissioner to enquire whether Mays the principal debtor had not lands on which the debts set up were a lien. But the exceptions were overruled; and it appearing that all of the debts were a surety for F. H. Mays, except that of Guggenheimer, the court directed an enquiry into the property which went into the hands of the assignee in bankruptcy, to see whether there was anything in his hands which might be applied to the payment of these debts. It appeared from the account settled in the bankrupt court all that fund except \$248.08 had been consumed in payments made by the assignee.

The cause came on to be heard on the 1st of November, 1876, when the court held that the debts reported, specifying the amount due to each creditor, were due and should be paid; but postponed the enforcement of their payment until an account of the fund in the hands of the assignee in bankruptcy was taken; and that having been taken with the result above mentioned; and the commissioner having reported that the rents of the land would not pay the debts in five years, the cause came on again to be heard on the 27th of April, 1878, when the court decreed, that unless the defendants, or some one of them, within ninety days from this date, pay the subsisting liabilities of D. P. Ewing's estate as determined by the de-

556 cree of the 1st *of November, 1876, subject to a credit for the sum of \$248.08, upon the debt reported to be due to the assignee, W. A. Glasgow, who was appointed a commissioner for the purpose, do after advertising, &c., proceed to sell at public action the lands in the bill mentioned of which D. P. Ewing died seized, &c., &c. And thereupon Cora Bell Ewing and Anna J. Ewing infants by their next friend Charles Bayne, and H. C. Douthat, administrator, &c., applied to a judge of this court for an appeal, and supersedeas; which was awarded. For other matters, see the opinion of Anderson, J.

George W. Hansbrough and Mays & Mays, for the appellants.

Figgatt and William A. Glasgow, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The plaintiffs in the original bill, had

obtained a decree against Fletcher H. Mays in the suit of Kyle, guardian, *v.* Kyle's heirs, in the circuit court of Botetourt county, for certain sums of money due them severally, payable out of the proceeds of certain real estate, which said Mays, as special commissioner, had sold, and the proceeds of sale collected, under a decree of the court in said cause, which he had failed to pay over to them; for the payment of which Daniel P. Ewing was bound as his surety, in the bond which he gave as such special commissioner; and they filed their bill in chancery, in the county court of Botetourt, against the said Mays, and his assignee in bankruptcy (alleging that he was a bankrupt), and the heirs and representatives of Daniel P. Ewing, who was dead, and others, seeking the recovery of their several judgments, and that the real

557 estate of which the said *Daniel P. Ewing died seized, might be subjected to their payment; if the court should be satisfied that there were not personal assets, as they virtually alleged, out of which they could be satisfied.

This court is of opinion that this suit, and the suit aforesaid of Kyle, guardian, *v.* Kyle's heirs, were for different and distinct objects, and that the plaintiffs were not restricted, in seeking their relief, to the latter; if they could have proceeded in that suit. And having brought their suit in the county court for that purpose, which had jurisdiction of the case, the court is further of opinion, that it was competent for other creditors of Ewing, to come in by petition, and ask to be made parties plaintiff in said cause, on the usual terms, and to be allowed to participate in the results thereof; and that proper enquiry be made for all outstanding, unsatisfied debts of decedent's estate, and of the real and personal assets, and that their debts may be satisfied out of the same.

The court accordingly allowed Ellett & Drewry, and H. & I. Guggenheimer, to file their several petitions for that purpose, which were filed on the 12th of May, 1873. On the 15th day of July following, H. C. Douthat, the administrator de bonis non of Daniel P. Ewing, deceased, filed his demurrer and answer to the bill of plaintiffs, and on the same day B. M. Allen was appointed guardian ad litem for Cora Bell Ewing, and Anna James Ewing, infant heirs of D. P. Ewing, deceased; and the cause was referred to the master to take an account of all liens on the real estate of Daniel P. Ewing, deceased; also the yearly rental value of said estate, and of any other matters deemed pertinent by himself, or required by either party; and to report to the next term of the court. And the cause was removed to the circuit court of said county. The term "all liens,"

558 in the said *decretal order, must be taken to mean all debts which may bind the real estate.

Lucy Ferguson, one of the plaintiffs, having died since the filing of the will, the cause was revived in the name of W. B. Simmons her administrator.

On the 24th of March, 1874, the cause was heard by the circuit court, on the demurrer

to the bill, which the court sustained; and gave the plaintiffs leave to amend. And at the May rules, 1874, an amended bill was filed in the names of Ellett & Drewry, partners, and H. & I. Guggenheimer, partners, W. B. Simmons, administrator of Lucy Ferguson, deceased, and Isabella Rowland

It is contended by appellants that the paper purporting to be an amended bill is not an amended bill, because it is a departure from the original bill, and makes a new case, both in respect of parties, and in the relief sought. And that the court erred when it sustained the demurrer, in giving leave to amend, instead of dismissing the plaintiffs' bill; and that the amended bill should have been struck from the file, on motion. This we think comprises in substance the position of the appellees.

The court is of opinion, that although the original bill was not filed as a creditor's bill, the county court did not err in the order of 12th of May, 1873, allowing Ellett & Drewry, and H. & I. Guggenheimer, on their motion, to file their petitions, and to be made co-plaintiffs with the complainants: and on the 15th of July following, in the reference to a master, to take an account of all liens on the real estate of Daniel P. Ewing, deceased. In *Stephenson v. Taverners*, 9 Gratt. 398, "A creditor (it was held), has a right to bring a suit for his claim; but he ought to bring it for himself and all other creditors." The plaintiffs, upon that authority

had a right to bring the suit for their **559** claims, *but they ought to have brought it not only for themselves, but for all other creditors. And not having done so, the other creditors had a right, on petition to come in and be made co-plaintiffs with them. And in the same case, it is held, when in a suit for the administration of assets, (which is this case; for that purpose both the personal representative, and the heirs, were made defendants); a decree is made for an account of outstanding claims against the estate, it operates a suspension of all other pending suits of creditors; who must come in under the decree, which is considered a decree in favor of all the creditors." So that if it comes to the knowledge of the court that there are other claims against the estate outstanding, it would be the duty of the court to decree an account, and all creditors must come in; and such decree even suspends all other pending suits of creditors, and they must come in and prove their claims under such decree, though they have a suit of their own pending for their recovery. In *Harvey's adm'r v. Steptoe's adm'r*, 17 Gratt. 289, it was held that where there was a decree directing a commissioner to take an account of all outstanding and unsatisfied debts, the court took upon itself the administration of the assets, and would have restrained parties afterwards from proceeding by separate suits. In the recent case of *Kent's adm'r v. Cloyd's adm'r*, 30 Gratt. 555, the same doctrine was enunciated, and it was held, that "the same result follows when the heir or devisee is made a party with a view to a sale of the real estate."

From the time the decree for an account was rendered in this case, it was no longer a separate creditor's suit, but was a general creditor's suit; and the petitioners, even from the date of the order of the court making them co-complainants with the plaintiffs, were as essentially plaintiffs as if their names had been inserted in the original bill as plaintiffs, when it was filed. But if this were not so, "it is the settled practice of courts of equity as was held by this court in *Belton v. Apperson*, 26 Gratt. 207, Judge Staples delivering the opinion of the court, to allow an amendment of the bill by the introduction of new parties, plaintiffs or defendants, were necessary to the ends of justice, or to prevent further litigation. As a general rule this is not a matter of course, but is discretionary with the court." If it was right in the circuit court to sustain the demurrer, it was surely a proper case for leave to amend.

But this court does not perceive any good grounds for the demurrer. In the reasons or causes assigned by the demurrant. To all of them which have not been already sufficiently answered except the plea of the statute of limitations, we think the statute is an answer. It is found in ch. 175, p. 1126 of the Code, § 2, and is as follows: "A creditor before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

And now as to the bar by the statute of limitations. The right of action could not have accrued against Ewing before the date of his bond; which is the 26th of May, 1858. And if the filing of the amended bill, which was at the May rules, 1874, could be regarded as the commencement of the suit, the estate of D. P. Ewing would not be protected by the statute. But by the express authority of *Harvey's adm'r v. Steptoe's adm'r*, supra 305, the statute of limitation ceased to run against them from the date of the decree for an account, to-wit, the 15th of July, 1873.

We think it is by no means clear, that the plaintiffs, including the petitioners, could not have maintained their case upon the original bill; but waiving that, we do not think that the amended bill is a departure from the original bill, and makes a new case in respect of parties, which has already been sufficiently shown as to adding parties, and we think it did not make a new case by dropping two of the plaintiffs. If they had been paid as was suggested at the bar, or if they had concluded to withdraw from the suit for any cause, they had a right to do so, with the assent or acquiescence of their co-plaintiffs. And it does not appear that the defendants were prejudiced thereby; and there was no such connection between their claims and the remaining plaintiffs as was incompatible with their sever-

ence. But by withdrawing their claims from the administration of the fund by the court, they were excluded thereafter from a participation in it; which could not prejudice the personal representative or heirs of Daniel Ewing.

The court is also of opinion, that whilst the amended bill amplifies the statement of the case, and presents it with greater precision and fullness, and with more directness, and with some averments, which were not expressed in the original bill, it does not make a new case from that which was made by the original bill and the petitions. The conclusion is, that the court did not err, in overruling the defendants' motion to strike it from the file.

The claim of Ellett & Drewry was not barred by the lapse of five years after the 1st of January, 1869. The institution of their proceeding if not to be regarded as of the date of the filing of their petitions, would date, as has already been shown, from the decree directing an account—which was July, 1873.

The claim of Ellett & Drewry, though "a mere legal demand, and never asserted and established by a judgment in a court of law," we have shown was cognizable in a court of equity, to prevent a transfer or charge upon his debtor's estate, and to obtain all the relief he would be entitled to, after obtaining a judgment or decree.

The court is further of opinion, that, receiving the testimony of Riddlebarger, the evidence falls short of proving that H. & I. Guggenheimer's claim has been satisfied.

But we have more doubt about the third assignment of error in the petition of appellants, that infants were not properly represented before the court by guardian ad litem, when the decree was made for the sale of their land. It appears from the record that Charles Bayne, their statutory guardian, was in that capacity before the court, and his joint answer with others to the original bill, in his own right, and as guardian of Cora Bell Ewing, and Anna J. Ewing, infant heirs of Daniel P. Ewing, deceased, was filed by leave of the court on the 12th of May, 1873, the same day that the petitions of the creditors before mentioned, were filed. His answer was sworn to four days before—i. e., the 8th of May—and consequently before their claims were asserted; and it does not appear, that he had ever heard of them at the time his answer was prepared.

The joint answer of Charles Bayne and Mollie his wife to the amended bill is filed, but not in his character as guardian of the infant heirs. A guardian ad litem was appointed, as we have seen, for the infant heirs in the original bill, on the 15th of July, 1873. It does not appear from the printed record, that they answered him. But the appellees produced a copy of their answer by their said guardian ad litem, certified by the clerk as a true copy of an answer found among the papers in said cause, and which was among the files when the transcript was made by him to be presented to this court, and he presumes the

'same was filed' at the date of the order appointing the guardian ad litem. This paper was presented the day after the argument was commenced, by one of the appellees' counsel, who was not present on the first day of the argument, and in whose custody it was, and the appellants' counsel objected to its being read by the court as a part of the record. The printed document relied on by the appellants' counsel, is not certified by the clerk to be a full transcript of the record, but of only so much of it "as was desired by defendants, counsel."

The court has deemed it proper under the circumstances, to look into said paper, but there is nothing upon its face or in the record as exhibited to show that it was ever regularly filed, further than merely to put it with the papers; and when that was done, does not appear, except by the supposition of the clerk. It does not appear that it was ever brought to the notice of the court, and not being referred to by any of the decrees, it does not appear that it was considered by the court, or that either of the infant heirs was before it, by her guardian ad litem, either upon the original, or amended bills. They were the parties most largely interested in the decision, and though their answering by guardian ad litem, may be a mere matter of form, the uniform practice in courts of chancery has strictly required it. An infant cannot appear by attorney. When the statutory guardian of the infant is before the court and has answered, and the record shows that his rights have been carefully investigated and maintained, there might be some relaxation of the rule.

564 *In this case the court is of opinion, that the record does not show satisfactorily, that the rights of those infant heirs have been so investigated and protected. Sundry exceptions were made by the counsel of Bayne and wife and the heirs of Ewing to the report of Commissioner Godwin, filed March 1st, 1875. In the third exception, the exceptant states, that the answers filed distinctly state that Mr. Mays had real estate at the time of the rendition of the decrees and judgments set up, amply sufficient to satisfy them, and it would seem to be grossly inequitable to proceed upon the patrimony of the infant children of W. P. Ewing, who was a mere surety, "until the property of the principal debtor F. H. Mays, is exhausted." It is evident that F. H. Mays was the owner of numerous tracts of land, and large personal property, which he says in his answer, was unincumbered, which were ample to satisfy the decrees and judgments in this suit. The answer of the assignee affirms that there were judgment liens before the war more than sufficient to consume all the assets of the estate. But those judgment liens don't attach to the personal property. He says these judgments have been regularly reported to the bankrupt court, and he presumes that the whole fund will be applied to them. The record of that court is not before us, and we cannot know what was done by it. But it appears that F. H. Mays sold one of his tracts of land to Henry Lipse for \$5,000—in 1862 or '63, which

he conveyed to him in 1865, which may be primarily liable for these decrees and judgments, before the land he sold to W. P. Ewing in 1860, and conveyed to his heirs at law in 1863. It does not appear that any satisfactory inquiry has been directed or made into that matter, though it was virtually brought to the attention of the court, by the exception of the counsel of Bayne and wife and the heirs of Ewing, to the

565 *report of the commissioner before referred to. Such enquiry may avail nothing for the infant heirs of Ewing upon investigation. But such would be the hardship and injustice of throwing this burden upon their inheritance as shown by the record of this case, if it appears probable, that others may be primarily liable in equity, there should be a thorough and searching enquiry made, before the burden is thrown upon them. And it not appearing that they have been regularly before the court and made their defence by guardian ad litem, the case must go back, that they may appear and answer by guardian ad litem, and that thorough enquiry may be made as to the matters referred to; and they will be allowed to make any other defences which may be deemed proper, and equitable. The court is of opinion for the foregoing reasons to reverse the decree, and remand the cause to the circuit court of Botetourt.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in proceeding to decree against the infant heirs of Daniel P. Ewing, deceased, without requiring an answer from the guardian ad litem of said infants, if not appearing by the record that any such answer was in fact filed. The said circuit court ought also to have caused an enquiry to be made by one of its commissioners, whether any and what real estate of F. H. Mays was and is subject to the lien of judgments recovered against him by the parties to this suit, or either of them, and

566 especially whether the tract of *land conveyed by him to Henry Lipse is not primarily liable to such liens. It is, therefore, decreed and ordered, that for the errors aforesaid the decrees appealed from be reversed and annulled, and that the appellees pay to the appellants, the heirs of Daniel P. Ewing, deceased, their costs by them expended in the prosecution of their appeal aforesaid here.

And the cause is remanded to the said circuit court, with instructions to have a proper answer filed in behalf of said heirs, if they have not retained their majority, or to require them to answer if they have attained their majority, and also to have proper enquiries made with respect to any real estate owned by said Mays, liable to the lien of the judgments aforesaid, and to take further proceedings in conformity with this decree and the opinion of this court.

All of which, on motion of the appellees by their counsel, is ordered to be forthwith certified to the said circuit court of Botetourt county.

Decree reversed.

567 *Schultz & als. v. Hansbrough & als.

September Term, 1880, Staunton.

1. **Conveyance of Lands by Debtor after Judgment—Order of Liability.**—By deed bearing date the 15th of October, 1863, Mrs. G, in consideration of \$10,000, for which S executes his bond to G, conveys a tract of land to S reserving in the deed a vendor's lien. G marries H, and H obtains from S a new bond for the principal and interest, and in October, 1868, recovers a judgment against S for the amount. S, who owned a number of tracts of land, after the judgment, conveys the lands to different purchasers; and among them by deed dated 22d of May, 1877, S conveyed to R the land purchased of G; and R in this deed bound himself to pay the debt of S to G. By deed dated May 3, 1878, S conveyed all his lands including the land bought of G to L in trust to secure a number of his creditors stating their debts as about a certain sum. In August, 1878, H files his bill to subject the lands owned by S at the date of his judgment or afterwards acquired to satisfy his judgment. **Held:** The land conveyed by G to S, and by him conveyed to R is to be first sold to satisfy the judgment of H.
2. **Commissioner's Report—Failure to Include All Debts—Recommission.**—The commissioner who was directed to take an account of the debts of S and their priorities, and of the lands of S and to whom and when aliened, after stating certain judgments, and debts secured by specific liens, reports that the debts secured by the deed to L were

***Equity—Liens upon Real Estate—Priority.**—In *Pitts v. Spotts & Gibson*, 86 Va. 71, the court said: "In *Schultz v. Hansbrough*, 33 Gratt. 567, Judge Burks, speaking for the court, said: 'It is a rule in equity, said to be well established in this country, that where one has a lien upon two funds, and another a posterior lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency'; though the rule," he added, "is generally applied only in cases where to compel a resort to the single charged fund would not be productive of additional risk or injury to the double creditor."

Same—Lien Reserved on Real Estate—Vendor's Rights.—The vendor of land retained a lien, when he sold, for the purchase money, one of the terms of the contract being the assumption by the purchaser of a debt of the vendor in part payment of the purchase money. **Held**, that the vendor has the right to require the land to be subjected to the lien for his exoneration. See *Rhea v. Preston*, 75 Va. 757, citing principal case.

†Same—Enforcement of Liens on Real Property—Sales.—Decree to sell lands to enforce liens, without first, by account taken, ascertaining amounts and priorities of all encumbrances thereon, is premature and erroneous. *Hoge v. Junkin*, Com'r, 79 Va. 220; *Muller's Adm'r v. Stone*, 84 Va. 834; *Alexander v. Howe*, 85 Va. 198; *Dillard v. Krise*, 86 Va. 410; *Fidelity Loan, &c., Co. v. Dennis*, 93 Va. 507; *Horton v. Bond*, 28 Gratt. 815; *Cole v. McRae*, 6 Rand. 644; *Hartman v. Evans*, 38 W. Va. 679.

not presented before him, and he does not report them. **Held:** The report should be recommitted to the commissioner to take an account of said debts; and it was error to make a decree for the sale of the lands of S before this account was taken.

3. **Bill for Sale of Debtor's Land—Equity Procedure.**—For the principles upon which a court of equity proceeds upon a bill filed for the sale of a debtors' lands, for the payment of his debts, see the opinion of *Burks, J.*

568 *4. Same—Specific Interrogatories—Force and Effect.—The answer of a defendant to specific interrogatories in a bill, are evidence for him; and its statements must be taken as against the plaintiff as true, unless overcome by the requisite proof.

This was a suit in equity in the circuit court of Botetourt county, brought in August, 1878, by Hiram Hansbrough against Joseph Shultz and others to subject the real estate of Shultz and George S. Penn, to satisfy a judgment for \$11,717.41, with interest, which he had recovered against them, in October, 1868. The bill and amended bill sets out a number of parcels of land which Shultz owned at the date of the judgment or afterwards acquired, all of which he had subsequently conveyed by three deeds in trust to secure creditors. And he calls upon Shultz to answer and say: 1st. What real estate in the said county he owned at the commencement of the October term, 1868, of this court. 2d. What real estate he has acquired since the commencement of the said term of the court. 3d. What portions of the real estate owned by him in said county at and since the commencement of the said term of the court he has aliened. 4th. To whom, when, how and for what consideration has he aliened any portion thereof.

The first two of these deeds was each to secure a single debt. By the third which bore date the 3d of May, 1878, Shultz conveyed to Lewis Linkenhoker, a number of tracts and lots of land, to secure a number of creditors, stating that he is indebted to the said creditors in various amounts approximately stated as follows, viz: To William Jolliffe in the sum of \$5,302.95 with interest thereon from the 14th of October, 1876, &c., stating most of the debts as about a certain sum.

Among the tracts of land conveyed in the deed is one described as containing between three and four thousand acres, being the same tract conveyed to Shultz *by Ann Gorgas; and by Shultz conveyed to Harrison Robertson for the joint benefit of Robertson, Shultz and two others. By deed bearing date 15th of October, 1863, Ann S. Gorgas in consideration of \$500 in hand paid, and of the further sum of \$10,000, for which the said Shultz has executed his bond payable in two years after the termination of the war between the United States and the Confederate States, with interest thereon from the date of the deed, payable annually, conveyed to him this tract of land setting it out by metes and bounds; and in the conclu-

†Same—Answer to Bill—Effect.—See 4 Min. Inst. (2nd Ed.) 1325.

sion reserving the vendor's lien on the lands as a security for the payment of the said \$10,000. And by deed dated the 22d of May, 1877, between Shultz and Harrison Robertson, reciting the purchase of the land from Mrs. Gorgas, and the terms of the purchase, and that the principal of the bond was yet due, and constituted a lien on the land; and that Robertson has assumed the payment of said bond for \$10,000 and all interest due or which may become due upon it, in discharge of said lien, in consideration of the said sum of \$10,000, and interest to be paid by the said Robertson the said Shultz conveys to him the said tract of land.

Robertson answered the bill admitting the judgment was a lien on the lands of Shultz and that the land conveyed to him was ultimately liable for the payment of the plaintiffs' debt; but insisting that it was not all due, he having paid to the plaintiff sums amounting to \$2,400, and as he is informed and believes, Shultz had previous to his conveyance to him paid other large sums of money on said debt.

On the 17th of February, in vacation, the judge of the court taking the bill for confessed as to all the parties except Robertson and McCarty, the latter being one of the creditors upon whom process was not served, made an order of account as follows:

570 *Whereupon, on motion of plaintiff, it is by me adjudged, ordered and decreed that this cause be referred to Wm. B. Simmons, Esq., one of the master commissioners of this court, who is hereby directed to take an account of the following matters, to-wit:

"1st. What lands the defendant, Joseph H. Shultz, owned at the date of the commencement of the October, 1868, term of this court, whereon the judgment of the complainant was a lien.

"2d. What lands the said Shultz has owned since the date of the said commencement, whereon the said judgment was a lien.

"3d. What parts, if any, of said lands have been aliened since the commencement of the said term.

"4th. To whom, when and how, and for what consideration such alienations were made, stating them in the order of their priority respectively.

"5th. What real estate was owned by the defendant, Penn, at and since the commencement of the said term, whereon the said judgment was a lien; and what, if any, alienation thereof, or of any portion thereof, has since been made.

"6th. What is the annual value of the said lands of the said Shultz and of the said Penn respectively.

"7th. What liens exist on the lands of the said Shultz, stating the date, amount, and to whom belonging, of each lien respectively.

"8th. What liens exist on the lands of the said defendant, Penn, stating the date, amount, and to whom belonging, of each lien respectively.

"9th. Ascertain and state and report to this court, on the first day of its next term, the aforesaid and all other matters which

may be required by any of the parties, or which may be deemed pertinent by himself.

"But it is ordered by me that before taking the said account, the said master commissioner shall publish *once a week for four successive weeks, in some convenient newspaper published in the county of Botetourt, notice of the time and place of taking the said account, and such publication shall be equivalent to personal service of such notice on the parties or any of them."

The commissioner returned his report, in which he states, 1st. The lands owned by Shultz at the date of the plaintiffs' judgment, dividing them into six different parcels, as conveyed to Shultz by different persons, estimating the value of each parcel and making the valuation of the whole \$24,722. Among these is the Gorgas land; 2d. The land conveyed by Shultz since the date of the judgment, the person to whom conveyed, and the date of the conveyance; 3d. The annual rental value of the land as \$930; 4th. The liens upon the lands by judgment. The first of these is that of the plaintiff, which after allowing payments upon it, he states as due on 15th of April, 1879, principal and interest \$10,716.80. He states six other judgments, which he says are—except one of them—secured by deed of trust, and one bond which with interest to April 15th, 1879, amounts to \$1,219.72, also secured by deed of trust. The whole amount of debts reported as secured by liens is \$16,913.50. And he concludes his statement by saying—There are many other debts mentioned in the several deeds of trust filed with complainants' bill, but they, the several debts, have not been set up with their proofs before your commissioner. See three trust deeds filed. And he states the amount of debts secured by the deed to Linkenhoker at \$20,202.95, from which he deducts \$4,980, and makes all the debts \$35,381.73.

William Jolliffe, who is one of the creditors named in the deed to Linkenhoker, and a defendant in the cause, filed a number of exceptions to the report, of which the first and the third are as follows:

572 *1. That the master although by the vacation decree of 17th February, 1879, he is specially directed to take an account of "what liens exist on the lands of defendant Shultz, stating their date, amount, and to whom belonging, of each lien respectively," has taken only a partial account of said liens, and has failed to report as to a number of such liens, the existence of which was known to him from papers in the cause, and especially that he has failed to make any report as to the large amount due to this exceptant, as shown by the deed of trust to Lewis Linkenhoker, filed as an exhibit with complainants' bill. (See the statement of the master at the conclusion of his report.)

3. That the master has utterly failed to enquire as to and show the amounts due to the respective creditors mentioned in the several deeds of trust, whether any of them have been paid in whole or in part, and what is their relative priority, without which this exceptant could not, if he desired to do so,

bid intelligently on any of the property sought to be sold.

After the report had been returned to the court Shultz filed his answer in the cause. He admits the plaintiffs' judgment, and that he was the owner of the land mentioned in the bill. He says further—the amount due by said judgment to the plaintiff was the purchase and interest thereon of a tract of mountain land containing about four thousand acres in the county of Botetourt purchased by defendant in the year 1863 from Mrs. Ann Gorgas, then a widow, but subsequently married to the plaintiff, the price being \$10,000; and the additional sum of \$1,747.41 included in the judgment, being the interest which had accrued thereon up to the 5th of October, 1867; that plaintiff after his marriage with Mrs. Gorgas, insisted that respondent should give a new bond payable

to himself, and including in it the accumulated interest which was *due, and on this bond said judgment was rendered. He states the agreement with and conveyance to Robertson; and he says that all the foregoing facts, agreements and arrangements were made known to the plaintiff, and met his full concurrence and approbation.

The cause came on to be heard on the 4th of June, 1879, when after correcting some small admitted errors as to the credits upon the plaintiffs' debts, proceeded: "As to the other exceptions the court considers that the defendant, Jolliffe, is not aggrieved by anything in said report contained so far as the same states the lien of the complainant's judgment to be the foremost of all the liens stated on the real estate of the said Shultz, and shows the right of the complainant to have said lien satisfied by a sale of the said real estate, or of enough of it for that purpose; and that the account of liens, as reported, is sufficient to indicate the order of priority among the several liens and classes of liens existing on the said real estate, taking notice of the several judgments enumerated and stated, and also of the three several deeds of trust executed by the defendant Shultz to trustees Johnston and Linkenhoker, which are made part of bill, and are mentioned and stated according to their respective dates in the recapitulations of liens in the said report, which report, amended as aforesaid, the court doth adjudge, order and decree to be confirmed; yet the defendants, or such of them as may desire it, have leave to have said report recommitted to the said master, in order that he may, after having given notice as specified in the former decree, take evidence as to any payment, release or satisfaction of any of the judgments in the report mentioned, or of any of the debts in the several deeds of trust set forth, and ascertain, state and report any other matters which the *parties, or their counsel or any of them, may require, or as may be deemed pertinent by the master.

574 And the court doth consider that the judgment aforesaid of the complainant is a lien on all of the real estate which was owned by the defendant Shultz at its date, and on

all which he has since acquired, as set forth in the report, and is also a lien on all of the real estate owned by the defendant Penn at the date of the judgment, which real estate is also described in the report; but it appearing from the report that several of the tracts of the land of the defendant Shultz have been, at different times (as set forth in the report), aliened by said Shultz, the court considers that the complainant is entitled to subject to sale, for the satisfaction of his said judgment, the real estate aforesaid, only in the inverse order of the alienations thereof, subjecting first the land last aliened. And it appearing to the court, from the report, that the rents and profits of the real estate aforesaid of the defendant Shultz will not, in the period of five years, satisfy the costs of this suit—the expenses of the sale, and principal, interest and costs of the complainant's judgment—the court doth adjudge, order and decree that unless within the period of sixty days from the rising of this court, the said Shultz, or some one for him, shall pay unto the complainant, or his attorney, G. W. Hansbrough, the costs of this suit, and the principal, interest and costs of the complainant's said judgment, then L. C. Hansbrough, Esq., and Lewis Linkenhoker, Esq., (who are hereby appointed special commissioners for the purpose, either one of whom may execute this decree), shall, after first advertising the time, place and terms of sale for four successive weeks next before the day of sale in some newspaper published in the county of Botetourt, and in the city of Lynchburg, and in the city of Richmond, as the commissioners may deem judicious, proceed, in 575 *front of the 'Botetourt House,' in the town of Buchanan in said county, or on the premises, to sell at public auction to the highest bidder so much of the real estate owned by the defendant Shultz, at the date of the said judgment of the complainant, and of the real estate acquired by the defendant Shultz since the date of the said judgment, and since then aliened by him, in the inverse order of the several alienations thereof, selling first the lands last aliened, as may be sufficient to pay the costs of this suit, the expenses of the sale and the principal, interests and costs of the complainant's said judgment, on the terms following, to-wit: for cash enough to pay the costs of this suit and all of the expenses incident to the sale, and as to the balance of the purchase money, on a credit of one, two and three years with interest from the day of sale, taking from the purchasers bonds with approved personal security for the deferred installments of the purchase money, and reserving title until the payment of the whole, and right to resell at the risk and loss of the purchaser in case of non-compliance with the terms of the sale by the purchaser. And it is further adjudged, ordered and decreed that if in the judgment of the commissioners, or of either of them, it would be advantageous to those interested in the sales that the said lands—or any of them of defendant, Shultz, be surveyed and platted before the day of sale, they are authorized to

have such surveys and plats thereof made and defrayed out of the proceeds of the sale. And they are also authorized to sell the said real estate in separate parcels or lots as they (or either of them) may deem advantageous to those interested.

"But it is further adjudged, ordered and decreed that before making sale as aforesaid, the said commissioners (or the one acting) shall, in the clerk's office of this court, before the clerk thereof, enter into bond

576 *in the penalty of \$600, with approved security, payable to the Commonwealth of Virginia, and conditioned according to law.

"It appearing to the court from the bill and proceedings of this cause that the defendant, George S. Penn, is only a surety of and for the defendant, Shultz, in and upon the said judgment of the complainant, no decree for the sale of any part of the said surety's real estate is now entered, on the supposition that the real estate of the principal will suffice to pay the said judgment; but in the event that supposition should prove erroneous, then the right is reserved to the complainant to subject to sale so much of the surety's real estate as may be necessary to satisfy any portion of the judgment which may remain unpaid."

And thereupon Shultz, Jolliffe and Linkenhoker applied to this court for an appeal and supersedeas; which was allowed.

Ed. Pendleton, for the appellants.

Hansbrough & Hansbrough, for the appellees.

BURKS, J., delivered the opinion of the court.

If a trustee in pais, with power to make sale of real estate for the payment of debts, attempts to make such sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by the debtor, secured creditor, subsequent encumbrancer, or other person having an interest, will restrain the trustee until these impediments to a fair sale have by its aid been removed as far as it is practicable to do so. This

577 *rule has been affirmed in numerous cases decided by this court. See *Rossett v. Fisher*, 11 Gratt. 492, 499, and cases there cited; also, *Lane v. Tidball*, Va. Rep. (Gilmer) 130.

And so, if aid of the court is invoked in the first instance to enforce encumbrances on lands, a decree for sale without first ascertaining, settling and determining what encumbrances are chargeable on the property, the amounts thereof respectively, and the order in which they are so chargeable, would be premature and erroneous. Such has been the uniform course of decision by this court, commencing at an early period. Many of the adjudged cases are referred to in the opinion in *Horton & als. v. Bond*, 28 Gratt. 815, 822. See also *Simmons v. Lyles & als.*,

27 Gratt. 922; *Kendrick & als. v. Whitney & als.*, 28 Gratt. 646, 655.

The principle on which the decisions in both classes of the cases are founded, is, that a sale without first removing a cloud from the title and adjusting and settling rights in dispute, and without previously ascertaining and determining the liens and encumbrances, the amounts, and priorities, tends to a sacrifice of the property—as to creditors, by discouraging them from bidding, when they probably would have bid, for the protection of their own interests, if the rights of all parties had been previously ascertained and fixed with reasonable certainty. *Cole's adm'r v. McRae*, 6 Rand. 644.

In the case before us, the bill was filed by a creditor to enforce the lien of his judgment against lands aliened after the recovery and docketing of the judgment, and, by the amended and supplemental bill, the judgment debtors, the alienees and such creditors as were secured by deeds of trust, were made parties defendants. The bill, in form not a creditor's bill in a strict sense, would seem to be so in substance,

578 and, at all events, *became such under the order which was entered directing accounts of the lands aliened and of all liens and encumbrances thereon. *Simmons v. Lyles & als.*, supra.

The lands consisted of numerous tracts or parcels conveyed to various persons at divers times, and the encumbrances were by sundry judgments rendered, and several deeds of trust executed at different periods. The commissioner in his report sets out the lands, the names of the alienees and dates of the deeds of conveyance, and also the several judgments, dates and amounts, and then remarks, that "there are many other debts mentioned in the several deeds of trust filed with the complainant's bill, but they the several debts have not been set up with their proof before your commissioner. See the 3 trust deeds filed." He then makes a summary or recapitulation of the liens and their order, and, after stating the several judgments, says, that "the last six judgments, except that of W. A. Lindsay, are secured by trust deed May 3d, 1878, S. to L. (Shultz to Linkenhoker), which see."

Then follows what he calls the "8th lien" described as "the debts secured by deed of trust from Shultz to Linkenhoker, dated 3rd May, 1878, with the various amounts aggregating \$20,292.95." From this sum he deducts \$4,980, showing a remainder of \$15,312.95. It is impossible to ascertain with certainty from any thing on the face of the report on what account this deduction was made, but it is supposed that it was for the amount of the judgments included in the deed of trust, though calculation would seem to show a material variance between the sum of the judgments and the amount deducted. This aggregate of the debts secured by the deed of trust is evidently made up of the principal sums mentioned in the deed, without the addition of interest. Now, looking to the deed to ascertain what debts are

secured, we find great uncertainty.

579 *They are numerous and variously evidenced by judgments, bonds, notes and open accounts. The deed professes to state the amounts "approximately" only. In the enumeration, the debts are generally described as "about" the sum stated, and in most instances no dates are given, so as to show when the debts were contracted or when they are payable. It was just this kind of uncertainty, that, in the opinion of this court, in *Wilkins v. Gordon & wife*, 11 Leigh 547, rendered it improper in a trustee to make sale; and it was one of the objects of the order of reference in the present case to remove this uncertainty. The commissioner should have enquired into each one of these debts and ascertained and reported definitely whether it was owing, and if so, the amount of it, principal and interest. In this way only could he have furnished the necessary information to the court and the parties. As to these debts (the judgments excepted) the report gave no material aid in their ascertainment, and as to them the enquiry as made by the commissioner, had as well not been ordered. The report is in other respects defective and imperfect. It is not necessary to go further into particulars. The decree confirming it carries on its face evidence that it ought not to have been confirmed: for, notwithstanding the confirmation, it provides in terms, "that the defendants or such of them as may desire it, have leave to have said report recommitted to the said master, in order that may after having given notice as specified in the former decree, take evidence as to any payment, release or satisfaction of any of the judgments in the report mentioned, or of any of the debts in the several deeds of trust set forth, and ascertain, state and report any other matters which the parties, or their counsel, or any of them, may require, or as may be deemed pertinent to the master." Instead of confirming the

580 *report and ordering a sale, the circuit court should have sustained the exceptions of the appellant and recommitted the report.

But if a decree confirming the report and ordering a sale had been proper, still the decree entered is erroneous.

It appears by the answer of Shultz, that the judgment of Hansbrough (complainant below) was for a debt originally owing by Shultz to Ann S. Gorgas, with whom Hansbrough, after the debt was contracted, intermarried, and after marriage he took the bond of Shultz for the debt payable to himself, and recovered judgment upon it. It was contracted for the purchase of a tract of land known in the proceedings as the "retreat" property, sold by Mrs. Gorgas to Shultz and conveyed to him by deed on the face of which a lien was retained for the deferred installment of the purchase money, which was the greater part. This deed is exhibited with the answer and shows the retention of the lien. After the recovery of the judgment and before the deeds of trust which have been referred to were given, this land

was sold by Shultz to the appellee Harrison Robertson, the latter undertaking to pay the Gorgas debt, principal and interest, in discharge of the lien retained on the land by Mrs. Gorgas. This undertaking of Robertson is recited in the deed conveying the land from Shultz to him. The statements so far of the answer of Shultz are responsive to the bill and especially to the fourth special interrogatory therein propounded to him concerning the real estate aliened, requiring him to disclose "to whom, when and how and for what considerations, he aliened any portions thereof."

When a bill calls for a material disclosure from the defendant on oath and the defendant in his answer on oath makes such disclosure fully and unequivocally, *the

581 answer to the extent of such disclosure, is as much responsive as when it expressly and positively denies material allegations in the bill, which the defendant is called upon to answer; and in either case, it is an elementary principle in equity jurisprudence, that the answer, as far as it is responsive, is evidence for the respondent, and its statements so far must be taken against the complainant as true unless overcome by the requisite proof. *Fant v. Miller & Mayhew*, 17 Gratt. 187; *Shurtz & als. v. Johnson & als.*, 28 Gratt. 657, 663.

There is no evidence controverting these statements of the answer. On the contrary, they are to a certain extent corroborated by the deeds already referred to, and a copy of the deed to Robertson was exhibited by the complainant and filed with his bill. Mr. Robertson in his answer, does not in express terms refer to the contract with Shultz as set out in the answer of the latter, but he impliedly recognizes it by referring for his title to the deed from Shultz, which on its face sets out Robertson's engagement.

From this proof it appears, that the appellee Hansbrough has two securities for his debt; first, a specific lien by virtue of the deed from Gorgas to Shultz on the land subsequently conveyed by the latter to Robertson, and second, a general lien by judgment on that land, and also on all the other lands aliened by Shultz, while the only security held by the appellant Jolliffe and the creditors at large embraced with him in the deed of trust to Linkenhoker of May 3rd, 1878, is by virtue of the last-named deed in which the land previously conveyed to Robertson is not included.

It is a rule in equity, said to be well established in this country, that where one has a lien upon two funds and another a posterior lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted

582 to *resort to the other only for the deficiency; but this rule is generally applied, it seems, only in cases where to compel a resort to the singly charged fund would not be productive of any additional risk, injury or delay to the double creditor. *Adams' Equity* (6th Amer. Ed.) 272 (side page), note 1, and authorities there cited.

This equity, however, has no existence, as against a bona fide purchaser, in favor of a

creditor who has no lien on the land sold, unless such equity springs out of some special provision of the contract between the purchaser and the vendor. In the absence of stipulations to the contrary, the purchaser of a clear title has the right to require his vendor to remove all encumbrances from the land, and this equity is prior and paramount to the equity of any creditor acquiring a subsequent lien on other lands of the vendor to have the securities marshalled for his relief against the purchaser.

But where the purchaser buys subject to an existing encumbrance, or undertakes to pay it off in satisfaction of the purchase money due his vendor, the case is very different. He thus becomes the principal debtor and as between himself and the vendor at least, he is primarily bound to discharge the encumbrance, and the vendor having a right as against him to require the obligation to be performed, the subsequent encumbrancer is entitled to stand in the vendor's shoes and have his equities administered for his relief. *Aldrich v. Cooper*, 2 Lead. Cas. Eq., Part 1. (4th Ed.), 270, 271, 273, et seq. and cases there cited.

And such is the case before us. Robertson, under his contract with Schultz, is bound to pay the Gorgas debt, now held by Hansbrough. In his relation to Shultz, he is the principal debtor and Shultz surety only, and the latter and the creditors who succeed to *his equities, have the right to require the land held by Robertson to be subjected to the satisfaction of the lien which rests upon it in exoneration of the lands subsequently aliened by Shultz and encumbered by the deeds of trust. *Buchanan v. Clark*, 10 Gratt. 164. See also the reasoning of Judge Tucker in *Douglass v. Fagg*, 8 Leigh 588, 602, 603; notes to *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq., Part I. (4th Amer. Ed.), 147. Hansbrough, the judgment creditor, cannot complain of this. It does not prejudice his rights. It imposes no additional hazard, inconvenience, or delay upon him. He filed his bill against all the alienees and asked that all the lands aliened, as far as necessary, should be subjected to the satisfaction of his judgment. The alienees are all before the court, and it is the plainest equity imaginable, that the land primarily bound should be first subjected. If the lands conveyed by the trust deed of May 3, 1878, were first sold, after satisfaction of the complainant's judgment, the trust deed creditors would be entitled to be substituted for relief against the land held by Robertson, or such of the proceeds as remained after satisfaction of Hansbrough's judgment. There is every reason therefore why the land sold to Robertson shall be subjected in the first instance.

The statute (Code of 1873, ch. 182, § 10) declaring the order in which aliened lands shall be liable, must be construed so as to harmonize with the equities which have been considered. It could never have been intended by the legislature to subvert equities at once so potent and so obvious.

There is nothing in the record showing that the lien reserved by the deed of Mrs.

Gorgas has ever been released. The mere taking of the bond by Hansbrough for the same debt would not of itself operate a release, and the lien is subsequently recognized in the deed *from Shultz to Robertson as existing. See opinion of Judge Staples in *Coles v. Withers & als.*, supra 186, and authorities there cited. But even if the lien under the deed has been released, the result would not be changed. There is still the judgment lien and the agreement of Robertson to pay the debt.

The decree of the circuit court must be reversed, and the cause remanded with directions to recommit the commissioner's report, and in any sale of the lands which may hereafter be ordered, the land conveyed to Robertson must be subjected before the lands subsequently aliened.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the land conveyed by the appellant, Joseph H. Shultz, to the appellee, Harrison Robertson, by deed bearing date on the 22d day of May, 1877, a copy of which deed is made an exhibit in this cause, is first liable to the satisfaction of the judgment of the appellee, Hiram Hansbrough, and should be subjected thereto before the other lands aliened by said Shultz should be resorted to for that purpose.

But the court is further of opinion, that the debts and the amounts thereof chargeable of said lands, and especially the debts secured by the deed of trust to Lewis Linkenhoker, trustee, dated May 3d, 1878, are not ascertained and determined by the report of Commissioner Simmons and the decree aforesaid with such certainty as to authorize a sale of said lands, and the said decree was therefore premature, and is erroneous *in ordering such sale before the said debts and amounts thereof had been so ascertained and determined as aforesaid.

Therefore, it is decreed and ordered that the said decree be reversed and annulled, and that the appellants recover against the appellee, Hiram Hansbrough, their costs by them expended in the prosecution of the appeal aforesaid here; and this court now proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the first and third exceptions of William Jolliffe to the report of Commissioner Simmons be sustained, and that said report be recommitment to one of the commissioners of the said circuit court with instructions, after giving notice to the parties, to make further enquiries into the matters embraced in the other exceptions of said Jolliffe to said report, (this court not determining any questions raised by the last-named exceptions), and also into the several debts aforesaid, and ascertain the dates and amounts thereof, principal and interest, whether owing and to whom, and restate the accounts ordered

by the decree in this cause rendered on the 17th day of February, 1879, and make report to the said circuit court. And it is further decreed and ordered that in hereafter ordering any sale of the said lands that may be necessary, the said circuit court shall order the land aforesaid conveyed to the said Harrison Robertson to be sold to satisfy the judgment of the appellee Hiram Hansbrough, in the bill and proceedings mentioned, first and before sale shall be made for that purpose of the lands subsequently aliened by the said Shultz.

Decree reversed.

586 *Gilbert v. Washington City, Virginia Midland and Great Southern Railroad Company.

[1 Am. & Eng. R. Cas. 473.]

September Term, 1880, Staunton.

I. Railroads—Receivers—Powers of Court Appointing.—A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary—within its corporate power—to preserve the property and give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any acts, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts.

II. Same—Same—Same—Lease of Other Road.—In such a case the court may authorize the receiver to take a lease of another railroad, where it is manifestly for the interest of the creditors and the company. And so on like conditions the court may authorize its receiver to contribute out of the accrued revenues in his hands, to the building of another railroad.

III. Same—Same—Same—Sale of Consolidated Road.—The roads in the hands of the

*See Smith's Ex'x v. W. C., etc., R. Co., 33 Gratt. 617; Williamson's Adm'r v. W. C., etc., R. Co., 33 Gratt. 624; Brown v. Point Pleasant, 36 W. Va. 299.

Receivers—Appointment.—As to power of court to appoint receiver, see Karn & Hickson v. Rorer Iron Co., 86 Va. 754.

Lien—Priority.—See, as to relative priority of execution creditors, and mortgage creditors. First Nat. Bank v. Anderson, 75 Va. 250; Boston & Co. v. C. & O. R. Co., 76 Va. 180; 1 Min. Inst. (4th Ed.) 604, 605.

Mortgages—After-Acquired Property.—See 1 Min. Inst. (4th Ed.) 600 *et seq.*

Railroad—Mortgages—Right of Mortgagee to Profits.—The law is now well settled that until possession of the trust subject is taken by trustee, or by proper judicial authority, the grantor is entitled to the profits. When possession is thus taken, the trustee becomes entitled to the profits, but only to such as thereafter accrue. Frayer's Adm'r v. R. & A. R. Co., 81 Va. 388; 1 Min. Inst. (4th Ed.) 604.

court, is the property of a company, constituted by the consolidation of three railroad companies, all of which had before the consolidation issued their bonds and executed mortgages on their property to secure them. The court may direct the property of the consolidated company to be sold as a whole; and afterwards fix the amount to be paid to the several holders of the bonds and mortgages, on the respective roads.

587 *IV. Same—Bonds—Interest Coupons—Effect.—One of the railroad companies not

having been able to pay the interest on their bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of said interest. **Held:**

1. This was not a novation of the debt for the interest; and these bonds are secured by the mortgage.

2. The coupons for interest bore interest from the time they were payable.

This was an appeal by Frederick E. Gibert from a decree of the circuit court of Alexandria, made on the 13th day of February, 1880, in a cause depending in said court in which John C. Graham, in behalf of himself and all other creditors of the Washington City, Virginia Midland and Great Southern Railroad Company, was plaintiff, and the said company was defendant. Gibert who filed his petition in said suit as a creditor by bonds issued by the Orange and Alexandria railroad company, obtained from this court an appeal from the decree of the circuit court of Alexandria, which directed a sale of the property and franchises of the said defendant company. The case is stated by Judge Christian in his opinion.

F. L. Smith, I. H. Carrington and Wm. W. Gordon, for the appellant.

James Alfred Jones and William J. Robertson, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on appeal from a decree of the circuit court of the city of Alexandria. The case under ordinary circumstances would have been heard by this court sitting at Richmond, it properly belongs ⁵⁸⁸ longingly there, but on motion of appellees, in order to have a speedy decision of the case, it was transferred to the court here. The court recognizing the importance, both to the bondholders and all other claimants, as well as the great public interests involved, in putting an end to controversies arising with respect to this, one of the most important railroad lines in the State, has carefully considered the numerous questions presented by the record, and has

†**Debts—Novation—Discharge.**—No mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or a vendor's lien, will operate to discharge the debt, unless so intended by the parties. Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co., 86 Va. 1, 38 Am. & Eng. R. Cas. 559.

Removal of Causes.—The principal case is cited in support of the proposition that the court of appeals has power to transfer a case from one of its places of session to another in Lillienfeld's Case, 92 Va. 820.

arrived at its conclusions at the earliest practicable period, consistent with the pressing duties of the court here; only taking time enough to examine carefully the large and voluminous record (covering over a thousand pages of printed matter), and will now proceed to give its conclusions upon the whole case as it comes before us.

Before proceeding, however, to discuss the questions involved, it is necessary and proper to give a brief history of the proceedings in the cause.

The original bill was filed by John C. Graham, who was the holder of second and third mortgage bonds of the Orange and Alexandria railroad company. Default having been made in the payment of both principal and interest of his bonds which were then due, he brought his suit on the seventh of June, 1876, in the circuit court of Alexandria, in behalf of himself and all other creditors of the "Washington City, Virginia Midland and Great Southern Railroad Company;" which company by virtue of the powers vested in it, had assumed the indebtedness and taken the assets of the Orange and Alexandria railroad company.

The bill set forth the plaintiff's debts, the deed securing them, and all other deeds of trust on the property of said company, or any division thereof: copies of these deeds were filed with the plaintiff's bill.

589 *The bill set forth in detail, how the said defendant corporation was created, and of what its property consisted. It further set forth the consolidation of the Orange and Alexandria railroad company with the Manassas Gap railroad company, as constituting the Orange and Alexandria and Manassas railroad company, and the subsequent consolidation of the Orange, Alexandria and Manassas railroad company, with the Lynchburg and Danville railroad company, which constituted, under the acts of consolidation, the said Washington City, Virginia Midland and Great Southern Railroad Company.

The bill further alleged the insolvency of said company, and that default had been made under each of said mortgage deeds, filed with the bill, both as to principal and interest.

The bill referring to the several mortgage deeds, alleges that according to the terms of said deeds, the beneficiaries thereunder are entitled to foreclose the same, and cause sale of said property to be made, for the purpose of satisfying said debts; but that owing to the complicated and conflicting nature of the claims and liens existing against said company and its property, it was impossible for the trustees in said deeds properly to administer the trusts imposed upon them by said deeds, until the conflicting claims and liens have been adjusted as to their amounts and priorities, by the intervention and aid of a court of equity.

The bill further alleges that no sale can be properly or judiciously made until such an account has been ordered and taken as will ascertain the exact status of such liens, their priorities, and the property to which the same will attach.

The bill further charges that there were numerous outstanding judgments and executions against said company, and that

levies were being made upon property 590 erty *which should properly be applied to the debts secured by the deeds of trust on said road and its divisions.

The prayer of the bill was, for an injunction to restrain the said company from further operating or controlling the said road, and that a receiver should be appointed by the court, to take charge of the assets of the said company, under the direction of the court.

The bill further prayed for certain accounts to be taken, and for a sale of the property upon such terms and in such manner as may best promote the welfare of all parties interested therein, and for a proper distribution of the proceeds of such sale, and for general relief.

After the filing of said bill by the plaintiff Graham, many parties, creditors by bond and otherwise, filed their petitions in the same cause, asserting their several claims against the defendant corporation, and uniting with the original plaintiff in the prayer for the appointment of a receiver, and the sale of the property.

An injunction was awarded as prayed for, and John S. Barbour, Esq., was appointed receiver of the road. A decree was entered, defining his powers as receiver. An inventory was ordered of the property of the defendant corporation, and the receiver directed to account monthly before a commissioner of the court.

At the November term, 1876, the bill was taken for confessed as to all the defendants, and a general account was ordered according to the prayer of the bill.

"First. An account showing of what property, real and personal, rights and franchises, the said defendant corporation was seized and possessed.

"Second. An account of all liens of every kind, whether created by deed, judgment, or otherwise, 591 resting upon said property or franchises, or any part thereof, how the same was created, and how evidenced, and upon what portions of said property the said liens respectively rest, the amount, order and priorities of the debts secured or evidenced by said liens, when the said debts were or will be due, and up to what date interest has been paid thereon.

"Third. What debts are due by said company other than those secured by said liens, the amount thereof, how evidenced, and to whom due. This account to show specifically, as far as possible, the consideration of said debts, classifying and reporting separately: 1st. The amounts due by way of wages, salaries or fees to the laborers, servants, agents and employees of said company prior to June 1st, 1876; showing which of said amounts are now held by the laborers, servants, agents or employees who performed the services for which said debts were contracted, and which are held by the assignees of such persons; and as to the debts so held by assignees, what considera-

tion was paid by said assignees therefor. 2nd. The amount due for supplies furnished said company prior to said 1st day of June, 1876, and to whom said sums are due.

"Fourth. An account showing whether any, and if any, what contract of lease has been heretofore made between the said defendant company and the Baltimore & Ohio railroad company, whereby any part of the property, rights or franchises of said defendant company have been placed in the possession of said B. & O. R. R. Co.; what the terms of said lease; what amount is due thereon; how the rent reserved thereunder has been heretofore paid; filing with his report under this order a copy of said lease and any papers connected therewith.

"Fifth. An account showing, as far as practicable, the net revenues of each of the divisions of the road *of the said defendant company, conveyed respectively in the different deeds of trust, to-wit: the divisions lying between the city of Alexandria and the city of Lynchburg, between the city of Lynchburg and the city of Danville, and between the town of Manassas and the town of Harrisonburg, charging each division with the cost of running and keeping the same in repair, the interest on such liens as exist thereon, and its proportionate part of the general expenses of said road, and crediting it with the receipts thereon, and its proportionate part of the receipts of said road from through freight and travel: the account to commence on first day of December, 1876. And the said commissioner is further ordered to make a further statement showing a like division of receipts and expenditures applicable to said several divisions of said road, as far as the same is practicable, for the period of time between the date of the appointment of said receiver and the 1st of December, 1876."

Under this order for accounts, as above set forth, Commissioner Shepperd filed an elaborate report, with accompanying depositions and papers, covering hundreds of pages of the printed record. It is not necessary to refer in detail at this point, to said report, but so much of it will be noticed hereafter, as affects in anywise the questions we have to determine.

On the 24th of September, 1879, the appellant, Frederick E. Gibert, filed his petition, and for the first time became a party to this suit.

That petition in substance alleged that he was the owner of the second and third mortgage bonds of the Orange and Alexandria railroad company, to the amount of \$60,000, specifying the numbers and denominations of said bonds so held by him.

593 *He alleged that there was a combination among certain of the creditors of the defendant corporation in this suit, for the sale and purchase of the property of said company, upon which his bonds were a lien, and which combination, if carried to a successful termination would work great wrong and injury to the petitioner, and prove most oppressive to him. He filed with his said petition a paper showing the terms and con-

ditions of said combination, and styled "A scheme for reorganization of the W. C., V. M. & G. S. R. R. Co.," which he prayed to be read as part of his petition. He complains that by said scheme it was proposed to issue to the Baltimore and Ohio railroad company, bonds to the amount of \$263,405.97 to be secured by a mortgage equal in dignity with the lien of petitioner's bonds and thereby greatly lessening and depreciating the value of his mortgage bonds.

Upon this petition he was admitted a party plaintiff to this suit, by a decree entered on the 27th of September, 1879. By that decree there were certain further directions to Commissioner Shepperd to make further enquiries, and there was also a confirmation of the report of Receiver Barbour approving the agreements made with the "Charlottesville and Rapidan railroad company," which will be noticed in another part of this opinion.

On the 13th of February, 1880, the circuit court entered an elaborate decree in which it passed upon the various claims reported by Commissioner Shepperd, and upon the various liens upon the different divisions of said railroad and their priorities. That decree contained the following provisions, which are all that it is now necessary to refer to, to-wit:

"It appearing that the property of the defendant corporation liable to said liens and subject to sale as hereinbefore set forth, cannot be otherwise sold to advantage

594 *and without prejudice to the interests of the several liens and the beneficiaries thereunder, the court doth adjudge, order and decree that the rights, franchises, property and works of the defendant corporation as specifically set forth in the 37th section of this decree, be sold as an entirety free and discharged of and from the liens and encumbrances of the said several deeds of trust and judgments hereinbefore found and recited, and any and all other liens thereon: and when the sale herein ordered shall have been made and confirmed by this court, all claims and equities of redemption of the several lienholders in the order of their subordination, and of the defendant company, or of any of the companies consolidated into it, shall be forever determined and barred: and as the defendant corporation has this day filed in the papers in this cause an express waiver in writing of a day for payment and confessed its inability to pay the amount of principal and interest for which it is now in default, the said sale shall be made without further delay, and without granting any such day for payment.

"And the court doth adjudge, order and decree that John S. Barbour who is appointed commissioner for that purpose, do make the sale provided for in the last section, and do sell the rights, privileges, property, and works of the defendant corporation as set forth in the 37th section of this decree as subject to sale for the satisfaction of said liens hereinbefore enumerated in conformity to the directions hereinafter contained.

"Such sale shall be made by the commissioner at public auction, at some convenient

place in the city of Alexandria, in the State of Virginia, to be designated by him. Notice of the time, place and terms thereof shall be given by an advertisement which shall be published before such sale at least once a week for sixty days," in certain newspapers therein designated. The Baltimore

595 *and Ohio railroad company, which is the holder of all the debts secured, under what is known as the "gold mortgage," and the defendant corporation by counsel, agreeing that such shall be the time and character of said advertisement.

"The terms upon which said commissioner shall sell said property shall be for cash as to a sum of money equal to the principal and interest of all the bonds secured by deeds of trust on said property or any parts thereof, except those secured by the deed of trust of the defendant corporation, dated on the 1st of May, 1873, in which D. H. Miller, Robert Garrett and John W. Burke are trustees, and for a further sum of cash equal to the past due interest on the debt secured by that deed; as to a sum equal to the principal of the debt which has been heretofore ascertained to be due under said deed, on such credit as will meet the amount of said debt at maturity, taking care that as to such deferred payment provision be made for the purchaser to so pay interest on the purchase money in installments that the interest so to be paid by him shall meet the coupons for interest yet to fall due on said principal; and as to the residue of the purchase money, on a credit of one, two and three years, with interest from date of sale. For the deferred payments, as above provided, the commissioner shall take the obligations of the purchaser, and return them with his report of sale, when the court will direct how the payment of same shall be secured, by some satisfactory lien on the premises sold. Of the cash, which it is herein provided shall be required on the sale of said property, \$200,000 shall be paid to the commissioner within five days after said sale, and the residue shall be paid by the purchaser upon the confirmation of said sale in such manner as the court in the decree of confirmation may direct."

596 *The decree further provided that the commissioner of sale should enter into bond in the penalty of \$300,000, with security to be approved by the clerk of the court, conditioned for the faithful performance of his duties as such commissioner.

It was from this decree that upon the petition of the appellant Gibert, an appeal was awarded by one of the judges of this court. In his petition for appeal there are seventeen assignments of error, which will now be noticed seriatim:

First error assigned.

"That the O. & A. R. R. Co. being in arrears of interest upon its four mortgages in or about the years 1865-7, funded the coupons for past due interest, and issued to the holders in their place bonds for the amounts due thereon respectively. These 'funded interest bonds' amount to many hundreds of thousands of dollars. The master stated the

amount of such securities, and reported them as liens under the respective mortgages, and the court confirmed his report and so decreed. Your petitioner assigns such action of the court as erroneous."

It was urged in argument here, that when the holder of the coupons surrendered them and accepted bonds in their stead, he consented to a novation of the contract; that he chose to receive an instrument payable at a different date from the one originally his, and that the legal effect of the transaction was an absolute payment and discharge of the coupons.

The court is of opinion that this assignment of error is not well taken. In the first place, there is no evidence in the record that the coupons were surrendered by the holders when they accepted the funded interest **597** *bonds. We cannot presume, in the absence of proof, that such surrender, contrary to all usage in such matters, was made at the time that the funded interest bonds were accepted; but, if the coupons had been surrendered and the funded interest bonds taken in lieu of them, the legal effect would not have been to discharge the lien of the mortgages. The mortgages secured the interest, which was the debt, of which the coupons were evidence merely. The mere change of the evidences of this debt could not destroy the lien which had been given for its security. According to all the decisions there must be the clearest proof of an intention on the part of those who took the funded interest bonds to release the lien of the mortgages. They cannot be deprived of the benefit of their liens by simply accepting another security for the same debt. The acceptance, by them, of the funded interest bonds in place of the coupons, even if they were surrendered, was not an extinguishment of the debt. It was but the acceptance of another security for the same debt. It cannot therefore, be considered as a novation of the contract, or an extinguishment and discharge of the debt evidenced by the coupons; the debt remains the same, but the security for its payment only is changed. See *Watts v. Kinney*, 3 Leigh 272; *Yancey v. Mauck*, 15 Gratt. 300; *Meade v. Grigsby*, 26 Gratt. 612; *Smith & als. v. Blackwell*, 31 Gratt. 291; and the recent case of *Coles v. Withers*, supra 186. In the last named case, Judge Staples reviewing the cases upon the subject, says: "So long as the debt exists the courts will never presume the chief security taken for its payment has been surrendered without satisfaction, unless upon the clearest and most convincing testimony." The Virginia cases already cited sustain this position, and the authorities elsewhere **598** sustain it. The rule laid down *in 1 Hilliard on Mortgages (a very high authority), is that nothing short of payment or express release will have that effect.

The court is therefore of opinion that the first assignment of error is not well taken.

Second assignment of error.

"That the master in making up his statement of liens, calculated and allowed interest

on all overdue coupons from the date of their maturity, placing the amount of said coupons in the column of principal. None of the mortgages under which these bonds were issued speak of coupon bonds."

The court is of opinion that this assignment of error is not well taken. It will be seen from the record (p. 583) that the court decided that six per centum interest only should be allowed upon the funded interest bonds, and Commissioner Shepperd reformed his report accordingly (see p. 900 of the record), no interest whatever being allowed in that statement upon the "funded bonds and certificates," and six per centum per annum only upon the bonds and certificates themselves. So much of this objection as relates to the allowance of a higher rate of interest than that borne by the original bonds is founded therefore on a mistake as to the facts.

While it is true that the mortgages do not in terms speak of the bonds as coupon bonds, there is nothing in any one of them inconsistent with the idea that they were to be issued in that form. On the contrary each of them (the mortgages) provides for and secures the payment of the interest at fixed periods (semi-annually) down to the time of the maturity of the bonds; and then for the payment of the principal. The most appropriate, if not the universal mode in

599 which the *interest thus to become due and payable on railroad bonds is evidenced, is by a coupon for each installment attached to the bond upon which the interest represented by it is to accrue. Bonds with coupons attached were accordingly issued under each and all of the mortgages without objection from any quarter; and without question raised by any party, until after the institution of this suit, as to the propriety of issuing bonds in that form. Indeed the very bonds which the appellant himself holds are of this character which he now objects to for the first time. It may be therefore confidently asserted that the issue of coupon bonds was in conformity with the provisions of the mortgages and fully authorized by them; and this being true, there can be no doubt that the coupons carried interest from the time that the company was in default in paying them, and that such interest was secured by the lien of the mortgages. For authority for this proposition we refer to *Arents v. Commonwealth*, 18 Gratt. 750; *Aurora City v. West*, 7 Wall. U. S. R. 82, 105; *Town of Genoa v. Woodruff*, 2 Otto U. S. R. 502.

We are therefore of opinion that the second assignment of error is not well taken.

Third assignment of error.

"That the circuit court authorized and empowered the receiver to lay out \$10,000, to aid in constructing a short branch road connecting with the Lynchburg and Danville division, said branch road being built and owned by another corporation."

It may be first observed that there is an error of fact in this assignment of error. The branch road does not belong to another corporation. The record shows that every

foot of that road belongs to the Mid-land *Railroad Company, and it is specifically named in the final order of sale as a part of the assets to be sold.

The decree complained of in this assignment of error was entered on the 21st of November, 1877. It appears that at that time there were no parties objecting to it, but it was entered, as shown by the very terms of the decree, upon the suggestion to the court, that the interest of all the parties to the suit would be promoted by an expenditure of a portion of the receipts of said road in the hands of the receiver, in aiding in the construction of a short branch therefrom, extending from a point upon the Lynchburg and Danville division, between Sycamore and Ward Spring stations, westward to the iron ore banks near Pig river; and the court being of opinion that such extension of the road would promote the interests of all the parties concerned, directed said receiver, out of such funds as may be in his hands to be administered, to expend in the construction of said branch road a sum not to exceed \$10,000, in amount, provided said receiver shall be satisfied upon a further examination of the matter, that such outlay will be judicious; and provided further that he shall not expend said sum or any part thereof until he shall be satisfied that such expenditure will insure the construction of the whole of said branch road to said ore banks. The record shows that this work was completed in a few months at a cost to the receiver of less than \$8,000, the residue of the cost being borne by persons interested in the ore banks. The receipts from this stem of the road paid back, as the record shows, all its cost in a little over six months, and it has ever since been a most valuable feeder to the main line, paying nearly \$200 per day thereto on account of the large amount of iron ore transported over said branch road.

601 *Without deciding the question as to the power of the court as an original proposition, to make such expenditure, we think it is plain that this action of the court empowering its receiver to make this expenditure of \$10,000, was eminently advantageous, as the sequel showed, in adding largely to the receipts of the road, and promoting the interests of all parties interested in its welfare.

No complaint was made from any quarter for more than two years after this wise and judicious action of the court. It is too late now to make any such objection.

The road has already been built, and is in greatly successful operation. The money has already been expended. Who is to pay it back if the appropriation was wrong? The court—or the receiver? Neither of course can be held liable. The expenditure of \$10,000 brought large receipts into the treasury of the road, and manifestly promoted the interests of all the bondholders, lienholders and others creditors against the road.

We are therefore of opinion that the third assignment of error is not well taken, and must be overruled.

Fourth assignment of error.

"That the court authorized and empowered the said receiver to lease two other lines of railway, the property of two other corporations, viz: the 'Charlottesville & Rapidan railroad' and the Franklin & Pittsylvania R. R. The first-named railroad, to-wit: the 'Charlottesville & Rapidan R. R.' was chartered by the general assembly by an act passed February 12th, 1876. This charter was amended February 6th, 1878. By the original act it was to extend, under its charter, from Charlottesville to Orange C. H. By the amended

602 *act, power was given it to lease its road to any other company, and to borrow money and make a mortgage to secure it. It is manifest, and a mere reference to these acts makes it apparent, that this road was incorporated by the legislature, for the purpose of meeting a great want of the Virg'a Midland Company; for before that time the trains of that company were compelled to run over the track of the Chesapeake & Ohio Co., for which privilege the company had to pay an annual rent of \$30,000. And although it paid so large a rental for the use of the road between these two points, its use was subordinate to the control of the C. & O. Co., and that too without the privilege of doing any local business between Gordonsville and Charlottesville or any intermediate points; and besides that, was excluded from northbound business at Charlottesville or southbound at Gordonsville. It is therefore plain that, in order to the full development and welfare of the Midland line, its track should be continuous and under its own management. This new company in June, 1878, made a proposition to Receiver Barbour which is fully set forth in his report (on p. 526 of the record). The substance of the proposition was that the new company would lease its road to the Midland Co. for a period of thirty-four years for the annual rent of \$36,000, and at the end of that time all the property, works and franchises of said road should be 'used, occupied and possessed by the said Midland road forever.'"

The court is of opinion that the circuit court, under its discretionary power, had the authority to direct its receiver to accept the proposition made by the Charlottesville and Rapidan company, and to confirm his action in the premises. It was of manifest advantage to all the lienholders and all other

603 creditors interested in the *Midland road that this missing link between Charlottesville and Gordonsville should be supplied, thus forming a continuity of line under the control and management of the Midland company. The advantage on all hands is very apparent when it is remembered that for a sum but little over the annual rent it was already paying to another company under the great disadvantages of being subordinated to its control, it thereby secured, not only the control of a continuous line, but at the end of 34 years the whole property, works and franchises of the new company would belong in fee simple to the Midland company. The advantages of this arrangement being so apparent and not ob-

jected to by any parties before the court—not even by the appellant here—the only question is, did the court have the power, in the exercise of a sound discretion, to authorize and confirm this act of its receiver. We think it undoubtedly had that power and that it was its duty so to exercise it. A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary within its corporate power to preserve the property, and to give to it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts. 4 Otto U. S. R. 734 (Jerome v. McCarter); Wallace v. Loomis, 7

604 Otto U. S. R. 146, 162. The receiver, in making this contract, *and the court, in authorizing and approving it, were but carrying out the powers granted by the legislature, on the 28th March, 1871, (Acts 1870-1. p. 293), when it authorized the Orange, Alexandria and Manassas railroad company "to construct a railway from Orange C. H. or Gordonsville, or some point on the line of their road between these places, to some suitable point on their road between Charlottesville and Lynchburg, or on the C. & O. R. R., so as to connect the eastern portion of their road with the southwestern extension from Charlottesville to Lynchburg."

Now as to the lease of the Franklin and Pittsylvania railroad, which is the second branch of the fourth assignment of error, that road was chartered by the legislature on March 13, 1878, (see Acts 1878-79, p. 203) for the purpose of constructing a narrow-gauge railway from Rocky Mount, in Franklin county, to Pittsville, in Pittsylvania county, and the same act gave to this company the power to lease the road when built, to the "Midland road." The legislature by its charter, having given the power to lease the road, when built, to the "Midland road," the intelligent receiver, who had been president of the "Midland road," and knew well all its interests, recommended to the court, by a report filed in May, 1878, (see page 518 of the record) that the "Midland road" should lease, as it was authorized to do under the act of assembly, the Franklin and Pittsylvania railroad. It would extend this opinion to too great length to quote the report of the receiver, to show the reasons which he urged upon the court to authorize such lease. It is sufficient to say that no man can read that elaborate report without coming to the conclusion that it was very advantageous to the interests of the "Midland road" that this lease should be authorized and confirmed by the court.

605 *The report of the receiver shows that this short line of road—a distance of about thirty miles—would be a most valuable tributary to the "Midland R. R."; that it penetrated a rich and productive country, and especially gave access to valuable banks of iron ore necessary to the manufacture of Bessemer steel.

The terms of the lease were most advantageous to the Midland Company, because it would receive a road built and equipped by the Franklin and Pittsylvania railroad company, at its own cost and then leased for thirty-four years to the "Midland road," the lessee paying only \$7,000 per annum therefor. The record shows that this lease, so made by the receiver and confirmed by the court, was of great and manifest advantage to all interested in the prosperity and welfare and successful operation of the "Midland R. R." All that has been heretofore said, and the authorities referred to to sustain what was said, with reference to the lease of the Charlottesville and Rapidan railroad, apply with full force to the lease made and confirmed of the Franklin and Pittsylvania railroad. The court is therefore of opinion that the fourth assignment of error is not well taken.

Fifth assignment of error.

"That the lease made by the defendant corporation to the B. & O. R. R. Co., of that portion of its road lying between Harrisonburg and Strasburg was recognized by the court as valid, when there has up to this time never been any legislative authority for such lease."

It is sufficient to say that the lease, of which complainant is here made, was entered into by the "Virginia Midland" Road on the 20th August, 1873, three years

606 *before the suit was brought. The record shows that the court below did not make this lease. When it took charge of the property this lease was an accomplished fact, and certainly, as the record shows, a valuable one for the company. The court did not, *ex mero motu*, set aside this lease. No one objected to it; it was already done, and was manifestly an advantage to all parties interested in the "Midland Road."

The first objection found to this arrangement is made by the appellant who was already a bondholder materially benefitted thereby and who by implication ratified the same. The court is therefore of opinion that no question having been raised by any of the parties interested, in the pleadings in this cause, and the lease having been made before the court took possession of the subject, and it being manifestly beneficial to all parties concerned; the said fifth assignment of error is not well taken.

Sixth assignment of error.

"The action of the court in requiring the purchaser of the defendant corporation's franchises and property to take them subject to the leases herein before recited."

It is sufficient to say that this question has already been disposed of in what has

already been said respecting the fourth assignment of error; the court below and this court being of opinion that said leases were of manifest advantage and promoted the welfare and general condition of the "Midland" Company.

Seventh assignment of error.

"That by section 44 of the decree of sale (p. 1016 of the Rec.) only 60 days' notice of the time and place of sale was required to be given, and that to be published in each of the cities of Alexandria and Lynchburg in the State of Virginia and in Baltimore and New York."

It is true that what is known as the "Gold mortgage" required that there should be ninety days' notice, and that publication should also be made in Philadelphia, Boston and London; the decree of the court below explains this change in the terms and time of notice by declaring in section forty-four, that the Baltimore and Ohio railroad company, which is the holder of all the debts secured under what is known as the "Gold mortgage," and the defendant corporation agreeing by counsel that such should be the time and character of the advertisement. This assignment of error is therefore not well taken.

Eighth assignment of error.

"That the sale of the Lynchburg and Danville division was not directed to be made in Lynchburg as provided in the Lynchburg and Danville mortgage."

This involves the question of a sale as an entirety, which will be considered hereafter.

Ninth assignment of error.

"That there should not have been any decree for sale at all, but that the revenues of the main line should have been applied to the extinguishment, principal and interest of the four O. & A. mortgages in the order of their priority."

It is sufficient to say that such a scheme would have been utterly impracticable. **608** The record shows that *the net revenues of the whole road were \$370,000, and the total amount of the first four Orange and Alexandria mortgages on the 1st of January, 1880, was \$4,813,678.24. The average rate of interest on this amount at seven per centum would be for one year \$290,075.59. A simple calculation would show that it would take something like fifty years to pay off the principal and interest of the first four mortgages. Of course such a scheme was totally impracticable.

Tenth assignment of error.

"That the mortgages of the O. & A. R. R. Co. constituted liens upon the Manassas Gap R. R. prior in dignity to the O., A. & Manassas R. R. and all subsequent mortgages."

The court below was of opinion that the said first mortgage of the Orange, Alexandria and Manassas railroad company takes priority as to so much of the road of the defendant corporation as lies between Manassas and Harrisonburg, the said portion of said road

not being after-acquired property of the Orange and Alexandria railroad company, which passed under its then existing mortgages, upon its consolidation with the Manassas Gap railroad company, under the act of assembly authorizing such consolidation. We are of opinion that the circuit court was right in this conclusion. The record shows that there was a company known as the Orange and Alexandria railroad company, which worked and owned a road from Alexandria to Lynchburg; and there was another known as the Manassas Gap railroad company, which worked and owned a road from Manassas to Harrisonburg. In 1867 by virtue of an act of assembly empowering

them to do so, the said companies consolidated, upon terms *mutually agreed upon, and the consolidated company was known as the Orange and Alexandria and Manassas railroad company, and as such and by virtue of an act of the legislature, made a mortgage upon the joint property. Under these circumstances, neither of these companies acquired the other, and neither road is "after-acquired property" to the other. They were co-ordinate, and by an act of assembly were united as a new company, with the power to make a deed of trust on the joint property. The term "after-acquired property" applies to such necessary accretions as are requisite to keep up the road, such as new rails, cross-ties, depots, rolling stock, machinery, and, it may be, real estate required for the legitimate purposes of the corporation. But it surely cannot cover a different road belonging to another corporation which either by purchase or legislative enactment becomes united with or consolidated into it. Nor can it cover any property, right or franchise which according to its charter, at the date of the use of the term "after-acquired property," it had no right to hold, assert or exercise. These principles are well settled by the decision of this court in the case of *Alex. & Fred. Co.'s Trustees v. Graham*, 31 Gratt. 789, which is conclusive on this point. The court is therefore of opinion that the tenth assignment of error is not well taken.

The eleventh, twelfth, fourteenth, and sixteenth assignments of error may be treated together.

They all in different forms raise the question as to whether the circuit court erred in directing a sale of the whole road as an entirety. Or, in other words, whether, under the terms of the various mortgage deeds, it was not the duty of the court to decree a sale of the different divisional roads consolidated into the Washington City, Virginia Midland and Great Southern Railroad Company.

610 *This consolidated road is composed of three divisions: 1st. The Orange and Alexandria railroad, which under its original charter had authority to build a railroad from Alexandria to Gordonsville; 2d. The division extending from Charlottesville to Lynchburg; and a third division, the construction of a road from Lynchburg to Danville.

These three divisional railroads were con-

solidated into one by an act of the general assembly, and the consolidated company thus created was thereafter called and known as the Washington City, Virginia Midland and Great Southern Railroad Company, thus forming a continuous line of railroad from Alexandria to Danville.

The question presented to the court below was, whether to sell this line of railroad by sections and divisions, in accordance with the mortgages on the several divisions, or to sell the whole as an entirety and to distribute the proceeds after sale among the lienholders of the separate divisions, according to equitable principles of distribution.

It being apparent that there must be a sale to meet the principal and interest overdue, and no party in interest disputing the necessity for a sale, but all agreeing that such sale must be made, the question before the court below was, as to how such sale should be effected.

The court therefore very properly directed an enquiry as to the best mode of bringing the property into the market, and accordingly directed its commissioner to enquire whether the interest of all the parties interested will best be subserved by a sale of the road as an entirety or by a sale of the divisions upon which the several mortgages respectively rest.

The commissioner considered the subject carefully and elaborately, and examined distinguished railroad *men, and came to a very decided conclusion that it is to the interest of all parties concerned to have a sale of the road as an entirety, and stated in his report that it would hardly be practicable to sell the road in divisions as there were so many interests in common between the respective divisions (see record, page 894). Upon the return of this report, the court decreed that "the premises, rights, franchises, works and property of the defendant corporation cannot be sold in parcels without loss and prejudice to all parties interested therein, and that the nature and situation of the property is such that the interest of all parties requires that it shall be sold as an entirety."

The court is of opinion that this conclusion of the circuit court was plainly right, and that it was manifestly in the interests of all the parties interested, including the appellant.

In the opinion of this court, it would, on the contrary, have been plainly erroneous if the court below had decreed a sale by sections, or parcels, or divisions of this line of railroad.

The value of a railroad consist generally in its length, continuity and connections, and the business which it can accomplish. Its value is not to be estimated by its rolling stock and cars and depots and real estate acquired, but its great value is in the length and continuity of the line and the connections which it forms between different points of trade and commerce. The great value of this road is that it extends across the State from tidewater nearly to the boundary of the southern line of Virginia, at Danville.

Taken together as a whole, with all its di-

visions consolidated, and its collateral feeders, it becomes one of the most important railroad lines of the State. Manifestly its great value depends upon its length of line and continuity and connections. If

612 cut up into parcels, *and sold by divisions, it would lose its great value as a continuous line of road. If thus sold, the lienholders on the different divisions would not realize the same amount as if sold as an entirety. It was argued that to sell the road as an entirety would be in violation of the contract of mortgage-liens upon the separate divisions. The plain answer to this proposition is, that a sale of all the different divisions at the same time carries out effectually the contract to sell upon default each separate division. And the fact that the particular separate division on which the mortgage rests, is sold at the same time and together with other divisions of the road, is in no manner a violation of the contract of the mortgagee.

But in the decree of the court below ample justice is done to all the lien creditors of the different divisions of this railroad. The fund, after sale, is to be apportioned according to the earnings of the different divisions of this railroad upon equitable principles reported by the commissioner, after examination of experts familiar with the subject. And the result is that the lien holders of the different divisions will get in the distribution the proportion to which they are entitled, which is certainly more favorable to them than a sale of the road in parcels and divisions. Indeed it is manifest that such a sale would not only be injurious to other parties interested but would give to them (the mortgages on divisions of said road) a larger per centum of their debts than if the sale was directed to be made in parcels, and by divisions of the road.

After a careful consideration of the report of the commissioner, and the evidence returned therewith, the court is of the opinion that it is to the manifest interest of all parties interested that the sale should be made of the said railroad as an entirety, and that the circuit court was right

613 in decreeing such sale, and *that such sale will violate none of the contract rights of the mortgagees.

There are only two remaining questions to be considered, as set forth in the petition for appeal, which will now be briefly noticed. One arises upon the report of the commissioner, in which it is insisted here, interest upon interest was reported by the commissioner and confirmed by the court; and the other remaining question is, as to the priority of the liens of certain executions upon judgments obtained against the railroad for labor of employees, and damages for destruction of property, &c.

As to the first question, it may be remarked that the record shows that there was no exception to the commissioner's report in this respect. The report returned covered hundreds of pages and multifarious subjects.

It was the duty of the parties objecting to this part of the report to put their fingers on the point, and call it specially to the attention of the court. This was not done, and it is not surprising that the court should have overlooked, amid such a mass of different questions submitted, this unimportant question of the rate of interest charged by the commissioner. We do not mean to pass upon this question and to say in this opinion whether the interest charged by the commissioner was correctly charged or not. It is sufficient to say that if there was error in this charge of interest (upon which we express no opinion) the court may hereafter correct it when it comes to distribute the fund. Certainly, if erroneous, it cannot interfere with the great question in the case, as to whether the sale of the entire railroad should be confirmed as ordered by the court. It will be time enough when the fund comes to be administered by the court, for the court to correct this error, if error it be.

614 *And now as to the question whether the executions issued upon judgments obtained against the company, the court does not now feel called upon to express any opinion, especially as these questions are involved in appeals taken in this same case and now pending at Richmond. All these questions may be, and will be, properly decided when the fund arising from the sale of the railroad comes into the hands of the court for distribution, and will in the meantime be decided by this court in the several causes now pending in this court at Richmond.

Neither of these questions (to-wit: the question of interest upon interest, and the question of priority of executions over the liens of the deeds of trust), whether the decree of the said circuit court is erroneous or not in these respects, can at all interfere with the power of the court to make sale of the property as an entirety. The amounts involved are comparatively insignificant, and even if erroneously decreed, cannot effect the great question in the case, as to the sale of the property as an entirety. These questions will be postponed to the time when the distribution of the fund becomes necessary.

There is one other question not presented in the petition of appeal, but very earnestly argued at the bar here; and that is, as to proper parties. It is insisted by the learned counsel for the appellant that the trustees in the several mortgage deeds being dead, the legal title was outstanding and that there was no one before the court to represent that legal title.

With respect to this argument, it is sufficient to remark, that if on the death of the trustee, Lamar, the legal title was in abeyance, that would not defeat the trust, nor prevent the jurisdiction of the court from attaching, in the absence of a representative of the legal title, no such representative

615 being in existence. Indeed *it would be a potent reason for the court to pro-

ceed, and take upon itself the execution of the trust, on the principle, that a court of equity will never suffer a trust to fail, for want of a trustee. If however, the legal title is not in abeyance, then upon the death of Lamar it either devolved by operation of the statute (Code 1873, ch. 174, § 9), on Lamar's personal representative, or else it resulted to the old companies, and passed under the consolidation acts to the new company, and in either case such title was represented by parties before the court. So that in any order to be taken all necessary parties were before the court below.

That court having possession of the property, works, rights and franchises of the company, will have no difficulty in conveying the mere legal title to the purchaser whenever it becomes necessary and proper.

Upon the whole case the court is of opinion that there is no error in the decree appealed from, and that the same so far as it affects the questions presented by the record and petition for appeal before us must be affirmed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the several decrees of the said circuit court, appealed from by the appellant, F. E. Gibert, as to which the decree of this court is now rendered. It is therefore decreed and ordered that the said several decrees, except so far as hereinafterwards mentioned, be in all respects affirmed; and that the appellees recover against the appellant their costs

616 by them *expended in the defence of the appeal and supersedeas here. But the court expressly reserves for future decision so much of the appellant's thirteenth assignment of error as applies to the decree of said circuit court for the payment of sundry executions therein named. And this court now expressing no opinion as to the question of compound interest raised on the appeal, leaves that question open to the court below when it comes to distribute the fund after the sale among the parties entitled thereto.

And it is expressly further provided that the questions on sundry appeals granted to Wm. J. Robertson, J. R. Tucker, the Abbott iron company, Williamson's administrator and Reed & Morton, and the question arising on the twenty-first section of the decree of said circuit court rendered on the 13th of February, 1880, which rejected the claim of Sarah G. Smith, executrix of F. L. Smith, shall not be in any manner affected by this decree, but that all of said questions will be considered by the court at its term to be held in Richmond. All which is ordered to be certified to the said circuit court of the city of Alexandria.

By order of October 14th, 1880, the case was removed to Richmond.

Decree affirmed.

617 *Smith's Ex'x v. Washington City, Virginia Midland and Great Southern Railroad Company.*

[1 Am. & Eng. R. Cas. 493.]

November Term, 1880, Richmond.

Absent *Moncure, P.*

1. Mortgages—Limitation of Action.—In

the case of a claim secured by a mortgage although the remedy by an action at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment.

2. Trustees—Compensation—Preferred

Claim.—A trust deed by a railroad company provides that upon a sale of the trust property by the trustees out of the proceeds of sale, after satisfying the costs and expenses of sale and of this trust, the trustee shall pay to the holders of the bonds secured thereby the amount so held by them. If the trustee has performed services in executing the bonds, &c., for which he is entitled to compensation, he is entitled to be paid for these services in preference to the bondholders secured by the deed.

This is a branch of the case of *Graham v. The Washington City, Virginia Midland and Great Southern Railroad Company*, for the nature of which case see the opinion of Christian, J., in *Gibert v. Washington City, Virginia Midland and Great Southern Railroad Company*, supra, 586.

This was a petition filed by Francis L. Smith's executrix in a cause depending

618 in the circuit court of *the city of Alexandria in the name of John C. Graham, who sues for himself and others, against the Washington City, Virginia Midland and Great Southern Railroad Company, asking the court to decree her compensation for services rendered to the company by the said Francis L. Smith in his lifetime. The circuit court refused to allow the claim, on the ground that it was barred by the statute of limitations; and the petitioner obtained an appeal to this court. The case is stated by Judge Burks in his opinion.

Ould & Carrington, for the appellant.

J. A. Jones, William H. Payne, C. M. Blackford and H. R. Garden, for the appellees.

*NOTE.—This and the two following cases are branches of the previous case of *Gibert v. Washington City, Virginia Midland and Great Southern Railroad Company*; and although they were decided at subsequent terms of the court it is thought best to bring them together.

†**Mortgages—Limitation of Action.**—See *Coles v. Withers*, 33 Gratt. 186 and note; *Wolf v. Violet's Adm'r*, 78 Va. 57; *Paxton v. Rich*, 85 Va. 378. In *Camden v. Alkire*, 24 W. Va. 680, the court said: "Though the debt be barred the lien may be enforced. The fact that a debt secured by a mortgage is barred by the statute of limitations does not as a general rule extinguish the mortgage security or prevent the enforcement of it by suit. *Smith v. Washington City, &c.*, 33 Gratt. 617; *Hanna v. Wilson*, 3 Gratt. 243." See also *Chris v. Chris*, 28 W. Va. 39; *Ross v. Norvell*, 1 Wash. 14; *Turk v. Skiles*, 45 W. Va. 89.

BURKS, J., delivered the opinion of the court.

Mrs. Sarah G. Smith, as executrix of her late husband Francis L. Smith, one of the trustees in the fourth mortgage or deed of trust of the Orange and Alexandria railroad company, filed her petition in this cause in the court below, alleging that a large number of bonds were issued under said mortgage, all of which were signed by the said F. L. Smith as such trustee, which occupied and consumed a large portion of time, and that he discharged other duties and responsibilities as such trustee; that it is usual and customary to pay trustees under railroad mortgages for similar services: that nothing was ever paid to the petitioner, or to the said Francis L. Smith, for his said services as trustee, although, as alleged, he was entitled to have received large sums of money therefor. The prayer is for an enquiry as to the amount the said F. L. Smith was entitled to and should have received for his said services as trustee,

and for an order directing the payment
619 *of the amount to the petitioner by the receiver out of the accruing profits and rents of the property under his charge.

The commissioner, to whom the petition was referred, reported in favor of allowing the claim, and fixed the amount at \$1,560.

To this allowance, the Baltimore and Ohio railroad company, and other bondholders, filed three exceptions:

"1. Because the said claim is barred by the act of limitations.

"2. Because it is not customary to pay for such services in this State, and no other of the trustees under any of the mortgages covering said road has made any claim for similar compensation, or has ever been paid any.

"3. Said claim, even if allowed, is not a lien upon the corpus of said road or its revenues in the hands of the receiver."

The circuit court was of opinion that the claim of the petitioner was barred by the act of limitations, and therefore sustained the first of the exceptions; and, without passing upon the others, dismissed the petition.

The exceptions, in the form in which they were taken, virtually concede that the services were rendered as alleged, and assuming that Mr. Smith had a valid claim therefor upon the company, the question is, without reference to the amount, whether the claim is barred by the act of limitations.

We are decidedly of opinion, that it is not barred. The claim is for services as trustee under the mortgage or deed of trust, is a part of the expenses of the trust, and is as effectually secured by the deed as the loan evidenced by the bonds provided for. In the event of

sale by the trustees for default, it is
620 expressly provided, *that "out of the proceeds of sale, the said trustees, or the survivors or survivor of them, shall, after satisfying the costs and expenses of sale and of this trust, pay to the holders of said bonds the amount so held by them," &c.

It may be, that the remedy at law by personal action against the company is barred:

but, if so, it by no means follows, that the specific lien created by the deed of trust is therefore extinguished, and the equitable remedy for its enforcement by foreclosure taken away. The generally received doctrine is, that the statute bars the remedy, but does not extinguish the debt; and if the debt be secured by mortgage, though an action at law for its recovery be barred, the lien of the mortgage continues, and is not affected by any lapse of time short of the period sufficient to raise the presumption of payment. The same doctrine applies to the lien of a vendor of real estate retaining the title as a security for the purchase money. This court so decided in *Hanna v. Wilson*, 3 Gratt. 242. And in the recent case of *Coles v. Withers*, supra 186, Judge Staples points out the distinction between the mere personal obligation of the debtor is not the security furnished by a reserved lien or mortgage; and it clearly results from the principles laid down in that case, that there may be a loss of remedy on the personal contract by lapse of time and yet the security provided by the mortgage not be impaired.

The law is thus stated by Warner, J., in delivering the opinion of the supreme court of Georgia in *Elkin v. Edwards*, 8 Geo. R. 325-326: "When a mortgage has been taken to secure the payment of a promissory note [it would be the same if the promise was not in writing], and the remedy on the note is barred by the statute of limitations, is the remedy on the mortgage also barred? We

think not, for the reason that the
621 *creditor stipulated, by contract, for two remedies against his debtor, to enforce the collection of his demand. One remedy was by suit on the note, and having obtained judgment for the amount of the note, such judgment would bind all the property of the defendant. The other remedy was upon the mortgage by petition and foreclosure, in the manner pointed out by the statute. By this latter remedy, the creditor can sell the mortgaged property in satisfaction of his debts. Although the remedy on the note may be barred, after the expiration of six years, yet the debt is not extinguished."

To the same effect are the authorities generally. See *Thayer v. Mann*, 19 Pick. R. 535; *Pratt v. Huggins*, 29 Barb. R. 277; *Borst v. Corey*, 15 N. Y. R. 505-510; *Belknap v. Gleason*, 11 Conn. R. 160; *Miller v. Trustees of Jefferson College*, 5 Smedes & Marshall R. 651; *Trotter v. Erwin*, 27 Miss. R. 772; *Nevitt v. Bacon & als.*, 32 Id. 212; *Joy v. Adams*, 26 Maine R. 330; *Wiswell v. Baxter*, 20 Wisc. R. 713; *Cookes v. Culbertson*, 9 Nev. R. 199; *Angell on Limitations* 73-74; 3 *Parsons on Contracts* 99-100.

The second and third exceptions were not passed upon by the circuit court. The former presents a question of fact, which may be varied by further enquiry and additional evidence, if furnished, and therefore we do not deem it proper to express any opinion upon it. But as the latter raises merely the question of the proper construction of the deed, we do not regard it as out of place to say, that in our opinion, the petitioners claim, if

decided to be established, is payable according to the terms of the deed out of the proceeds of sale of the mortgaged subject, and has precedence over the bond debts secured by said deed. But while it is accorded this priority, the security is subordinate to 622 the three prior mortgages *on the same subject, and they must be satisfied before any of the proceeds of sale can be applied to this claim. If, on the sale of the subject, after satisfying the prior mortgages, any of the proceeds remain for the bondholders secured by the fourth mortgage, the petitioner's claim, if established, will be payable out of such proceeds before any portion thereof shall be applied to the secured debts of said last named bondholders.

For the reasons stated, the decree of the circuit court, so far as it relates to the appellant's claim, will be reversed, and the cause will be remanded for further proceedings as soon as the other appeals from the said decree now pending in this court have been disposed of.

The decree was as follows:

The court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, without deciding whether or not the claim of the appellant as set forth in her petition filed in this cause in the said circuit court has been established by the proofs, (the said circuit court not having passed on that question in the said decree), is of opinion that the said claim, if the same shall be decided to be established, is not barred by the act of limitations, and is secured by the fourth mortgage or deed of trust in the proceedings mentioned, to be paid out of the proceeds of the sale of the mortgaged subject, and has precedence over the bond debts secured by said deed; but, while it is accorded this priority, the security is subordinate to the three prior mortgages or deeds of trust, and they must be satisfied before any of the proceeds of sale shall be applied to said claim; and, if on the sale of the subject, any of the proceeds, after satisfying the prior mortgages or deeds of trust, remain for the bondholders secured by the fourth mortgage or

623 *deed of trust, the said claim of the appellant, if established, should be paid out of said proceeds before any portion thereof shall be applied to the secured debts of the said last-mentioned bondholders.

And the court is further of opinion, that so much of said decree as relates to the appellant's claim, to-wit, paragraph "XXI" of said decree, is erroneous; therefore it is decreed and ordered, that so much of the said decree as is hereinbefore declared to be erroneous, to-wit, paragraph twenty-one aforesaid, be reversed and annulled, and that the appellant recover her costs by her expended in the prosecution of the appeal aforesaid here, to be paid out of any funds in this cause under the control of the said circuit court. And this court now proceeding to render such decree as the said circuit court ought to have rendered, in lieu of so much of the decree first aforesaid, as has been hereinbefore

reversed, it is further decreed and ordered, that of the exceptions filed by the Baltimore and Ohio railroad company, and other bondholders, to Commissioner Shepperd's report, so far as the same relates to the appellant's claim, the first and also the third, so far as the latter is inconsistent with the opinion of this court hereinbefore expressed, be overruled, this court not passing upon any question raised by the second of said exceptions, the said circuit court not having passed on the same; and it is further decreed and ordered, that this cause be remanded to the said circuit court for further proceedings to be had therein touching the appellant's claim aforesaid, in order to final decree, in conformity with the opinion and principles hereinbefore expressed and declared.

Decree reversed.

624 *Williamson's Adm'r v. Washington City, Virginia Midland and Great Southern Railroad Company.

The Abbott Iron Company v. Same.

[1 Am. & Eng. R. Cas. 493.]

January Term, 1881, Richmond.

1. **Railroads—Insolvency—Receivers—Preferential Claims.**—Where a railroad has been taken possession of by a court of equity, and a receiver to manage the road has been appointed, if at the time the receiver was appointed the railroad company was indebted for services rendered or materials furnished them, these creditors are entitled to be paid out of the net revenues of the road in preference to the mortgage bondholders; and if said net revenues have been applied to pay interest to these bondholders, or to the repair, improvement, or the extending of the road, upon a sale of the road, the proceeds of the sale of the road to the extent of the said net revenues are to be applied to the payment of these creditors.
2. **Same—Same—Same—Same.**—For the principles which will guide a court of equity which has taken possession of a railroad and appointed a receiver, in adjusting and enforcing the rights of all the creditors and parties interested, of and in the railroad company, see the opinion of *Staples, J.*, and the cases of *Fosdick v. Schall* and *Hale v. Frost*, 9 Otto 235, 389.

This is a branch of the case of *Graham v. The Washington City, Virginia Midland and Great Southern Railroad Company*. And the nature of the case is stated by Judge Christian in his opinion delivered in the case of *Gibert v. The Washington City, Virginia Midland and Great Southern Railroad Company*, supra, 586.

The appellants in this case filed their

*Distinguished in *Addison et al. v. Lewis et al.*, 75 Va. 701.

Railroads—Mortgages—Rights of Mortgagee to Profits.—See *Gibert v. W. C., etc., R. Co.*, 33 Gratt. 586 and note; 1 Min. Inst. (4th Ed.) 602, 603, 604.

Liens—Priority.—See *Gibert v. W. C., etc., R. Co.*, 33 Gratt. 586 and note; *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 1.

several petitions in the case of *Graham v. The Washington City, Virginia Midland and Great Southern Railroad Company*, pending in the circuit court of the city of Alexandria, claiming that they were creditors of the company, on *account of supplies of material furnished the company before the appointment of a receiver. It appears that the claim of Williamson was for cross-ties and lumber for bridges furnished; and that of the Abbott Iron Company was for iron rails furnished, all of which cross-ties, lumber and iron rails had been furnished in the years 1874 and 1875.

Upon the first hearing of these and similar cases on the 25th of February, 1878, the circuit court held that the claimants were only creditors at large, whose claims were subject to the prior liens of the bondholders secured by the deeds of trust. And upon petitions for a rehearing of the decree, the court by its decree of the 13th of February, 1880, held that the portion of the net profits of the road received by such claimants, was fully equal to their share of such profits, and dismissed the petitions in these cases. And the petitioners thereupon applied to this court for appeals; which were allowed. The facts are sufficiently stated by Judge Staples in his opinion.

J. G. Field, John W. Johnson, F. P. Clark, and W. T. Clark, for the appellants.

J. A. Jones, W. H. Payne, G. W. Blackford, F. Smith and H. R. Garder, for the appellees.

STAPLES, J., delivered the opinion of the court.

The original bill in this case was filed in June, 1876, in the circuit court of Alexandria, by John G. Graham, on behalf of himself and other creditors, against The Washington City, Virginia Midland and Great Southern Railroad Company. After setting out the several deeds of trust constituting liens on the road, the bill charges the insolvency of the company. It alleges that the *current net revenues of the road are insufficient to satisfy the annual interest upon its indebtedness. And it asks that a receiver be appointed by the court to take charge of the property, to collect its rents, tolls, income, and profits; that an account of the assets be taken, a sale of the property be ordered, and a proper distribution of the proceeds be made, and for general relief.

On the 13th of July, 1876, an order was entered in the cause conformably to the prayer of the bill, enjoining the company from further operating the road, and appointing John S. Barbour receiver. Other orders were entered from time to time, but they need not be specially mentioned here, as they have no material bearing upon the matters in controversy.

In the progress of the cause one of the appellants (The Abbott Iron Company) filed its petition asking to be paid a balance of about \$13,000 due that company for iron rails furnished the railroad company in May and

July, 1875, which rails were in use at the time of the appointment of the receiver.

The reason assigned by the officers of the company for the failure to pay this claim, was that after paying for labor and material to operate the road, they were compelled to reserve its revenues to pay past due interest on the company's mortgage debts.

The other appellants also filed petitions asking to be paid for lumber furnished, and for services rendered as employees of the company prior to the appointment of receiver. All the claims thus asserted against the company for material and supplies furnished, and for salaries and wages of employees, amount to about \$244,000, exclusive of interest.

Upon this state of facts the question arises whether these claims, not having been paid by the company out of the current revenues of the road, as they ought *to have been paid, are now entitled to be paid from the net revenues in the hands of the receiver in preference to the debts due the mortgage creditors.

The appellees' contention (to state the proposition in general terms) is that when the mortgagee takes possession of the mortgaged estate, he is entitled, as incident thereto, to the rents and profits, to be applied in satisfaction of his debt; that by the appointment of a receiver the court takes possession for him; that the order of appointment is in the nature of an equitable execution for his benefit; and the appellants being merely creditors at large, without a lien upon the earnings of the road in the hands of a receiver, cannot legally claim they shall be applied to the payment of unsecured debts.

On the other hand, it is insisted for the appellants, that the common law doctrines relating to ordinary mortgages of real estate cannot be looked to for analogies and precedents to guide the courts in the interpretation and effect to be given to mortgages of railroad property; that the latter are comparatively of modern origin and development, and the jurisdiction of the equity courts in the appointment of receivers in such cases must be exercised with reference to the rights not only of the mortgage creditors, but of the other creditors having equal or superior equities.

In illustration of this point, it is said that in the case of an ordinary mortgage, the creditor, as a general rule, does not so much rely on the rents and profits as upon the corpus of the estate; that repairs and improvements are not essential to his security, they are not invited by him, and he cannot be held to have authorized them by his silence or his acquiescence.

With respect to a railroad mortgage the case is entirely different. If the mortgage debt is ever paid it must be from the earnings of the road. If there is *a foreclosure and sale and the road is purchased by the mortgage creditor, as is usually done, his reliance is at last upon the tolls and earnings. That constant repairs, replacements, and additional equipments are necessary, which must first be paid for before

the mortgage creditor is entitled to anything; and in taking the mortgage he impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income; and if not so paid before the appointment of a receiver, they ought to be paid within reasonable limits from the net income of the road after such appointment. To sustain these positions the counsel rely upon some recent decisions of the courts, especially the cases of *Fosdick v. Schall*, 9 Otto 235, and *Hale v. Frost*, reported in the same volume, as laying down a different rule with respect to railroad mortgages, and as fully sustaining the appellants' pretensions. These decisions, it is claimed, ought to be regarded as binding authority because they were made after a general invitation to the bar of that court interested in like cases to present briefs on the subject; and after a most patient hearing and the most searching and able arguments from the best legal minds of the country, the court arrived at unanimous conclusion on the subject. Opinion of Hughes, J., in *Atkins & Co. v. Petersburg Railroad Company*, 3 Hughes' R. 313.

In the first-named case, *Fosdick v. Schall*, Chief-Justice Waite, speaking for the whole court, lays down the following proposition:

"When a court of chancery is asked by railroad mortgagees to appoint a receiver pending proceedings for foreclosure, the court in the exercise of a sound discretion may as a condition of issuing the necessary order impose such terms in reference to the payment

from the income during the receivership of outstanding *debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, as may under the circumstances of the particular case appear to be reasonable. If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of the cause, if required in the due administration of justice and the enforcement of the equities of the respective parties.

"When the current earnings of a railroad, which ought in equity to have been employed to pay current debts contracted before the receiver's appointment for labor, supplies, and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has been thus improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors.

"This doctrine of restoration of the fund rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road, but upon the idea that the officers of the company are in a sense trustees of these earnings, for the benefit of the different claims of creditors, and if they gave to one class of creditors that which properly belongs to another, the court may, upon an adjustment of accounts, so use the

income in its hands as to restore, if practicable, the parties to their original rights."

These principles, as applied to railroad mortgages, thus laid down by the supreme court of the United States, appear to have commended themselves generally to the courts and the profession throughout the country.

630 *It will be observed that in the opinion of the supreme court the right of the supply and labor creditor to payment from the funds of the receivership is not limited, as some have supposed, to a restoration of the amount paid to mortgage creditors in the way of interest; but whenever it appears that additional equipments have been provided for the road, and permanent improvements made, from the earnings in the hands of the company, leaving the supply and labor debts unpaid, it is in the power of the court to use the income of the receivership in paying such debts, and thus restore what has been improperly diverted. So that a diversion from the labor and supply creditor may occur as well in paying for equipments and improvements as in paying the mortgage creditors; and this upon the obvious ground that without supplies and labor the business of the road cannot be carried on, and the mortgage creditor in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be first paid from the current receipts.

If any reasonable doubt could be entertained of the extent and meaning of the decision in *Fosdick v. Schall*, it is set at rest by the subsequent case of *Hale v. Frost*, decided by the same court a short time afterwards; reported also in 9 Otto 389. In that case the court unanimously affirmed the following principles as governing in these cases: The net earnings of the road while in the possession of the court and operated by its receiver are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such shall be found to exist; and, further, that the petitioners' claims in this case have superior equities to those of the mortgagees. Let us see what was the character of the debts thus allowed in preference to the mortgage liens. The claim of

631 the *car-spring manufacturing company was for car-springs and spirals sold the railroad company in March and April before the receiver was appointed. The claim of Hall, Ayer & Co. was for supplies to the machinery department and for material for construction purposes furnished two years or more before the appointment of the receiver.

The supreme court of the United States rejected the claim on account of material for construction purposes. The case as reported does not show the reasons; but one of the counsel for the appellants states in his brief, it appears from the original record "that this material was used in the construction of an independent branch road, and therefore the debt did not come under the influence of the principle governing this class of cases."

It is not at all immaterial because the

supreme court directed payment of the claim for car-springs and spirals, and of the claim for supplies to the machinery department of the road to be paid from earnings in the hands of the receiver in preference to the claims of the mortgage creditors. It is not pretended there was any diversion in that case in favor of those creditors, because the company had paid no interest since the year 1873.

It seems, however, that there was a floating debt of \$1,600,000, contracted in previous years, for equipment and construction, repairs, wages, taxes, &c., to which the net earnings of the road, to the amount of \$550,000, had been applied by the company.

If the decision of the court proceeded upon any idea of division of the funds, it was a division for purposes of equipment, construction, and repairs, and not for payment of interest to the mortgage creditor. Let us then see what are the points of resemblance between that case and the case before us.

632 *As already stated, the claims in controversy here amount to about \$244,144, exclusive of interests, nine-tenths of which accrued in the year 1874 and 1875.

Between September 30, 1874, and the date of the receiver's appointment, the gross revenues of the company were sufficient to pay all the current expenses of operating the road, including the present claims, and to leave a net income of more than \$600,000. During the same period there was paid by the company to its mortgage or trust creditors, according to one estimate, the sum of \$412,682; according to another estimate the sum of \$317,750. Our more immediate enquiry, however, is with the year ending September 30, 1875, as during that year the claims with which we have to deal accrued.

It appears that the gross revenues for that year were \$1,033,980. How much was paid to mortgage creditors in the way of interest is not clear—according to one estimate, \$101,588; according to another, \$196,000. A large amount was also paid for what is known as the Lynchburg and Danville extension. The balance of more than \$400,000 was used by the company in paying its floating and unsecured debt.

It appears that a large portion of this debt was contracted in the purchase of equipments and in making repairs and useful improvements. President Barbour, in his annual report of the operations of the road for the year ending 30th of September, 1875, states "that considerable outlays have been made during the year in the form of repairs to the roadway, bridges, and equipments, besides several small expenditures for new work and construction required for the proper working of the road."

He further states that 1,224 tons of new iron rails and 68,753 cross-ties have been put on the track during the year. Several large bridges across the principal

633 *rivers have been rebuilt, and extensive repairs made to the small bridges on the line. The maintenance of the property in good condition has been regarded as

material to the safety of the trains and the proper working of the road, apart from the policy of preserving it from depreciation.

"The necessity of making these heavy appropriations for repairs has absorbed means to a large extent which otherwise would have been applied pro tanto in payment of the company's indebtedness." This explains why it was the labor and supply creditors were not paid. The money was expended in preserving the property from depreciation for the benefit of the mortgage creditors. I say, for their benefit, because the record shows that between the date of the appointment of the receiver and the 14th of October, 1879, there was paid them \$603,789 from the net income of the road.

This statement of facts is, I think, sufficient to show that the present case is directly within the influence of the decisions of the supreme court of the United States.

The learned counsel for the appellees have appreciated this difficulty from the beginning, and they have not hesitated to assail those decisions as opposed to well-established principles of law, and violative of the rights of mortgage creditors.

It is admitted by them that an application for the appointment of a receiver is addressed to the sound discretion of the court, but they say it is a discretion to be exercised according to well-established rules and precedents, and when a case is made out which falls within these rules the appointment follows as a matter of course; and they deny that a court of equity may at its will and pleasure deprive the mortgagee of his lien upon the net income of the road acquired by the appointment of a receiver. As the

634 principle of law *laid down in this proposition is the turning point in the case, it is to that I propose to address myself.

No well-read lawyer at this day would venture to assert that the jurisdiction of a court of equity in any case is a mere matter of grace depending upon the favor of the court, or that the court may arbitrarily impose terms upon parties according to its caprice and pleasure as the price of its interference. When we say that the remedy is "discretionary," we mean simply that it depends on equitable considerations exclusively. In this respect it is distinguishable from the remedy to enforce a legal right; as, for example, a suit to subject land to the lien of a judgment, or to recover damages at law for the breach of a contract.

In these latter instances the right is absolute, and the plaintiff, whether in one tribunal or the other, if he has kept himself within the strict rules of the law, is entitled to enforce his demand without qualification or condition. But when he invokes the extraordinary jurisdiction of a court of equity in his behalf, based purely upon equitable grounds, his application is not a matter of strict right, *ex debito justitiæ*, but rests with the sound discretion of the court whether it shall be granted, looking to all the circumstances of the particular case. The court will enquire not only whether the conduct of the plaintiff has been fair and conscientious

in every respect, but whether the proposed relief will operate hardly and oppressively upon other parties. It will look to all the facts and circumstances and all the collateral incidents with a view to determine its action; and if fully satisfied the exercise of the jurisdiction in the particular case will be unjust or oppressive, it will refuse to interfere altogether, or it will impose just and reasonable terms upon the applicant as a condition of relief. In all such cases the court possesses the power of adapting

635 its decrees to *the circumstances of the case—of adjusting cross-equities, of imposing terms, and of doing complete justice in its minutest details to all concerned. These principles apply with peculiar force to the appointment of receivers. It is an exercise of the extraordinary power of the court, based upon equitable considerations. It is often harsh and oppressive in its effects, wresting the property from the owner without a hearing and before a decree, and inflicting irreparable mischief. As was said by Lord Eldon with reference to a bill for specific performance, the jurisdiction is not compulsory with the court, but the subject of discretion. The question is not what the court must do, but what it may do, under the circumstances. If it may refuse the application altogether, it may, as a necessary consequence, impose terms as a condition of granting it, and it may modify those terms from time to time, as occasion may require. In *Owen v. Homan*, 4 H. L. R. 997, Lord Cranworth said: The receiver, if appointed in this case, must be appointed on the principles on which the court of chancery acts, by preserving the property pending the litigation which is to decide the rights of the litigant parties. In such cases the court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officers. No positive unvarying rule can be laid down as to whether the court will or will not interfere by this kind of interim protection of the property. It is, however, useless to multiply authorities upon this subject. They may be found in the elementary works and in the adjudged cases. See *High on Receivers*, *Kerr on Receivers*, and the cases cited. The appointment of receiver is analogous in its nature to a preliminary injunction. Its primary object is simply to take charge of the property pendente lite so that it may be forthcoming to answer the final decree

636 of the court. *It settles nothing; it determines no right; it is merely one of the modes in which the preventive justice of a court of chancery is administered. It operates as an equitable sequestration of the rents and profits to be ultimately disposed of according to the rights and priorities of those entitled, whether regular parties in the cause or only parties in interest coming before the court in a reasonable time to assert their claims. *Beverly v. Brooke*, 4 Gratt. 187.

What, then, are the rights of the parties in interest now before the court? I do not deem it necessary to go into a discussion of the principles of law relating to mortgages of

railroad property. The encumbrances involved here are not mortgages; they are ordinary deeds of trust. In some of them mere power of sale is conferred upon the trustees. Under these deeds the only remedy of the trust creditors is, of course, in a sale of the property in accordance with the terms and provisions of the deeds themselves. In the other deeds it is provided, that upon default made in the payment of principal or interest and demand made by the creditors, the trustees shall take possession of and operate the road; and after paying the necessary expenses so incurred, they are to apply the balance to the creditors secured; or the trustees may, if required, make sale of the property. Under neither of the deeds have the creditors any lien on the earnings of the road until entry and possession taken. For, according to the authorities, although the mortgage by its terms may cover the earnings, the mortgagee has no lien upon them so long as the road remains in possession of the company, nor does a lien attach even in a suit for a foreclosure and sale until a receiver is appointed. The bill filed in this case in behalf of all the creditors, and assented to by them, avers that the trustees cannot take possession under any of the deeds in consequence

637 *of the conflicting claims and liens upon the property, and the court is asked to take possession for the creditors, through the instrumentality of a receiver, and to sequester the tolls and revenues for their benefit, to the exclusion of all other creditors.

This claim of the appellees is not a matter of right on their part. It does not result from nor is it a part of their contract. To use the language of the supreme court of New York upon this identical question, "This relief it will be readily seen from the conditions necessary to its enjoyment, does not grow directly out of the relations of the parties or the stipulations contained in the mortgage, but out of equitable considerations alone. It is not, therefore, a matter of strict right, but it is addressed to the sound discretion of the court." *Syracuse City Bank v. Tallman*, 31 Barb. 201, and cases there cited.

Upon this point the language of the supreme court of the United States is very emphatic: "The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of the rule which always applies in such cases, and do equity in order to get equity."

The doctrines so laid down in *Fosdick v. Schall* are fully sustained by the cases of *Douglas v. Cline*, 12 Bush. R. 608; *Duncan v. Chesapeake and Ohio Railroad Company*, 3 Court Law Journal 579; *Clark v. The Williamsport and Elmira Railroad Company*, decided by the supreme court of Pennsylvania, an unreported case; *Poland v. The La Motte Valley Railroad Company*, decided by the supreme court of Vermont; and *Ellis*

v. Boston, Hartford and Erie Railroad Company, 107 Mass. R. 1.

638 *There are one or two cases which hold a contrary doctrine. There may be others. Certainly the overwhelming weight of authority is in harmony with the decisions of the supreme court of the United States.

An effort has been made in the argument to distinguish this case from those decided by the supreme court in one or two important particulars. It is said, for example, if in this case the current debts for labor and supplies were not paid it was because the revenues of the company were misapplied in paying the general creditors; that both the current debt fund and the mortgage debt fund were diverted, and as this was done without the knowledge and consent of the mortgage creditors they cannot be called upon to make restitution. The same argument might have been made, and probably was made, in *Hale v. Frost*. There the mortgage creditors had received nothing for nearly three years. Here they received a large amount of interest. There, as here, the gross earnings of the road were sufficient to pay all the operating expenses of the road, with a large net income besides, which was applied to a floating debt of previous years; thus diverting the funds both from the mortgage creditor and the current debt creditor. The defect in the argument of the learned counsel is in supposing that the gross earnings of the company are divided into two funds—one for the payment of the mortgage debt creditor and the other for the supply and labor creditor, whereas all the earnings constitute but one fund, to no part of which the mortgage creditor is entitled until the current debt incurred in operating the road is first paid.

But let it be conceded that there are two funds of the character indicated; with what justice can it be claimed that one of them rather than the other has been misapplied?

Why should we say that the current 639 *debt fund has been diverted rather than the mortgage debt fund? A rule of that sort once established places it in the power of the company's officers to defeat the acknowledged equity of the current debt creditor by wasting or misapplying the assets.

When the earnings of the road are diverted to pay bonded interest, to purchase equipments and to make valuable improvements, is the supply and labor creditor to be told that he is without remedy because the company has also misapplied a part of its revenues in paying its general creditor of previous years?

The reply to all such suggestions is two-fold: First. The equity of the supply and labor creditor attaches to every part of the current revenue, as well that which is paid for equipments and improvements as that paid to the general creditor. Second. The mortgage creditor being directly benefitted by the equipments and improvements upon the road, cannot complain if the court uses the net income in its hands to repay what

has been thus diverted from the supply and labor creditor.

According to *Fosdick v. Schall*, the officers of the company are in a sense the trustees of the earnings for the benefit of different classes of creditors; and if they give to one class that which properly belongs to another the court has the power to restore the parties to their original rights, and thus do what the company itself ought to do if a receiver should not be appointed.

It has been further said that to apply the equity of the current debt creditors to this case we have to trace it through the transactions of years to find out when and where the misapplication of funds was made, and upon whom the responsibility is to be fastened.

The same objection might have been urged in *Hale v. Frost*, and yet the supreme court found no difficulty in applying to that case the principles laid down in

640 **Fosdick v. Schall*. But, as a matter of fact, the difficulty is more imaginary than real. Nearly all the debts in controversy were contracted in the fiscal year terminating the 30th of September, 1875, and the diversion occurred in that year and subsequent thereto down to the time of the appointment of the receiver.

The report of the president of the company, already adverted to, and the other documentary evidence show unmistakably to what purpose and for whose benefit a large amount of the earnings were applied. This has been already explained, and need not be repeated here.

The learned counsel for the appellees, in discussing the equities of the parties litigant, tells us that the employees of the company stood by and saw without objection the revenues of the road diverted to the payment of the general creditors, and now call upon the mortgage creditors for restitution.

If it can be supposed that these employees knew anything of the condition of the company, it is difficult to see how they could prevent a diversion of the funds. They clearly could not demand the appointment of a receiver. It will not be seriously insisted that each one of them ought to have instituted his action or warrant whenever there was any delay or default in paying the wages of each accruing from time to time.

What would be the condition of a railroad company thus involved in perpetual litigation with its army of employees, with its funds under process of garnishment, and its stores and necessary supplies subject to levy and sale under interminable executions? From what source could the company obtain its labor and material absolutely essential to the successful operation of the road, when it is once understood that no man could safely trust to its power of payment? It is

641 a *matter of common notoriety that these employees are but too often delayed in receiving their hardly-earned wages because the revenues of the road are taken for the payment of more pressing demands or for the purchase of equipments and for necessary improvements. But for the labor

and supply creditor the road must stop operation, resulting in the loss of its trade and its diversion to other channels, the general deterioration of the property of the company, and lasting injury to the mortgage creditor.

If the latter, through the instrumentality of a receiver, obtains possession of a road properly appointed and equipped, yielding valuable revenues, it is due in a great measure to the class of men whose claims are the subject of controversy here. The mortgage creditor knows all these things. He certainly cannot be ignorant of the continued default in the payments of the interest due him—a fact of itself sufficient to attract his attention and excite his suspicions. And yet he leaves the company for years in the uninterrupted possession and control of the earnings of the road, and notoriously obtaining credit from third persons for supplies and labor upon the faith of these earnings. When, under such circumstances, the creditor calls upon a court of equity to intercept the revenues for his benefit, he cannot complain that debts thus contracted shall first be paid, within limits so just and reasonable as are now prescribed by the courts.

It must not be forgotten that it is not merely the mortgage creditor and the stockholder who are interested in this species of property, but the public also are concerned. The railroads constitute the grand feature of modern civilization. Their influence is everywhere felt—in an improved agriculture, in the development and progress of manufactories, and in the gathering and diffusing the blessings of a liberal and

642 enlightened commerce. They have under the law public duties to perform, the neglect of which involves a forfeiture of their chartered privileges and incalculable misfortunes to the country. The personal safety and the lives of thousands of people are daily and hourly dependent upon their proper equipment and management. It is stated in one of the briefs filed in this cause that at the commencement of the past year there were more than ten thousand miles of railway in the United States being operated under the control, more or less immediate, of the courts. The assertion might safely be hazarded that nine-tenths of these companies were at the time indebted for necessary expenses incurred in operating their roads. When we consider the magnitude of the interests and the meritorious character of the claims thus involved, it is not at all surprising that the chancery courts, in the appointment of receivers for railroad companies have modified in some measure the rules applicable to ordinary mortgages of real estate. It has been said that this is a new departure. It may be so. Such departures are constantly occurring in the changing conditions of society. More than two hundred years ago the doctrine was established in England that the admiralty jurisdiction was limited to the ebb and flood of the tide. And that doctrine was adopted and followed in the United States until the year 1851, when it was deliberately abandoned by the supreme court

of the United States, and it was then held that the admiralty and maritime jurisdiction granted to the Federal government was not limited to tide waters, but extended to all public navigable lakes and rivers where commerce is carried on between the different States. 12 How. 443. The whole law of insurance is not more than a century old, and more than half of its important principles and distinctions is of recent

643 growth and development. In the memorable language of Lord Cottenham, it is the duty of courts of equity to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances decline to administer justice and to enforce rights for which there is no remedy. *Tyler v. Salmon*, 4 Myl. & Cr. R. 137, 619, 635; *Mare v. Mulany*, 1 Myl. & Cr. R. 559; *Red. on Railroads* 477.

For these reasons I think we ought to follow the decisions of the supreme court of the United States as laid down in the cases mentioned, and for the additional reason it is most important and desirable that upon such a question as this the Federal courts and the State courts within the same territorial limits shall adopt the same rules, and administer these trusts upon the same recognized principles of equity jurisprudence.

Upon the whole case my opinion is that the claims which are the subject of this controversy ought to be paid out of the net income of the road in the hands of the receiver. If this income has been used under the instructions of the circuit court for other purposes, the proceeds of the sale of the road itself may be used pro tanto to satisfy such claims. To this no well founded objection can be urged. It is a mere restoration of what has been diverted since the receivership; and the result is precisely the same to the parties concerned. If as between the mortgage creditors themselves a portion of them have received, in the way of interest, that which they were not justly entitled to; or if expenditures have been made which ought not to have been made, it is no fault of the petitioners and the other like creditors. The existence of these was

644 known as early as November, 1876, and it was no doubt understood they would be asserted in this suit. The decree of the circuit court of Alexandria must be reversed, and the cause remanded for further proceedings in that court, in conformity with the views herein expressed.

The decree was as follows:

The court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion for reasons stated in writing and filed with the record, that the claims of the appellants for services rendered and for supplies furnished the defendant corporation previous to the appointment of the re-

ceiver, have priority over the claim of the mortgage or trust created in the proceedings mentioned, and the said circuit court erred in not so holding by its decrees of the 25th of September, 1878, and the 13th of February, 1880. Whereupon for the error aforesaid, it is decreed that so much of the said decrees as in conflict with this decree be reversed and annulled and that the appellants recover their costs incurred in the prosecution of these appeals to be paid out of the funds under the control of the said circuit court. It is further ordered and decreed that these causes be remanded to the said circuit court to be there proceeded with to a final decree in conformity with this decree and the principles laid down by this court in its opinion aforesaid.

Decree reversed.

845 *Gibert v. Washington City, Virginia Midland and Great Southern Railroad Company.

[1 Am. & Eng. R. Cas. 512.]

January Term, 1881, Richmond.

Absent Moncure, P.

1. Railroads—Receivers—Insolvency—Priority of Judgment Creditors.*

—At the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff; and there are funds derived from income and balances due from employees, in the hands of or due to the company. **Held:** The execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors.

2. Same—Same—Same—Same—Rights. — If these funds or balances have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment.

This is another branch of the case of *Graham v. The Washington City, Virginia Midland and Great Southern Railroad Company*, then pending in the circuit court of the city of Alexandria. Whilst the cause was pending in that court a number of persons who had recovered judgments and sued out executions against the company before the appointment of a receiver, came into the cause, and claimed that their executions were liens upon the funds in the hands of the company or to which the company had claim at the time of the appointment of the receiver.

By the decree in the cause made on the 25th of September, 1878, the court **846** held that the execution liens, *which existed at the time of the appointment and qualification of the receiver, attached to all funds in hand, and balances outstanding, which belong to the defendant corporation, and that such funds and balances were subject thereto; and that where

such balances and funds have been heretofore otherwise appropriated by the receiver under the orders of the court, the same should be made good out of the funds and receipts of the company which have since or may hereafter come into the hands of said receiver, to the extent to which said balances and funds were so appropriated. And the commissioner was directed to report the amount of said funds and balances, and what executions were liens thereon, and their priorities.

The commissioner made his report, showing the amount of said funds and balances at the time of the appointment of the receiver to be \$21,217.90, and he also reported the execution liens and their priorities. And the cause coming on again to be heard on the 30th of May, 1879, the report of the commissioner was confirmed, and the receiver was directed, out of the assets in his hands or to come into his hands, and on account of the said sum of \$21,217.90, to pay to the said execution creditors—naming them—each a certain sum of money. And thereupon Frederick E. Gibert, and one of the mortgage bondholders, applied for and obtained an appeal to this court.

F. L. Smith and W. W. Gordon, for the appellant.

J. Alfred Jones, William H. Payne, C. M. Blackford and H. R. Garden, for the appellees.

STAPLES, J., delivered the opinion of the court.

847 *In this case a decision was rendered at the last term of the court at Staunton, affirming the decree of the circuit court of the city of Alexandria.

One of the questions presented by the record was not, however, passed upon at that time; this court for reasons perfectly satisfactory to itself, reserving it for future consideration. That question grows out of a controversy between the mortgage creditors on the one hand and certain execution creditors on the other. These latter creditors had placed their executions in the hands of the proper officer prior to the appointment of the receiver. At that time the company had money in bank to its credit, which together with what was due to it from other sources amounted to about twenty-one thousand dollars.

The point now to be decided is to whom does this fund belong—to the mortgage or trust creditors or to the execution creditors?

The decision of this question has been to some extent foreshadowed in the opinion just delivered. The subject, however, from its importance and novelty in this State, deserves a more extended consideration.

All the deeds executed by the company upon the road, embrace also the tolls, income, and earnings derived therefrom. Some of these deeds provided that upon default made in the payment of interest, the trustees on request of the bondholders, may take possession of, and manage the road, and after paying the necessary expenses of op-

*See *Gibert v. W. C., etc., R. Co.*, 33 Gratt. 586 and note.

erating the same, pay over the proceeds to the creditors secured; or they may sell the property upon request of at least one-half the bondholders.

Notwithstanding the long continued default of the company in paying the interest accruing from time to time, the trustees never took possession of the road, and it is asserted in the bill, they were unable to do

648 so *in consequence of the conflicting claims and liens of the various trust creditors. Nor is it pretended that any demand was ever made upon the company for tolls and earnings, until the bill was filed in the present case.

Notwithstanding a few decisions to the contrary, it is now well settled that so long as the mortgagor is permitted to remain in possession by the property, he is entitled to receive and apply to his own use, the income and profits of the mortgaged estate. And this is true although the mortgage by its terms covers the rents and profits, and although the creditor is authorized to take possession upon default made in the payment of the debt. As was said by Lord Mansfield, in *Chewning v. Black*, 3 Dougl. R. 391, until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profits made. These principles apply with greater force to mortgages of railroad property, than to any other class of securities. It is universally understood that so long as the company continues in possession, it must have the unlimited use and control of the earnings of the road, for the purpose of meeting its current expenses. Such earnings are indispensable for the work of repair and replacement, the purchase of supplies, and material and equipments, and for the payment of wages and salaries due to agents and employees.

Whilst it may be the duty of the company after payment of its current expenses to apply the income to the liquidation of interest due upon its bonds, it has been properly said—This obligation of its own force, no more carries title to the particular money received, as income, to the bondholders or trustees, than does the obligation to pay a debt, in ordinary cases, carry title to the creditors of the money in the debtor's pocket. Whether we call the earnings

649 of the road *net income, or gross income, they constitute but one fund in the treasury of the company, the control and disposition of which are inconsistent with the supposed title of the trustees to any part of it.

In the case of *Gilman v. Illinois and Mississippi Telegraph Company*, 91 U. S. R. 603, this precise question arose under a deed of trust very similar in its provisions to the deeds here. Mr. Justice Swayne delivering the opinion of the court, said: "Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profits could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road, will not be questioned. The amount directed to be so applied was within the discretion of the company. The same discretion should ex-

tend to the surplus. It was for the company to decide what should be done with it. In this condition of things the whole fund belonged to the company and was subject to its control. It was therefore liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could at any moment invoke the aid of the law, or interpose themselves without it."

These doctrines thus explicitly announced by the supreme court of the United States, had been previously declared in *Galveston Railroad Company v. Cowdly*, 11 Wall. U. S. R. 459; and they have been since reaffirmed in *American Bridge Company v. Hudlebach*, 4 Otto R. 798. They are fully sustained by the current of authority elsewhere. See cases cited in *Jones on Railroad Securities*, sec. 114 to 119, inclusive, and the cases cited.

650 *It has been already stated, that in some of the deeds no provision is made for the trustees to enter and take possession of the road; but a mere power of sale is conferred upon default made in paying the mortgage debts. Under these deeds there can be no pretence of any claims by the trust creditors to any part of the earnings so long as the company is permitted to remain in possession. The power of sale only contemplates an appropriation of the proceeds of sale of the premises to the payment of the debts, but not the earnings of the road, at least until demand made by the trustees for such earnings.

For these reasons, we are of opinion that the execution creditors are entitled to the fund in controversy, and the circuit court of Alexandria did not err in so decreeing. The decree of that court upon this branch of the case must therefore be affirmed.

Decree affirmed.

651 *Triplett & als. v. Romine's Adm'r & als.

September Term, 1880, Staunton

1. *Wife's Separate Estate—Ante-Nuptial Transfer to Stepchildren in Fraud of Creditors—Validity.**—M., a widow, having property settled upon her by her former husband, purchases land, and borrows from R, money to pay for it in part. Being about to marry again she enters into a marriage contract with her intended husband T, by which she conveys all her property real and personal to a trustee, in trust for the separate use of herself and T, and the children of T by a former marriage; the money she borrowed to pay for the land still being due and unpaid. **Held:** The land is liable to pay the debt due to R as against the children.

2. *Same—Same—Creditor's Bill—Parties.*—R files his bill against T and his wife M, to subject the land to the payment of his debt. They answer.

**Ante-Nuptial Contracts—Marriage as Consideration.*—See 2 Min. Inst. (4th Ed.) 684, 685, 686, 697.

†*Equitable Jurisdiction and Relief—Specific Performance.*—In *Halsey v. Peter*

an account is ordered and taken fixing the amount of R's debt, to some items of which T excepts. After the death of M and eight years after the suit was brought, the children of T file their petition in the cause setting out their claim under the deed, and asking to be made parties in the cause. R's administrator answers the petition, and the court decrees against them. **HOLD:** They should have been made parties; but as their case was fully stated and investigated upon their petition and the answer of R's administrator, and after the delay they would not be allowed to disturb the report of the commissioner, the appellate court will not reverse the decree; they may be made parties, if they desire it, when the cause goes back.

This was a suit in equity in the circuit court of Warren county brought in February, 1866, by Addison Romine in his lifetime, and on his death revived in the name of his administrator William H. Brown, against William H. Triplett and Mahala his wife and another, to subject certain real estate **652** and other property the *separate property of Mahala Triplett, to satisfy debts due from said Mahala to the plaintiff.

It appears that Mrs. Triplett, before her marriage, was the owner of property in her own right, settled upon her for her separate use by a former husband, and that she purchased two small tracts of land, for which she executed her bonds for the purchase money, and that the plaintiff Romine, who was her brother, lent her several sums of money to enable her to pay for the land. And by his bill he sought to subject this land as her separate estate to the payment of his debt. And in July, 1866, he had a lis pendens of the suit recorded in the clerk's office of the county court of Warren.

At the March term, 1866, Triplett and wife answered the bill. The facts as to the purchase of the land, as stated in the bill, is not denied, and a part of plaintiffs' debt is admitted, and some credits are claimed. And in conclusion they say the plaintiffs' bill is radically defective in substance and form, and that he is not entitled to any decree. And at this term there was an order for an account of plaintiffs' claim, but it was not taken.

At the March term, 1868, of the court the death of Mahala Triplett was suggested, and her estate was committed to the sheriff of Warren county. And at the March term, 1872, there was another order for an account of plaintiffs' claim against Mrs. Triplett's estate. And on the 7th of December, 1872, the commissioner returned his report fixing the amount due the plaintiff of principal

and interest up to January, 1873, at \$2,644.50. To this report the defendant Triplett filed exceptions, to a few items of charge and the failure to allow some credits.

At the February term, 1874, Elizabeth Triplett and others applied for leave **653** to file their petition in the *cause, which was opposed by the administrator of Romine; but the objection was overruled, and the petition was allowed to be filed.

In their petition they state that Mahala Ashby and William H. Triplett were married in May, 1865, in the county of Warren: That in contemplation of said marriage, and in consideration thereof, they on the 16th of May, 1865, entered into a marriage contract, by which the said Mahala Ashby conveyed (among other things) two tracts of land to a trustee for the sole use and separate benefit and use of the said Mahala and William H. Triplett and his children by a former wife, namely—setting out the names of the petitioners. And they filed the deed with their petition. They state that on the 27th of May, 1865, the said deed was proved as to Mahala Ashby, by the subscribing witnesses thereto, before the then clerk of the county court of Warren, in the clerk's office thereof, and was at the same time acknowledged by the said William H. Triplett, and was left in the possession of the clerk to be recorded, but the clerk through some inadvertence omitted to endorse upon the deed that it had been proved as to Mahala Ashby by the subscribing witnesses; and his term of office expired without his having made any such endorsement. It was again proved by the witnesses and admitted to record on the 26th of March, 1867. They claim that being jointly with their father the owners of the real estate by virtue of said deed sought to be subjected by the plaintiff to the payment of his claims, they do not admit its liability to said debt, or if it be liable to it or any part of it, still petitioners are deeply interested therein, and ought to be parties to the suit; and this they pray may be done; that Brown the administrator may be summoned to answer their petition; and that they may have all proper relief.

654 *The administrator Brown, was ordered to be summoned to answer the petition, and filed his answer. He refers to the time this suit had been pending, the answer of Triplett and wife, which makes no allusion to the deed, and no mention of it had been made until the filing of the petition. He admits the subscribing witnesses to the deed were at the clerk's office and made the oath mentioned in the clerk's certificate of that date.

He further says that the right of the petitioners even as stated by themselves, is not supported by any valuable consideration. They are volunteers according to their own showing; and no conveyance which Mrs. Ashby might have made in their favor can relieve her property from liability for a debt contracted by her with A. Romine long before said writing was executed, and which is yet owing and unpaid. And he insisted that the deed was not duly recorded until

Ex'or, 79 Va. 60, the court said: "In *Goring v. Nash*, 3 Atkyns R. 186, Lord Hardwicke is reported as saying: 'The strict measure which governs the courts in a question between persons who come to carry specific articles into execution, and purchasers, is not the rule of this court, for between families, the court have considered whether it would be attended with hardships or not, or whether a superior or inferior equity arises on the part of a person who comes for a specific performance.' And this is the ground Lord Cowper went upon in the case of *Finch v. Lord Winchelsea*, 1 P. Wms. 277. See *Triplett v. Romine*, 33 Gratt. 657; 2 Min. Inst. (3d Ed.) 684."

after Romine had brought his suit and docketed his *lis pendens*. He objects to being delayed in order to make the petitioner parties, and hopes that the matter brought forward in the petition will be determined thereon.

The cause came on to be heard on the 17th of October, 1878, when the court held that the marriage contract between Mahala Ashby and William H. Triplett, was not admitted to record until the institution of this suit, and the record of the *lis pendens*, and that it was therefore void as to the debts due Romine from said Mahala Ashby. And correcting the account stated by the commissioner in some small particulars, decreed that Romine should recover the sum of \$2,704.42 with interest on \$1,007.71, part thereof from October 1, 1878, till paid, and costs. And if it was not paid before the 1st of March, 1879, commissioners named were directed to sell the land, &c. And thereupon

Elizabeth Triplett and the other petitioner applied to *a judge of this court for an appeal and supersedeas; which was awarded.

Giles Cook and J. Y. Menifee, for the appellants.

R. Parker and McCormick, for the appellees.

BURKS, J., delivered the opinion of the court.

It is essential to the success of the appellants in this cause, that they shall show themselves to be purchasers for value of the land in controversy, or of some estate, or interest in it. They do not pretend that they ever paid or contracted to pay any money or other thing of value for it. It was the separate property of Mrs. Mahala Ashby, and she, in contemplation of marriage with the appellee William H. Triplett, settled it to the use of herself and her intended husband and his children by a former marriage. The appellant Granville Triplett and the female appellants are these children, and their claim is, that the marriage contemplated having taken place is a sufficient consideration to support the settlement to their use against a creditor of Mrs. Ashby, whose debt existed at and before the date of the settlement and though not a specific lien was then chargeable in equity upon the property settled.

That marriage is a consideration deemed valuable in law is an elementary principle, and, in ante-nuptial settlements untainted with fraud, that this consideration is sufficient to sustain against existing creditors of the settler, limitations of estates to the husband and wife and issue of the marriage, is well settled. "In marriage contracts," says Lord Cottenham in *Hill v. Gomme*, 5 Myl. & Cr. 254, "the children of the marriage are not only objects of, but quasi parties
656 to it"; *and it has been held by this court, that the consideration extends to children born out of wedlock, who are legitimated by the subsequent marriage of the parents and recognition. *Herring &*

als. v. Wickham & wife & als., 29 Gratt. 628; *Coutts & als. v. Greenhow*, 2 Munf. 363.

Whether the consideration extends to estates limited to collateral relatives is a question upon which there have been and still seem to be much diversity of opinion and conflict in the decisions. Adjudged cases both ways are numerous. We do not propose to review them. Many of them are referred to in the elementary works which we have examined and the principles introduced by the authors are there given. See 2 Lomax Dig. 335, 336 (side pages); Fry on Specific Performance §§ 108, 109, 110, 111. Kerr on Fraud and Mistake 204, 232; Sugden V. & P. (8th Amer. ed.) ch. 22, § 1, 46 (top), 716 (bottom), note 1; Schonerl Dom. Rel. 264; Bump. on Fraud. Convey. (2d ed.), 292, 293; and cases cited by these authors.

In reference to the cases generally, it is to be observed that while some of them are adjudications upon the relative rights and interests of creditors and purchasers on the one side and parties claiming under settlements on the other, yet by far the greater number seem to be cases of suits for the specific performance of articles among claimants under the articles, in which the rights of creditors were not drawn in question.

Speaking of the last-named class more particularly, Mr. Justice Nelson, in *Neves v. Scott & als.*, 9 How. (U. S. R.) 209, after adverting to the absence of uniformity and consistency in the decisions, says, "The result of all the cases, I think, will show, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the
657 *face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the consideration upon which it is founded; the consideration will extend through all the limitations for the benefit of the remotest persons provided for consistent with the law."

Without meaning to express any opinion as to the rule thus laid down when applied to suits among family relations for the specific execution of marriage articles, yet, if admitted to be correct, there is a distinction to be taken, we think, when the rights of creditors are involved. This distinction was noticed and remarked upon by Lord Hardwicke in the leading case of *Goring v. Nash & als.*, 3 Atkyns 136, 188, (side pages). "The strict measure," says the lord chancellor, "which governs the court in a question between persons who come to carry articles into execution and purchasers, is not the rule of this court; for, between families, the court have considered, whether it would be attended with hardships or not, or whether a superior or inferior equity arises on the part of the person who comes for a specific performance. and this was the ground Lord Cowper went

upon in the case of *Finch versus Lord Winchelsea*, 1 P. Wms. 277. Lord Harcourt had decreed the agreement between the Countess of Winchelsea, and the late Earl; and Lord Harcourt's decree was affirmed in the House of Lords. The Earl of Winchelsea, after the agreement, confessed a judgment for just debts. When Lord Cowper had the seals a second time, another bill was brought by judgment creditors, to be satisfied out of the estate.

He decreed for the judgment creditors; for, though it was ⁶⁵⁸ a sufficient agreement to bind the several branches of the family, yet not adequate to bind creditors. I mention this to show that the distinction has been already taken, and that it is one consideration how far the court will support agreements of this kind against relations in a family, and against purchasers and creditors." See *Reeves v. Reeves*, 9 Mad. R. 122, 132, (side pages); *Johnson v. Legard*, 1 Turner & Russell 281, 293; *Pulvertoft v. Pulvertoft*, 18 Ves. R. 84, 89; *Davenport v. Bishop*, 19 English Ch. Rep. (1 Phillips) 697, 704; *Osgood v. Strode*, 2 Peere Williams 245, 255; *Staplehill and wife v. Bully*, *Finch's Precedents* 224; *Ball v. Burnford*, Id. 113; 2 Spence's Eq. 290-293.

The decision of Vice-Chancellor Malins made in 1867 in *Smith v. Cherrill*, L. R. 4 Eq. 389, would seem to be sound and satisfactory. A lady (Frances Anne Smith) being indebted to the plaintiff at the time of marriage, settled all her real and personal property (with the exception of jewels and furniture exceeding in value the amount of her debt), upon failure of issue of the marriage, in favor of certain collateral relatives, including a niece whom she had adopted as her daughter. The lady survived her husband, and died without issue, leaving no assets. The question was, whether the settlement was valid as against creditors of the settler under 13 Eliz., ch 5. Held, that the settlement, so far as it was made in favor of collaterals, was voluntary, and should be set aside to the extent of the plaintiff's debt.

In delivering judgment, the vice-chancellor said—"I have always understood, and still understand, the law as it was settled by the case of *Johnson v. Legard*, 6 M. & S. 60, and by the same case as decided by Lord Eldon (1 Turner & Russell, 281), and by many other cases, to be this: that when a marriage

settlement goes beyond the immediate objects of the marriage, and (as in this case) there are provisions for collateral relatives from whom no valuable consideration moves, then quoad those objects, the settlement has nothing to do with the marriage, but is to be considered as a settlement purely for the purpose of providing for those relatives. If, therefore, this settlement had been executed, only containing a provision for the collateral relatives of Frances Anne Smith, that would have been strictly voluntary, and being without consideration, absolutely void as against creditors whom it defeated and delayed. * * * * This settlement, so far as the ultimate limitations go, is not for value, but purely voluntary."

The result of the decisions of this court

thus far, is, that the consideration of marriage (merely) operates under the settlement, free from fraud, to confer on the husband and wife and issue of the marriage, and on children base born but legitimated by subsequent marriage of the parents and recognition, rights in the property limited to them paramount to those of existing creditors of the settler although embarrassed with debt. This would seem to be going quite far enough, and the manifest injustice done to creditors by the established rules drew from Judge Staples in *Herring & als. v. Wickham & als.*, supra, the remark, that "the whole subject needs the attention of the legislative department." We are now asked to go further and hold, that the consideration extends to persons who are not even collateral relatives but total strangers in blood to the settler, and that such persons are purchasers for value with rights paramount to those of pre-existing creditors. We are not at all disposed to take a single step further in that direction. The mischief and gross injustice which would result from extending the rule, as we are asked to do, is strikingly exemplified by the case in judgment.

⁶⁶⁰ *A married woman, the owner of a separate personal estate over which she had full power, having contracted for the purchase of land to be settled to her separate use, to enable her to complete the purchase, applied to her brother for aid. He advanced to her at different times, at her request, on the credit of her separate property, several sums of money of considerable amounts, for which he took her bonds, the money borrowed to be used and applied in the payment of the purchase money for the land, and the money advanced was so applied. He generously indulged her for many years—until the death of her husband and for years afterwards. She at length contracted a second marriage, and, in contemplation of such marriage and for no other consideration, conveyed the whole of her estate, including the land aforesaid, to the use of herself and her intended husband and the children of the latter by a former marriage, without making any provisions whatever for the payment of the debts due to her brother or any other debts, if any others she owed. The bill in this case was filed by the brother, twelve months after the second marriage, to recover the debts due him out of the settled estate. And even after bringing his bill, he seemed not disposed to press his claim. For, although an account of his debts was ordered in the early stages of the suit, the order was not executed until sometime after his sister's death.

Now, under these circumstances, who has the better right in respect to the land in question—the children of the husband by a former marriage who paid nothing for it, or the indulgent brother whose debt unpaid was for money lent to his sister to pay for the land and which confessedly was used by her for that purpose? We do not hesitate to say, that these children must be considered and treated as volunteers, at least as

⁶⁶¹ respects *the creditor Romine, and

that their interest, whatever it be, under the deed of settlement, which is a very obscure and ambiguous instrument, is subordinate to the superior right of the creditor to resort to the land for the payment of his debt. Code of 1873, ch. 114, § 2.

This conclusion upon the view taken, makes is unnecessary to consider the doctrine of lis pendens on which the decree of the learned judge in the court below seems to have been founded. If the decree is right, as we think it is, in subjecting the land to the complainant's debt, it is not material here what reasons the judge below gave for it.

One question remains—whether the circuit court erred in not making the appellants, on their petition, parties to the suit. We think they ought to have been made parties. In any view of the case, they had an interest in the subject-matter in controversy. Although the deed may have been void as to the creditor (Romine) either, as the judge below thought, because it was not recorded until after the commencement of the suit and the docketing of the lis pendens, or, as this court thinks, without regard to the lis pendens, because the appellants are not purchasers for value but volunteers, still the deed is good between the parties, and the appellants have an interest in the property conveyed after the creditor complaining has been satisfied. But it is manifest from the record, that the appellants have not been prejudiced by not being made parties in a formal manner. They set up their claim in their petition, and Romine's administrator filed his answer to it, and upon this petition, answer, and the depositions taken, their pretensions were fully presented, investigated, and passed upon. Moreover, they never filed their petition until after the lapse of eight years from the institution of the suit, and more than

662 a year after the *commissioner had, as ordered, taken and reported the account of Romine's debt. The matters involved in that account seem to have been thoroughly sifted and investigated. The parties then defendants—Triplett (the surviving husband), Mrs. Triplett's administrator and her heirs—were represented by counsel, the same counsel, it would seem, who subsequently represented the appellants on their petition. Under these circumstances, it cannot be doubted that the report of the commissioner, with the exceptions thereto by the defendants, presented the case fairly and fully to the court for decision; and even if the petitioners had been formally made parties, they would not have been allowed, if they had asked for it, after such long delay and laches on their part, to have the commissioner's report recommitted. Besides, in their petition they do not appear to question Romine's debt, make no allusion or objection to the statement of it as presented by the commissioner's report, but the chief object seems to have been to present for decision the question of the liability of the estate for the debt as against their claim under the deed of settlement.

The fact is, the petition was never rejected by the court, but the cause was heard

upon it, together with the other papers referred to in the decree, and when the cause goes back they may yet be fully and formally made parties, if they desire it, though the step would seem to be of little practical importance if Romine's debt exceeds in amount the value of the whole land in controversy, as the commissioner's report indicates.

Upon the whole case, the court is of opinion that there is no error, to the prejudice of the appellants, in the decree appealed from, and that it should be affirmed.

Decree affirmed.

663 *Rinker & Wife v. Streit.

September Term, 1880, Staunton.

I. *Actions—Venue.**—S qualified as guardian of M in Frederick county. Her father lived in Hampshire county now in West Virginia, and he owned real estate in that county, which upon a bill filed by S was sold, and the proceeds paid over to him, and brought by him to Frederick county where he lived. M may sue S for a settlement of his account as guardian in Frederick.

II. *Guardian and Ward—Application of Principal to Ward's Support—Liability.*†

—The income of the estate of M, the ward, being insufficient for her support and education her guardian S expended the principal of the proceeds of the sale of her real and personal estate upon her, and upon the settlement of his account after the termination of his guardianship, he was still in advance to his ward. HELD:

1. The guardian was not authorized to use the principal of the ward's real estate for the support and education of his ward; and the court of equity settling his account could not render the expenditure valid by its decree.

2. Chapter 123, § 13, Code of 1873, which authorizes the chancery court in certain cases, to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction such application already made by the guardian; but the order of the court must be first made in order to authorize it.

3. The guardian may apply the principal of the ward's personal estate to her maintenance and education, in a proper case; and if the court would have authorized it upon application to the court, before it was done, the court may and will sanction it upon settlement of his accounts.

**Guardian and Ward—Liability for Assets Received in Foreign State.*—See 1 Min. Inst. (4th Ed.) 476.

†*Same—Sale of Ward's Realty.*—Not until act passed 17th March, 1873, (§ 13), was it lawful for the court to order the application of the proceeds of the ward's real estate, beyond the annual income, to his maintenance and education. And under that act such order must always precede such application. Gayle v. Hayes' Adm'r, 79 Va. 542; Whitehead v. Bradley, 87 Va. 676; Harkrader v. Bonham, 88 Va. 247; 1 Min. Inst. (4th Ed.) 472, 473, 474; 3 Min. Inst. (2nd Ed.) 119, 120. As to the application of the corpus of the ward's estate to his support and education, see Cunningham v. Cunningham, 4 Gratt. 43; Lincoln v. Stern, 23 Gratt. 816; Maguire v. Doonan, 24 W. Va. 510; Jones v. Lemon, 26 W. Va. 634; Myers v. Wade, 6 Rand. 444; Brown v. Grant, 29 W. Va. 118.

664 *This was a suit in equity in the circuit court of Frederick county, brought in January, 1876, by William F. Rinker and Mary G. his wife, who before her marriage was Mary G. Streit, against William H. Streit, who had been the guardian of the female plaintiff, for the settlement of his account as guardian.

In the year 1860, William H. Streit qualified as guardian of Mary G. Streit, then about five years old, in Frederick county, and also in 1867 in Hampshire county, where her father's property was situated. The father left several tracts of wild lands in that county, also one farm called the Jerry Mountain farm, and a house and lot in the town of Romney, and he owned a number of slaves. His personal property other than slaves, seems to have been mostly consumed in the payment of his debts. The slaves belonging to the ward ran off during the war, except one woman and her children, that the guardian had brought to Frederick, and were sold by him. The real estate was sold under a decree of the circuit court of Hampshire, made in May, 1871, in a suit brought by the guardian for the purpose, and the proceeds of the sale amounting to \$1,500 were paid over to him. The proceedings in this case are stated in the opinion of Judge Anderson.

The account was referred to a commissioner for settlement; and he made a report, which, after bringing the principal of the proceeds of the real and of the personal estate into the account, still brought the ward in debt to the guardian, on the 1st of January, 1876, in the sum of \$826.39.

The plaintiffs filed several exceptions to the report; of which the fourth was to the allowance of commissions to the guardian; and fifth, because the guardian is not charged in favor of the plaintiffs with the ward's personal estate, nor with the proceeds of the sale of the ward's land; but in-

665 stead thereof, the same are *allowed to be retained by the guardian; sixth, because of the allowance to the guardian of any debt against the ward further than was paid by the rents of lands, hire of negroes, dividends on stock, and interest on bonds and notes of the ward's estate.

The cause came on to be heard on the 1st of December, 1877, when the court was of opinion that the course of conduct of the guardian in this case in the provident care of his ward and in the faithful administration of her estate was worthy of commendation and approval; and was further of opinion that the necessities of the ward and the unproductiveness and inadequacy of her real estate, and the large advancements made for her support and education by the guardian from his private means, fully justify the application made by the guardian of the principal of the proceeds of sale of said estate, as the same came to his hands, to the proper expenditure of his ward; and the court doth approve the same. The decree was that the fifth and sixth exceptions be overruled, and the fourth exception sustained as to commissioners since 1869. And the report having been reformed in this respect, and another to a

small amount, the court decreed that the said William H. Streit do recover the sum of \$739.99, with interest from the 1st of January, 1876, until paid, to be credited as of that date with \$116.24, being the commissions allowed by the commissioner since the 1st of January, 1869, to be paid out of any property or funds of the plaintiff Mary G. Rinker that may be within the jurisdiction of this court, &c., &c. And thereupon the plaintiffs applied to this court for an appeal; which was allowed.

Dandridge & Pendleton, for the appellants.

Holmes Conrad, for the appellee.

666 *ANDERSON, J., delivered the opinion of the court.

The first question we have to consider, is as to the jurisdiction of the circuit court of Frederick county to maintain this suit. The defendant resided in the county of Frederick. He qualified there as a guardian of the female plaintiff, and has in his possession at least a part of the fund arising from the sale of her land under a decree of the circuit court of Hampshire county, in West Virginia, and is entitled under said decree, to receive the whole of it. The part he received he has in the county where he resides, and seeks to apply it in a way, which the plaintiffs contend, it is not lawful for him to do, and which is prejudicial to their rights. He is a fiduciary which the plaintiffs allege has funds in this State, and is liable to be sued here. If he were sued in West Virginia upon his bond given there, a judgment obtained against him there would be of no avail against him here. The court is of opinion upon the authority of *Tunstall & al. v. Pollard's adm'r*, 11 Leigh 1, and the subsequent decisions of this court, that the circuit court of Frederick county had jurisdiction of this suit.

The court is further of opinion that the circuit court erred in allowing disbursements to the defendant, the appellee here, out of the ward's real estate, beyond the annual income of the same. By section 8, of chapter 123, of the Code of 1873, page 929, it is enacted that no disbursement shall be allowed to any guardian, when the deed or will under which the estate is derived does not authorize it, beyond the annual income of the ward's estate, except in the cases mentioned; and in such cases, only the personal estate of the ward may be sold to satisfy expenditures over and above the income of his estate. But neither the

667 *ward personally, nor his real estate shall be liable for such disbursements. (Ibid. § 9.)

By section 13, of the same chapter of the Code, the circuit, county and corporation courts in chancery, may make any order for the custody and tuition of an infant, and the management and preservation of his estate; and when it shall be made to appear to the satisfaction of a circuit court of chancery that the proper maintenance and education, or other interests of an infant require, that the proceeds of his real estate, beyond the annual income thereof, should be ap-

plied to the use of said infant, it shall be lawful for such court to make such orders from time to time as may be necessary to secure such application; and to the extent that such proceeds may be so applied, they shall be deemed and taken to be personal estate, but no further. This provision was not engrafted into our laws until it appeared in the Session Acts of 1872-3, chapter 191. And previous thereto no sale of an infant's real estate was ever made, except under the particular provisions of the statutes, Rev. Code ch. 96, § 20, and ch. 108, §§ 16 and 23, which do not authorize the sale of an infant's real estate, or any part of it, for his maintenance and education. Judge Tucker said, in *Pierce's adm'r v. Trigg's adm'r*, 10 Leigh 419, "It is notorious, that until the passing of these statutes, no sale of an infant's real estate was ever made except under the authority of a private act of assembly. And the proceeds of a sale made under those acts, if the infant died under twenty-one years of age, was considered as real estate and passed to such persons as would have been entitled to the estate if it had not been sold. (R. C. ch. 108, § 21.) The law is the same now. Code of 1873, ch. 124, § 12.

It will be observed that by the act of 1872-3, supra, the application of the proceeds of the infant's real estate, beyond the annual **668** income, can be applied to *his maintenance and education, only upon the order of the circuit court, when it shall be made to appear to the satisfaction of the court, that the proper maintenance, education, or other interests of the infant, require it. There is no provision authorizing the court to sanction any sale which had been previously made of the infant's real estate which, if it had not been so made, the court, at the time of allowing such disbursements, would have ordered, as is made by the ninth section of the same chapter, in relation to the infant's personal estate. The sale or application of the infant's real estate to his maintenance and education, is authorized by said act only on the previous orders of the circuit court in chancery, made from time to time, as the exigencies of the case may require. There is nothing in said act, which indicates an intention of the legislature that it should be retroactive in its operation. In accordance with the settled doctrines on this subject, by repeated decisions of this court, the said act can be construed to be only prospective in its operation. And in this case, a large proportion of the expenditures made by the guardian, were made prior to the passage of said act of assembly, when there was no law in existence, which authorized under any circumstances or conditions the subjection by the courts of any part of the corpus of the infant's real estate to their payment.

The personal property of the ward in the hands of the guardian, consisted chiefly in slaves and some debts due his ward. If he had filed a bill in 1862, or 1863, or even at a later period, in the circuit court of Frederick county, for authority to sell the slaves, when he had possession of them, it could

have better been made to appear to the satisfaction of the court that it would be conducive to the interest of his ward to sell her slaves, than to sell her lands, whether **669** for her proper *maintenance and education, or for a safer and more profitable investment. He made sale of a woman and her children, and loaned a part of the proceeds of the sale on good security. Instead of lending the balance, or applying a portion of it to the payment of his ward's board and other expenses, he retained it in his own hands until it became worthless.

He exhibited his bill as guardian in the circuit court of Hampshire county, (where he had also qualified as guardian, the date does not appear,) for the sale of his ward's land in that county, and a lot in the town of Romney, except the tracts constituting the Jerry Mountain farm, the rents of which he put at ninety dollars in gold. The other lands consisting of numerous tracts which he asked might be sold, he described as wild mountain lands which were unproductive, and not likely to improve in value, the sale of which he represented was necessary for the support and education of his ward. And he prayed that after paying the debts of decedent's estate, if there were any, of which he had no knowledge, that the balance might be paid over to him for the support, maintenance, and education of his ward.

Seeming to abandon the object and design of this bill, at May rules, 1871, he filed as guardian, an amended bill, representing that it would promote the interests of his ward, and all other persons interested in the estate, to sell the Jerry Mountain farm as well as all the other lands of his ward. That said farm was deteriorating in value; and tenants could not be procured who would give it the care and attention which it should have in order to keep it in a condition to be profitably rented; and to keep it rented until his ward attains her majority, he believed it would have lost greatly, if not half, its value. He makes no allegation, or intimation **670** in his amended bill, that the sale of it, *or of any of the lands, is necessary for the maintenance and education of his ward, but evidently seeks the sale of all, with a view to a better investment for his ward. And proceeding under a similar act of West Virginia to that of ch. 124, of our Code, he prays that Mary Streit, his ward, and all those who would be her heirs or distributees if she were dead, may be made parties; that all the land of which P. B. Streit, the father of his ward, died seized, both the lands sought to be sold by the original bill, and that more particularly named in the amended bill, be sold, and the proceeds invested for the benefit of his said ward.

Upon the hearing, the court was of opinion, as expressed in its decree, "that it is for the interest of all persons interested therein, that the lands in the bill and amended bill named should be all sold, and the proceeds of sale otherwise invested, and that the rights of no persons will be violated thereby;" and decreed, that C. S. White, who was appointed

a commissioner for that purpose, should make sale of all the lands and the lot, in both bills mentioned, except such as had been previously sold. On the 9th of August, 1872, the said court, by another decree, confirmed the sale reported by the commissioner of the Jerry Mountain farm, and directed him to loan out the money—(\$1,000)—then in his hands, after paying costs, taking deeds of trust from the person or persons to whom it may be loaned, on unencumbered real estate, (which shall be worth at least double the amount intended to be secured), to secure such loan or loans, and to collect annually the interest, "and pay the same over to said guardian for the support and education of his ward."

And by a subsequent decree. C. S. White, special receiver, was required to collect as soon as possible, the fund in this suit, and to pay the same over, as well as any of said fund now in his hands, to William H.

671 *Streit as fast as collected. But before said Streit guardian shall receive any part of said fund, except the interest already directed to be paid to him, he shall execute and file with the clerk of this court, bond in the penalty of \$6,000, with two good securities who shall reside in Hampshire county, to be approved by said clerk, conditioned for the faithful application of so much of said fund as may come into his hands, for the proper management and preservation of any property or securities in which the same may be invested, and for the protection of the rights of all persons interested therein, whether such rights be vested or contingent.

This condition is in the very terms of the eighth section of chapter 124 of our Code. I have recited these proceedings more in detail, as they show with what care and vigilance the court of Hampshire was disposed to guard and protect the rights of the infant. And they show that the suit by the guardian in Hampshire, as amended, and the sale of the real estate of his ward, under the decrees of the court in that suit, were not for the maintenance and education of the ward, or to be applied to the disbursements previously made by the guardian, which the court had no power to do, but for a change of investment, for which purpose the proceeds of the sale were directed to be paid over to the guardian. And the said fund came into his hands as real estate. The conversion of an infant's real estate into money does not change its character as realty, and the proceeds of the sale retains the impress of real estate until the infant attains the age of twenty-one years. Such was the character of the fund which came into the hands of this guardian, and it was not applicable to disbursements for the maintenance and education of his ward beyond the annual income therefrom. But the interest on said

672 fund, not only on the *part he received, but also upon that part of it, if any, which has not been paid over to him—upon the whole fund which was derived from the sale of the real estate, is applicable to his disbursements, and ought to be so ap-

plied, as well as any personal estate, choses in action or possession, which have not been heretofore appropriated.

The court is of opinion for the foregoing reasons, that the court below erred in allowing the disbursements of the guardian out of the ward's land fund, beyond the interest or annual income thereon. And that for this cause the decree must be reversed.

This conclusion may operate a hardship upon the guardian, who is highly commended by the court below, and who we doubt not, is worthy of the high estimation in which he seems to be held. Upon a restatement of the account upon the principles herein declared, it may be found that his loss will not be much. But be that as it may, it is our province to declare the law as we find it, not to legislate. The court cannot depart from a general rule of law, in order to avoid individual hardship in a particular case. The laws we have been considering were made for the protection of infants, and we cannot allow a departure from them, or their infringement, to avoid individual hardship. As was said by Bronson, chief justice, "Courts of justice should take care that they are not misled by the hardship of a particular case * * * to make a precedent which would run counter to well established principles." Lord Tenderden is reported to have said, "hard cases make bad law."

The court deems it unnecessary to consider the appellant's other exceptions to the commissioner's report, or assignments of error, as it does not appear from the record that the guardian is chargeable with more of the personal estate, than is necessary for his indemnity.

673 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court of Frederick county had jurisdiction of the matters in controversy in this suit. The court is further of opinion that the real estate of the infant was not liable for the disbursements of her guardian beyond the rents and profits thereof, and when sold that the principal of the proceeds was not liable therefor, but only the interest upon the principal sum, and that the court below erred in allowing the guardian, in the settlement of his accounts, to apply any part of the principal of said proceeds to his disbursements, and that for this cause the decree aforesaid must be reversed. The court is also of opinion that the interest upon the proceeds of the sale of real estate of the said infant and the whole of her personal estate are applicable to the disbursements made by the guardian, and it appearing from the record that the whole of the personal estate, together with the rents and profits and the interest upon the proceeds of the sale of real estate, are not more than sufficient to indemnify the guardian for his disbursements, it is not deemed necessary to pass on the other exceptions to the account, or assignment of error. It is therefore

decreed and ordered that the said decree of the said circuit court be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And the cause is remanded to the circuit court of Frederick county for further proceedings to be had therein in conformity with this decree. Decree Reversed.

674 *Crigler's Committee v. Alexander's Ex'or.

September Term, 1880, Staunton.

1. Committee of Lunatic—Settlement of Account—Interest on Balance.—As a general rule the committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his account.

2. Same—Same—Commissions.—A committee of a lunatic who qualified as such in 1838, and continued to act until his death in 1875, and did not settle his accounts, is not entitled to commissions on his receipts from 1838 to 1859; and the statute of March 3, 1867, Code of 1873, ch. 128, § 9, is not retrospective in its operation, and therefore the court has no authority to allow said commissions under that act.

3. Statutes—Retrospective or Prospective—Construction.—For the principles on which a statute will be construed as prospective or retrospective, see the opinion of *Staples, J.*

This was a suit in equity in the circuit court of Clarke county, brought by the committee of Robert F. Crigler, a lunatic, against the executor of John Alexander, deceased, a former committee of said lunatic, for the settlement of the accounts of said Alexander as committee of said Crigler. Alexander was appointed a committee of said Crigler in 1838, and continued to act as such committee until his death in 1875; and never settled his accounts as such committee in all that time, though he seems to have kept an account of his receipts and disbursements. The estate of Crigler consisted of a small tract of twenty acres of land and some slaves.

The court directed a commissioner to settle the account; and when the report was returned it was *excepted to by the plaintiff for the allowance of several items of expense for the support of some of the slaves; and it was excepted to by the defendant for the failure to allow any commissions to Alexander.

The cause came on to be heard on the 16th of November, 1877, when the court overruled the exceptions of the plaintiff, and sustained the exceptions of the defendant; but limited the allowance of commissions on receipts

to the year 1839 up to 1850 inclusive, and for the years during the war, viz: from January 1, 1861, to January 1, 1866. And the report was recommended to the commissioner, with instructions to restate the account, and to be careful not to charge the said committee with compound interest, but to keep the interest and principal accounts separate and distinct.

The plaintiff afterwards presented his petition to the court for a rehearing of the decree, on the grounds of error in overruling his exception, sustaining the exception of the defendant, and giving the direction as to compound interest. And the cause coming on to be heard upon this petition on the 31st of May, 1879, the court refused to rehear the cause, and reaffirmed it in all respects. And thereupon Crigler's committee applied to a judge of this court for an appeal; which was allowed.

S. J. C. Moore, for the appellant.

Parker & McCormick, for the appellee.

STAPLES, J., delivered the opinion of the court.

In the year 1838 John Alexander qualified as committee of Robert F. Crigler, an insane person. As such committee he took possession of the estate of the lunatic, consisting of a small tract of land and a few *slaves. He continued in the discharge of the duties of his trust until his death, in January, 1875, without having, however, settled his accounts during all that time. The object of the present bill is to obtain such settlement, and a decree for what is due by the intestate. There is no controversy with respect to the funds which came into the hands of Alexander, or the manner in which his disbursements were made, with the exception of a few inconsiderable items, to be hereafter noticed. The matter of contention relates to the compensation to be allowed Alexander for his services.

The learned judge of the circuit court was of opinion that the intestate was entitled to his commissions on receipts from the year 1839 to the year 1850, inclusive, and from January, 1861, to January, 1866, inclusive. There is no difficulty with respect to the right to a commission for the last-named period—between 1861 and 1866—under the decisions of this court in *Strother v. Hall*, 23 Gratt. 652, 671, 673, and in *Moses v. Hart*, adm'r, 25 Gratt. 795, 804.

The question is, as to the commissions for the period between 1839 and 1850. It is conceded, that as the law then stood, the intestate had forfeited all claim to compensation by his failure to settle his accounts. But it is insisted, that under the act of March 3, 1867, the court is invested with a discretion in allowing such compensation for past or future services, and this discretion was properly exercised in the present instance in behalf of the estate of the intestate.

The first point to be considered is, whether the act of March 3, 1867, is retrospective in its operation; for upon that supposition only can the decree of the circuit

***Fiduciaries—Interest on Balances Due.**—See *Lovett v. Thomas*, Adm'r, 81 Va. 245; *Knight v. Watts*, 26 W. Va. 175; *Bird v. Bird*, 21 Gratt. 712; *Garrett v. Carr*, 1 Mo. 196.

†**Same—Commissions.**—See *Ward v. Funsten*, 86 Va. 359; *Davidson v. Pope*, 82 Va. 747.

‡**Statutes—Retrospective Effect—Construction.**—See *Ryan v. Comm.*, 80 Va. 385; *Robertson v. Gillenwaters*, 85 Va. 116; 1 Min. Inst. (4th Ed.) 26, 27; *State v. Mines*, 38 W. Va. 134.

court be sustained. It is hardly necessary at this late day to enter into a discussion of the principles governing the courts in determining whether a statute be or be not retrospective in its operation. Those

677 *principles are fully considered and the decisions cited in Potter's Dwarrris on Statutes 162; in Sedgwick on the Construction of Statutes 162-164; and in the cases of Town of Danville v. Pace, 25 Gratt. 1; 31 Gratt. 114.

The general principle deduced from these authorities is, "that no statute is to have a retrospect beyond the time of its commencement;" and this principle is one of such obvious convenience and justice that it must always be adhered to unless in cases where there is something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively. And although the words of the statute may be broad enough in the literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise unless a contrary intention is unequivocally expressed therein. Dwarrris' Notes, p. 162.

The Town of Danville v. Pace, was decided in strict conformity with these rules of interpretation. There the words of the statute were not only sufficiently broad, but by inevitable intendment applied to past transactions. And this view was strengthened by the fact that our statute was a literal transcript of a New York statute, which had been construed as retrospective, by the highest courts of that State. The reasonable inference was, that the legislature of this State in adopting the New York statute without change or modification, intended it should be construed in like manner as the New York statute.

We now come to the act of March 3d, 1867. It declares that any such fiduciary who shall wholly fail to lay before such commissioner a statement of receipts, for any year within six months after its expiration, shall have no compensation whatever for his services, during said year, unless allowed by the court. Acts 1866-7, p. 704.

The words unless allowed by the

678 court, *constitute the amendment. The other words are the old law re-enacted.

Now whether such a re-enactment is to be regarded as a repeal of the former statute, and the section thus amended, as an entirely new statute, or whether as intimated in Price's ex'or v. Harrison's ex'or, 31 Gratt. 114, the old law is not to be regarded as repealed, but as the law all along, and the changed portions are not to be taken as a part of the law, prior to the passage of the amendment act, the result is precisely the same. The language is, "Any such fiduciary who shall so fail." These words apply exclusively to future cases. It is impossible to give them a retrospective effect without doing violence to the language employed. Had it been the purpose to provide for past delinquencies, the phrase would have been any such fiduciary who shall have failed, or

words of like import. It has been said, however, that the loss of commissions consequent upon a failure to settle the fiduciary accounts, is in the nature of a forfeiture or penalty, against which it is not only competent for the legislature to relieve, but it may be fairly presumed that such was the intention. Now if the fiduciary was the only person affected by the forfeiture there would be no sort of difficulty in relieving him. But he is not the only person affected; all persons interested in the estate are directly concerned. The effect of giving a retroactive construction to the statute, is to compel these persons to pay what under the then existing laws, they were not bound to pay. It is substantially a new law, creating new rights, and imposing new obligations. It is very true that the statute of 1819 speaks of the loss of compensation as a forfeiture, but in the revision of 1849, these terms were deliberately omitted; probably because they were inappropriate, and calculated to produce erroneous impressions.

679 *In Woods v. Garnett, 6 Leigh 206, Judge Tucker has demonstrated that the loss of commissions by reason of a failure to settle the accounts is in no just sense a forfeiture or penalty; but a mere matter of statutory regulation; because as the fiduciary derives his right from the statute, he must comply with the terms prescribed by the statute before he is entitled to such compensation. There can be no such thing as a forfeiture where the fiduciary has failed to earn the commissions by complying with the provisions of the law under which he acts. See also 2 Perry on Trusts, § 994; Leading Cases in Equity, Part I., Vol. II., 514, 538.

The several statutes requiring the settlement of fiduciary accounts have been in force fifty or sixty years, probably longer. Although during this time they have been rigorously enforced by the courts, no effort has been made to repeal or modify them. They have always been regarded with great favor, as founded upon the soundest consideration of public policy. They furnish the best and probably the only security for the rights of infants, insane persons, and others whose estates are to be administered by trustees. And experience has demonstrated the only effectual mode of enforcing these provisions is to deprive the fiduciary of all compensation as a necessary consequence of his failure to comply with the statute. Neither the legislature at the revisal of 1849, nor any other legislature down to 1861 ever thought of relaxing them, or of giving authority to the courts to do so. When therefore the legislature of 1867 adopted the amendment in question, it could not have intended to go back and open accounts and transactions anterior to the war, or authorize the courts to do so. No such legislation was required by public or private considerations, or even desired by any one.

680 *It is equally clear, it is not the object of the act of March 3, 1867, to relieve those fiduciaries who had failed to settle their accounts between 1861 and 1867. That object was fully accomplished and the commissions saved by other statutes, as was

held by this court in *Strother v. Hull*, and other cases. What then was the design of the amendment of March 3, 1867?

At that time, everything connected with our political and civil status was involved in uncertainty and doubt. Although the government was in the hands of State officials, it was impossible to say how soon all of them would be displaced, and military appointees substituted in their place. In many of the counties of the State the offices were not filled at all, or were filled in many instances by incompetent persons; competent commissioners could not always be found to settle the accounts of the numerous fiduciaries throughout the State. In many cases the fiduciaries themselves had changed their places of residence, or their vouchers and papers were lost, or misplaced by the accidents of war. The legislature foreseeing that they would encounter difficulties in settling their accounts, wisely adopted a provision submitting the question of compensation to the sound discretion of the courts. The provision looked only to the future and was intended to meet future emergencies.

If, however, it be retrospective in its operation, then the decisions in *Strother v. Hull*, and *Moses v. Hart*, were clearly erroneous. For under those decisions the fiduciary was under the enabling act of March 3, 1866, entitled to his commission between 1861 and 1866, although he had not settled his accounts during that period, and no court could take them from him. Whereas under the act of March 3, 1867, the fiduciary is entitled to no compensation unless allowed by the court.

Here then we have a direct conflict
681 between two statutes operating *during the period. For under one, the fiduciary received his compensation even without the consent of the court. Under the other he is not entitled to compensation unless allowed by the court. Such is the inevitable result of giving to the act of March 3, 1867, a retrospective operation. These considerations satisfy us this could not have been the intention of the legislature, and the circuit court therefore erred in allowing a commission to the estate of the committee between 1839 and 1850.

For some reason, not disclosed by the record, the circuit judge did not pass upon the question of commission from 1866 to 1876. That question therefore is not properly before us for adjudication. As the case must go back upon other grounds, the subject matter of these commissions can then be settled by the circuit court.

The next question is, whether in stating and settling the accounts of the intestate as committee, he is to be charged with compound interest upon the balance in his hands. It is insisted this ought to be done, by analogy to the rule governing in the settlement of guardians' accounts. It is sufficient to say, that the liability of guardians for compound interest grows out of the peculiar provisions of our statutes on that subject. See Code 1873, § 10, ch. 124, and *Garrett v. Carr*, 1 Rob. R. 196.

These provisions have never been considered as applying to other trustees.

The accounts of the committee of an insane person are to be settled upon principles governing in the settlement of accounts of other fiduciaries having the control of trust funds. They are not chargeable with compound interest, except under very peculiar circumstances. Where there is an express trust for accumulating, and the trustee, instead of investing, retains *the funds in his own hands, or where he employs the money in his own business, and refuses to account for the profits, he may be charged with compound interest as a punishment, or as a measure of damages for undiscovered profits. See 1 *Perry on Trusts*, § 470-474; *Barney v. Saunders*, 16 How. U. S. R. 535; *Hill on Trustees*, 571, note.

Much of the reasoning of Judge Allen in *Garrett v. Carr* will apply as well to committees of insane persons as to guardians, and would seem to indicate that in some instances all classes of trustees, except executors and administrators, may be chargeable with compound interest, even upon a mere failure to invest. See page 215.

All that can be said therefore is, that no inflexible rule can be laid down on the subject which would apply to all cases. Generally, however, it is conceded that a trustee and other fiduciaries, except a guardian, are liable for simple interest only. This doctrine seems to be settled by a great variety of authorities, both English and American. 1 *Perry on Trusts*, § 470-474; *Barney v. Saunders*, 16 How. U. S. R. 535; *Hill on Trustees*, 571, note.

There is nothing in the case before us, to take it out of the operation of these general rules. The unexpended balances in the hands of the intestate were generally small sums, mainly the proceeds of negro hire, and the rent of lands retained by him. If these funds were punctually collected by the intestate, it does not appear that they were used in his own business, or that he derived any profit therefrom. It was a case of mere neglect to invest the money, for which the intestate is chargeable only with simple interest.

We are therefore of opinion that the circuit court did not err in directing the
683 account of the intestate as *committee, to be settled upon the basis of simple interest.

This disposes of all the matters in controversy, except the question of allowances made by the commissioner, to the estate of the intestate for the board of certain slaves belonging to the estate of the lunatic. These allowances appear to be in some instances extremely liberal, if not extravagant. They are, however, approved both by the commissioner and the learned judge of the circuit court. The amounts involved are small, and under all the circumstances, we are not disposed to disturb the decree in these particulars. It must, however, be reversed upon the grounds already mentioned, and the case remanded for further proceedings in conformity with the views herein expressed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court did not err in holding that the estate of John Alexander is properly chargeable with simple interest only in the settlement of his accounts as committee of Robert F. Crigler, lunatic.

The court is further of opinion that the said circuit court did err in allowing the estate of said Alexander commissions upon his receipts between 1839 and 1850, inclusive, the said Alexander having forfeited all claim to compensation by his failure to settle his accounts during that period; and the act of March 3, 1867, in the opinion of this court, having no application to the case.

684 *And this court, not deeming it proper to pass upon any other questions not decided by the circuit court, doth decree and order that for the error aforesaid the said decree of the 16th of November, 1877, be reversed and annulled, and that the appellant recover against the appellee, out of the assets of his testator in his hands to be administered, his costs by him expended in the prosecution of the appeal aforesaid here.

All of which is ordered to be certified to the said circuit court of Clarke county.

Decree reversed.

685 *Wood's Ex'or & als. v. Krebbs.

September Term, 1880, Staunton.

1. Rights of Innocent Purchasers of Encumbered Real Estate—Improvements—Rent—Set-Off.—On a bill by a creditor, secured by a deed of trust, to subject real estate to the satisfaction of his debt, the party in possession claims to be a purchaser for value without any knowledge of the deed. The lien being enforced, the party in possession may be allowed for his permanent improvements upon the land, but he must account for the rents and profits as an offset to his claim.

2. Judicial Sales—Decree—Terms.†—The deed of trust provides for a sale for cash; but the court as supposed by consent, makes a decree for a sale on credit. The vendor of the purchaser in pos-

***Rights of Innocent Purchasers of Encumbered Real Estate—Improvements.**—See *Brengle v. Richardson's Adm'r*, 78 Va. at p. 412; *Hurn v. Keller*, 79 Va. 415; *Effinger v. Hall*, 81 Va. 94; *McGee v. Johnson*, 85 Va. 161; *Dawson v. Grow*, 29 W. Va. 338; *Effinger v. Kenny*, 92 Va. 245.

†**Judicial Sales—Terms.**—Under the Code of 1873, ch. 174, § 1, a court may direct the sale of property to be for cash, or on such credit and terms as it may deem best, but this rule does not apply to mortgages, deeds of trust, and other instruments, in which the terms of sale are agreed upon. In such cases the contract of the parties governs. *Pairo v. Bethell*, 75 Va. 825; *Stimpson v. Bishop*, 82 Va. 190; *Hogan v. Duke*, 20 Gratt. 244; *Fultz v. Davis*, 26 Gratt. 903; *Wytheville Ice Co. v. Frick*, 96 Va. 146; *Watterson v. Miller*, 42 W. Va. 109. See Code of 1887, § 3397.

session, objects to the decree on a credit, and asks that the land shall be sold for cash. **Held:** The court should correct the decree and direct a sale for cash.

This is the sequel of the case of *Wood & al. v. Krebbs & als.*, 30 Gratt. 708. When the cause went back to the circuit court Jacob Strickler, to whom the land had been conveyed with general warranty, by the defendants Wood and Smith, by deed of the 10th of April, 1868, and who had been made a party defendant in the bill in this case, though it does not seem that he appeared, filed his petition in the cause in which he stated, that believing he had a perfect title to the land, and never having heard of the plaintiffs' claim, he had made extensive improvements upon it, which have greatly enhanced its value. He asks that he may be allowed for these improvements, and that this matter may be referred to a commissioner to report to the court, and that the amount found to be owing *to him for such permanent improvements be determined, and paid to him out of the proceeds of the sale of the land, &c.

The subject was referred to a commissioner; who reported that the value of the land was increased by the permanent improvements put upon the land by Strickler, \$2,653.60. He also reported specially at the instance of the plaintiffs' counsel, that John S. Strickler had been in possession of the land since it was conveyed to Jacob Strickler; and that the average rental value of the land is about \$400, which has been received and enjoyed by the said John S. Strickler, a son of Jacob Strickler, and put in possession by his father.

From the evidence the average rental value of the land without the improvements during the time it has been held by Strickler was \$300 a year, or for the eleven years \$3,300.

The cause came on to be heard on the 18th of March, 1879, when the court held that Jacob Strickler, under the circumstances of this case, was not entitled to be allowed for the value of the improvements, or any part thereof, put upon the land in the bill and proceedings mentioned, as against the complainant Isaac Krebbs and Stipe's administrator, whose claims are secured by the deed of trust of the 3d of April, 1854, from P. Cain and wife to A. Bowen; and dismissed the petition.

And it was decreed that unless the defendants, or some one for them, should within sixty days from the rising of the court, pay to the plaintiff Krebbs, the sum of \$776 with interest on \$400, part thereof, from the 1st of April, 1877, until paid, and to S. J. C. Moore administrator de bonis non, &c., of Samuel Stipe, deceased, the further sum of \$5,675.43, with interest on \$2,799.30 from the same

687 date, and the costs of the *suit, commissioners named were appointed to sell the land upon the terms of one-fourth cash, and the residue in three equal annual payments from the day of sale, with interest from that day: "which terms are by consent of parties substituted for the terms prescribed by the deed of trust." &c.

Before the land was sold under the foregoing decree Wood's executor filed his petition averring that it was a mistake to enter the said decree as by consent, fixing the terms of sale; and asking that the decree might be corrected in that respect, and the sale made on the terms of the deed; which was for cash. But the court overruled the prayer of the petition, and dismissed it. And thereupon Wood's executor, Smith and Strickler applied to a judge of this court for an appeal and supersedeas; which was awarded.

Holmes Conrad, for the appellants.

P. Parker, Byrd & Hucks and S. J. C. Moore & Son, for the appellees.

STAPLES, J., delivered the opinion of the court.

This case is the supplement to that of Wood et al. v. Krebs et al., reported in 30 Gratt. 708. It was held by this court in that case, that Wood and Smith were not bona fide purchasers for value; that it was incumbent upon them, in the exercise of due diligence, to examine the records of the proper court. Had they done so, they would have discovered the deed of trust executed by Peter Cain on the 3d of April, 1854, constituting a lien on the property in controversy; and they must be held therefore to have had notice of the existence of that deed.

688 *The present appellant purchased the same property from Wood and Smith. He was made a party to the suit, although it would seem he was never served with process, nor did he appear in person or by counsel. This court affirmed the decree of the circuit court, but remanded the cause for further proceedings. After the case went back to the court below the appellant filed his petition, stating that he had made permanent improvements on the land, while holding the same under a title believed by him to be good, and praying that he might be allowed compensation for the same. Upon the hearing, his petition was dismissed by the circuit court, that court being of opinion that the appellant, under the circumstances of the case, is not entitled to be allowed the value of his improvements, or any part thereof. The question before us is as to the correctness of that decree.

The claim of the appellant for compensation is resisted on three grounds:

First. That the appellant being a purchaser from Woods and Smith, and being a party to this suit when the former decree was rendered, is bound by that decree, and by all the equities which attach to his vendors. And as they were held not to be purchasers, for value without notice under the operation of the registry acts, neither can the appellant claim to be so considered; and not being such a purchaser, he is not entitled to any improvements he may have made on the land.

Secondly. It is insisted that the statute under which the claim for improvements is made, only applies as between the true

owner of the land on one side, and a person making the improvements under a defective title on the other, and that it has no sort of application to encumbrances, whether by mortgage, deed of trust, or judgment; which are matters of record, and of 689 *the existence of which all persons must at their peril take notice. And

Thirdly. If the claim of the appellant be just, he has been fully compensated for all his improvements by the uninterrupted use and occupation of the land during the long period he has held it.

As there is some difficulty in the minds of some of the judges with respect to the first two grounds suggested, they will be passed by without further consideration.

We come then to the third ground, and that is that the appellant has been fully compensated for all his improvements by the rents and profits of the land. In reply to this, it is insisted by his counsel, that "the appellant as purchaser cannot be held liable for rents and profits to the appellee, a creditor; that a mere encumbrancer can have no claim to rents and profits, unless it be after a decree of sequestration; and consequently the defendant's use and occupation of the land cannot be set off by such creditor against the defendant's claim for improvements."

Before examining the provisions of the statute, upon this point, it may be useful to enquire what are the doctrines of courts of equity upon the subject of permanent improvements by a bona fide holder of land, claiming under a defective title. It seems to be well settled, that where the legal title is in one person who has made improvements in good faith, and the equitable title is in another, who is compelled to resort to a court of equity, in support of his equitable claim, that court acting upon the principle that he who seeks equity, must himself do what is equitable, will require as a condition of such relief, that the true owner shall make compensation for such improvements. And so, where the owner asserts a claim for rents and profits, and an account is ordered,

690 any permanent improvement *made by the purchaser will be allowed as a set-off against the rents and profits; or if the owner is guilty of a fraud in permitting such improvements, with a knowledge of the claim, and without giving notice to the possessor, or is guilty of gross laches in asserting his claim after he is apprised of it, he will not be permitted to recover, except upon making compensation. 2 Story Eq. Jur. § 799, 1237; Morris v. Terrell, 2 Rand. 6; Walker v. Beauchler, 27 Gratt. 511.

But in all these cases, the tenant must of course account for the value of the use and occupation.

Whether the possessor of a defective title can claim for improvements against the true owner, where the latter asserts his title at law, and has been guilty of no fraud or laches, is a question of some difficulty, and one about which the authorities are not agreed.

To remove all difficulty on this subject.

and to prescribe an uniform rule in all this class of cases, the provisions found in chapter 131, § 32, and chapter 132, Code of 1873, pp. 963-966, were adopted.

Without intending to express any decided opinion on the subject, I am inclined to think these statutes apply only to cases arising between the owner of the estate on the one hand, and the party claiming compensation for improvement on the other. By the express terms of the ninth section, they do not extend to any suit by a mortgagee, his heirs, or assignees, against a mortgagor, his heirs, or assignees, for the recovery of the mortgaged premises.

If, as contended, the provisions with respect to rents and profits have no application to the case of a creditor by trust deed, or by judgment, if as against them the possessor may claim for improvements without being accountable for rents and profits, it is apparent that a creditor may be in many cases
 691 improved out of his *lien and his debt, without fault on his part and without possibility of protection or indemnity.

The most cursory examination will show that a person who claims compensation for improvements under these statutes, must in all cases account for rents and profits.

Under the very first section of chapter 132, the prayer of the petitioner is, that he may be allowed for his improvements over and above the value of the use and occupation of the land; and it is only upon a petition so framed, the court is authorized to interpose and to suspend the execution of the judgment or decree. The second section makes it incumbent upon the jury to estimate against the petitioner, the clear annual value (exclusive of the improvements,) of the premises during the time he was in possession; and other sections provide, that this value, and other damages if any, in behalf of the plaintiff, and the allowance to the petitioner for improvements shall be offsets one against the other.

Other provisions of the chapter lead to the same conclusion. The whole enactment is founded upon the idea, that the defendant as tenant in possession, is entitled to compensation for improvements made in excess of the benefits derived from the use and occupation of the land; and it is only upon averring and showing such excess he is entitled to arrest the execution of the judgment or decree against him, and to assert a lien upon the land.

A party therefore who files his petition under the statute, is only entitled to relief, and to such relief as is afforded by its provisions, whether his claims be asserted against the true owner, or mere encumbrancer.

There is nothing inequitable in this; for if the lien of the encumbrancer be a valid
 692 lien, the title of the *tenant in possession and all of his improvements are in subordination to that lien; and if he has been fully compensated for those improvements by the use of the land itself, he has sustained no loss or injury. This is certainly more just than to allow the tenant the use

of the land for nothing; and at the same time, to allow him to claim against the encumbrancer for improvements.

What is here said, is in reference to the statute exclusively. For as a general rule, a creditor, who records his deed of trust, or docketts his judgment, has done all he is bound to do; and parties dealing with the property do so at their peril, and in complete subjection to the lien. Graeme v. Cullen, 23 Gratt. 266, 307.

In the case before us the appellant estimates his improvements at \$4,000. In this estimate he includes certain expenditures for lime and fencing, which can not be considered as permanent improvements, in any just acceptance of the term.

Some of the appellant's witnesses say, the improvements have increased the value of the land \$2,500 or \$2,600, others say \$3,000, and none of them exceed the latter sum.

The commissioner, to whom the matter was referred, estimates them at \$2,653, and no exception was taken to this report in this respect. That estimate probably approximates the truth. Complaint is made that the commissioner instead of reporting the value of the improvements, has simply reported the "value of the land, as increased by the improvements." If there be any defect in this finding it is as much due to the appellant, as to any one else; for this is the enquiry, directed by the decree of November, 1878, entered by the consent of the appellant, and this is the enquiry addressed by his counsel to all the witnesses.

693 *Besides, this is all that is necessary under the statute; for all that the jury can estimate, is the amount to which the value of the premises is actually increased at the time of the assessment.

We come now to the question of rents and profits. The commissioner reports the annual value of the land without the improvements at \$300, and no objection was made to the report in this particular. Upon this point there is no controversy. All the witnesses agree, and the appellant makes no complaint. He acquired possession in 1868, and his improvements were made chiefly in 1872. Down to the time of the decree in this cause, in December, 1879, the defendant had held possession more than eleven years, which make an aggregate of \$3,300 of rent, without any charge of interest; \$300 in excess of the highest estimate of his improvements. The appellant is still in possession enjoying the rents and profits of the estate. He has therefore been more than compensated for all his expenditures, including the peaceful and uninterrupted use of the land for more than twelve years.

It is very true he loses the land itself; but he has his proper remedy against his vendors, who are admitted to be solvent, upon their covenants of warranty. But even though he had not, neither his misfortunes nor his follies can give him any just claim against the appellees.

Complaint is also made that the court below referred the matter to its commissioner

for enquiry, instead of empaneling a jury to make proper assessment as required by the statute. This is a very extraordinary complaint coming from the appellant, in view of the fact that he himself in his petition asked for the reference to a commissioner instead of a jury. And in conformity with his prayer, and by his express consent, a decree was entered directing the

694 commissioner to *make the enquiry for his benefit; and no exception was ever taken upon that ground until after the case was brought to this court. A party may of course waive a trial by jury in a civil case; it is the constant practice; and the appellant has effectually done so in this case.

This disposes of all questions arising on the merits of this case. It only remains to consider the objections to so much of the decree as directs the sale of the property upon a credit.

By the provisions of the deed under which the appellee claims, the property is to be sold for cash. Under the decree of the circuit court, intended to enforce that decree, it is provided that the sale shall be one-fourth cash, and the residue in three equal annual payments. It will thus be seen, the terms of sale fixed by the deed, are entirely different from those prescribed by the decree. This departure is founded upon the supposed consent of parties by their counsel.

Without now minutely examining the affidavits filed, it is very apparent there has been much misapprehension both on the part of the court below and the counsel with respect to the supposed consent as justified and even required that so much of the decree of March, 1879, as related to the terms of sale, should be set aside and annulled. That decree being out of the way, the circuit court ought to have directed a sale for cash in conformity with the deed of trust.

It is not often that the debtor or those representing him are found insisting upon a rigorous compliance with such terms. Whatever may be the motives that prompt the demand, this court has no alternative but to yield to it, where it is in conformity with the contract of the parties.

So much of the decree of the circuit court therefore as directs the sale on credit 695 must be reversed; and in *all other respects affirmed; and a decree entered here for the sale of the property for cash, as required by the trust deed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court, upon the facts disclosed by the affidavits of witnesses, ought upon the petition for a rehearing to have set aside so much of the decree of the 18th of March, 1879, as directed a sale of the property upon a credit, and in lieu thereof to have entered a decree for cash, in conformity with the provisions of the deed of trust. The court is

further of opinion that there is no other error in the said decree. Wherefore, for the error aforesaid, it is decreed and ordered that the said decrees of 18th of March, 1879, and of June, 1879, be reversed and annulled to the extent and in the particulars herein mentioned, and in all other respects affirmed; and that the appellee pay to the appellants their costs by them in this behalf expended.

It is further decreed and ordered that the cause be remanded to the circuit court with instructions to that court to enter a decree in conformity with this decree.

Decree reversed in part; affirmed in part.

696 *Davies & Co. v. Creighton.

September Term, 1880, Staunton.

1. Statutes—Repeal by Implication.—For the principles governing the question of the repeal of a statute by implication, see the opinion of *Burks, J.*
2. Same—Same—Building Fund Associations—Validity of Organization.—The act of May 29, 1852, which authorizes the organization of building fund associations, has not been repealed by any of the subsequent statutes; and a building fund association organized under that statute on the 8th of September, 1872, is a legally organized association.

This was an action of ejectment in the circuit court of Amherst county, brought by A. M. Davies and P. E. Waugh, partners under the name of A. M. Davies & Co. against Henry W. Creighton, to recover a tract of two acres of land lying in Amherst county. On the trial the plaintiffs offered in evidence a deed from the trustees of the Mutual building fund association of Lynchburg to the plaintiffs, and also with it the articles of association of the said company. This company was organized September 8, 1872, in the manner authorized by the act of May 29, 1852, without authority from the court. But the court excluded the evidence, and the plaintiffs excepted. There was a verdict and judgment for the defendant; and the plaintiffs obtained a writ of error.

John H. Lewis, for the appellants.

There was no counsel for the appellees.

697 *BURKS, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Amherst county rendered in behalf of the defendant in an action of ejectment.

The plaintiffs in error here were the plaintiffs in the action below, and on the trial of the issue, in order to show title in themselves to the land in controversy, they offered to introduce in evidence to the jury the deed of J. P. Bell, S. R. Dawson, and J. J. Mahone, described as trustees of the Mu-

*Statutes—Repeal by Implication.—See *Ryan v. Comm.*, 80 Va. 385; *Fox v. Comm.*, 16 Gratt. 1; *Hogan v. Guigon*, 29 Gratt. 705; *Fulkerson v. Bristol*, 95 Va. 5.

tual building fund association of Lynchburg, which deed purported to be attested by the president and secretary of said association, conveying to the plaintiffs the land claimed in the declaration, and, in connection with the deed, they also offered to introduce certain articles under which they claimed that the said association was a duly constituted corporation under the laws of this State. The defendant objected to the introduction of the deed and articles as evidence, and on his motion they were excluded from the jury. To this ruling of the court the plaintiffs excepted, and tendered their bill of exceptions, which was signed, sealed, and made a part of the record.

The rejection of these papers as evidence is the only error assigned. No reason for the rejection is stated in the bill of exceptions, but it is understood and has been so argued here, that the learned judge, who presided at the trial, based his ruling solely on the ground that the special statutes which authorized the self-incorporation of building fund associations by articles such as were offered in evidence had been repealed and superseded by other statutes of a more general character, which empower the courts to grant charters, and therefore that the Mutual building fund association of Lynchburg, never having obtained a charter
698 in *the mode prescribed by the statutes last mentioned, was never duly and legally incorporated.

If there has been any repeal of the special statutes which have been adverted to, it was not a repeal in express terms, but by implication merely. The rules and principles which guide the courts when the question for determination is whether one statute has been impliedly repealed by another were considered by this court in *Hogan v. Guigon*, judge, 29 Gratt. 705. It is there said, that the repeal of a statute by implication is not favored by the courts; for ordinarily where a repeal is intended by the legislature it is declared in express terms. The presumption is always against the intention to repeal where express terms are not used. The rule is stated by Chief Justice Marshall to be, that a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable; (*Harford v. United States*, 8 Cranch. 109); and by Judge Story, that it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary; but there must be a positive repugnancy between the provisions of the new laws and those of the old. *Wood v. United States*, 16 Peters' R. 342, 363. It is laid down in *McCoole v. Smith*, 1 Black U. S. R. 459, 470, that to justify the presumption of intention to repeal one statute by another, the two statutes must be irreconcilable; and in the more recent case of *Arthur v. Homer*, 96 U. S. (6 Otto) 137, that to induce a repeal of a statute by the implication of inconsistency of a later statute, there must be such a positive

repugnancy between the two statutes that they cannot stand together.

There may also be acts plainly intended to embrace and include the whole legislation on the subjects to *which they refer, and to be substituted wholly for the former acts on the same subjects; and in such cases, the provisions of the former laws on the same subject, although not expressly embraced in the subsequent acts, are impliedly repealed. *Fox's adm'rs v. Commonwealth*, 16 Gratt. 1; *United States v. Tynen*, 11 Wall. U. S. R. 88.

The method of incorporation pursued by the Mutual building fund association of Lynchburg was first authorized by an act of the legislature, passed May 29, 1852. That act provided, among other things, that persons might associate and become an incorporated company, for the purpose of accumulating a fund to enable its respective members to purchase houses and lots, erect buildings, remove encumbrances from real estate, and for other purposes enumerated, by signing articles of association of a particular description, and causing the same, when verified in the mode prescribed, to be recorded in the court of the county or corporation in which the association should transact its business. See Acts of 1852, ch. 101.

On the 3d day of March, 1854, (Acts 1853-4, ch. 46), an act was passed empowering the circuit and county courts, in their discretion, to grant charters for mining and manufacturing purposes. This was the first of a series of acts, extending down to the present time, investing the courts with jurisdiction to grant charters of incorporation.

On the 11th day of March, 1856, (Acts 1855-6, ch. 36), an act was passed amending the act of March 3, 1854, so as to extend its provisions to hotel, cemetery, gas-light, water, springs, and telegraph companies, orphan asylums, hospitals, academies, library and building associations.

The acts of March 3, 1854, and March 11, 1856, were amended March 15, 1858, so
700 as to forbid county *courts to grant corporate powers, thus leaving the jurisdiction for that purpose exclusively in the circuit courts. Acts 1857-8, ch. 70.

These several acts, commencing with the act of March 3, 1854, were embodied by the compiler in the Code of 1860, ch. 65, § 4 et seq., and on the 29th of January, 1867, sections 4, 5, and 7 of chapter 65 (Code of 1860) were amended, and the provisions of section 4 extended so as to authorize the circuit courts to grant charters of incorporation "for the conduct of any enterprise or business which may be lawfully conducted by private individuals," &c. Acts 1866-7, ch. 129.

By an act approved March 30, 1871, (Acts 1870-71, ch. 277), sections 4, 5, 6, 7, 8, 9, and 10 of chapter 65 of the Code of 1860, and all acts and parts of acts amendatory thereof, were repealed, and other provisions substituted; but the main features of the former acts were preserved. The circuit courts were empowered, in their discretion, on proper certificates, to grant charters to "joint stock companies for the conduct of any enterprise

or business which may be lawfully conducted by an individual or by a body politic or corporate, except to a railroad, or turnpike, or canal, beyond the limits of the county wherein the principal office of said company is to be located, or to establish a bank of circulation." This act, or the first section of it, was afterwards amended—March 6, 1873 (Acts 1872-3, ch. 113); but this amendatory act, which was passed after the Mutual building fund association had, if it ever did, become a corporation, and other subsequent amendatory acts need not be examined, as they do not affect the question under consideration.

A careful examination of the series of acts conferring on the courts jurisdiction to grant corporate powers, commencing with the act of March 3, 1854, fails to disclose a legislative intent to repeal the act of 1852

701 *(already cited), providing a special mode for the incorporation of building fund associations. It is true, that under these acts such associations might have been incorporated by the courts at any time since January 29, 1867, and even since March 11, 1856, if the term "building associations," used in the act of that date are equivalent to or include, as is probably the case, associations such as are provided for by the act of 1852. But it does not by any means follow, that an existing method of incorporation is designed to be abrogated merely because another is provided. There is nothing in the nature of the acts referred to or in the language in which they are expressed, to raise the presumption of an intention to repeal the act of 1852. They are not inconsistent with or repugnant to the latter act, but entirely compatible with it. They are, in respect to it, cumulative—auxiliary. They may well stand with it; and, if so, they must so stand.

But if the presumption of an intention to repeal could be fairly drawn from the statutes which have been referred to, when considered with reference to the act of 1852 alone, such presumption is plainly repelled by legislation not yet adverted to.

During the whole period of the legislation regulating the incorporation of companies for various purposes by the courts, the legislature has recognized the act of 1852, as an act in force, by amending it in many particulars from time to time, the last amendatory act to which our attention has been called having been approved March 31, 1871, (Acts of 1870-71, ch. 295), the title of which expressly refers to the act of May 29, 1852, by its title.

The amendments were made January 19, 1853; February 10, 1853; March 14, 1853; February 9, 1856; January 31, 1867;

702 March 31, 1871. See Acts *1852-3, p. 303; Acts 1855-6, ch. 119; Acts 1866-7, ch. 138; Acts 1870-1, ch. 295.

And it is a striking fact, that the amendment of January 31, 1867, was made the second day after the passage of the act already cited (Acts 1866-7, ch. 129), amending the code in relation to the incorporation of companies by the court, and that the amendment of March 31, 1871 (Acts 1870-1, ch. 295), was

made on the very next day after the passage of the general act before cited (Acts 1870-1, ch. 277), which was substituted for the former laws investing courts with jurisdiction to grant charters.

So it distinctly appears that so far from an intention being shown to repeal the act of 1852, the intention not to repeal but to keep it in force as modified by amendments has been plainly manifested over and over again down to a very late period.

And since the foregoing was written, our attention has been called to an act (not cited in argument) approved February 27, 1890, amending the law in regard to charters granted by the courts, in which it is expressly provided, that nothing contained in the section amended "shall be held or construed as denying to any building fund association organized and incorporated under the act of May twenty-ninth, eighteen hundred and fifty-two, and amendatory acts, all the rights, powers and privileges and franchises granted and vested under said acts to such associations." Acts 1879-80, ch. 110.

Can there be any doubt then, that the Mutual building fund association of Lynchburg is a legally constituted corporation? We think not.

It was said in argument that most of these associations in the cities and towns of the State have been organized and have been transacting business as corporations under the act of 1852 and the acts amendatory *thereof. If we were compelled, as we are not, to hold, that they have mistaken the law, great inconvenience and mischief would result.

Several cases connected with these associations have been before this court. In some of them it appears, that the associations were acting as corporations under the act of 1852 and the amendatory acts, but the validity of their incorporation seems to have been conceded or at least not questioned. *Christian v. Cabell*, 22 Gratt. 82; *White v. Mechanics' Building Fund Association*, Id. 233; *Edelin v. Pascoe*, Id. 826; *Winchester Building Fund Association v. Gilbert*, 23 Gratt. 787.

For the reasons stated, the court is of opinion, that the circuit court erred in excluding from the jury the deed and articles of association offered in evidence by the plaintiffs. The judgment must therefore be reversed, the verdict of the jury set aside and the cause remanded for a new trial.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court committed an error on the trial of this cause in excluding from the jury the deed and articles of association offered as evidence by the plaintiffs and set out in the bill of exceptions; therefore, it is considered and ordered, that, for the error aforesaid, the said judgment be reversed and annulled, and the verdict of the jury set aside, and that the

plaintiffs in error recover against the defendant in error their costs by them expended in the prosecution of the writ of error and supersedeas aforesaid here; and this

704 cause is remanded *to the said circuit court for a new trial of the issue therein. And upon such trial, if the plaintiffs shall again offer as evidence the deed and articles of association aforesaid, the same shall be permitted to go to the jury; which is ordered to be certified to the said circuit court of Amherst county.

Judgment reversed.

705 *Davis' Adm'r for, &c., v. Snead & al.

September Term, 1880, Staunton.

1. **Receivers—Whether Creditor—Sufficiency of Notice to, by Surety on His Bond.**—A person appointed by a court of equity in a pending cause, a receiver to collect the purchase money of lands sold by him as commissioner under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner, is not a creditor in the sense of the statute, Code of 1873, ch. 143, §§ 4, 5, to whom a surety on the bond may give the notice to bring suit upon it.
2. **Same—Same—Same.**—If the receiver was such a creditor, he could only have authority to sue after giving the security required of him in the decree appointing him receiver; and in the absence of clear and satisfactory proof that he had given the security required, the notice to him is not sufficient to release the surety.

This was an action of debt in the circuit court of Amherst county, brought in July, 1875, by John E. Williams, administrator of John D. Davis, deceased, who sues for the benefit of C. T. Hill, sheriff of the county aforesaid, and as such receiver in the case of Waugh & Davis against Robert W. Snead and Henry E. Smith. The action was founded on a bond, as follows:

"\$1,335.

"Six months after date for value received we or either of us promise to pay to John D. Davis, commissioner in the case of Waugh, &c., v. Davis, &c., his heirs or assigns, the just and full sum of one thousand three hundred and thirty-five dollars, with legal interest *thereon from date till paid, for the true payment of which said sum we hereby bind ourselves jointly and severally, our joint and several heirs, ex'rs and adm'rs.

"Witness our hands and seals this 25th February, 1860.

"Ro. W. Snead. [Seal.]
"H. E. Smith. [Seal.]"

The defendants filed the plea of payment; and Smith also filed a special plea in which he averred that he executed the bond declared on as the surety of Snead. That on the 10th

of September, 1860, said Davis was authorized by decree of the circuit court of Amherst in the suit of Waugh v. Davis to collect said bond, and had complied with the requirements of said decree; and that on the 15th of October, 1866, after said writing had been long due and payable, said defendant gave notice in writing to Davis under and in pursuance of the act of assembly, Code of 1873, ch. 143, §§ 4, 5, to institute suit forthwith thereon, and that at the time notice was given to Davis, said Snead was able to pay off said bond, and so continued, &c. And he avers that Davis did not in a reasonable time after said requisition, as by law he was required, institute suit on said bond, &c., whereby said Davis had forfeited his right to demand of the defendant the money due by said writing obligatory, and defendant was released, &c.

The plaintiff moved the court to strike out the special plea; but the court overruled the motion and plaintiff excepted.

On the trial of the cause the plaintiff demurred to the evidence; and the court rendered a judgment for the defendant. And the plaintiff obtained a writ of error. The case is stated by Judge Staples in his opinion.

707 *Robert Whitehead and J. T. Brown, for the appellant.

Sheffey & Bumgardner, for the appellee.

STAPLES, J., delivered the opinion of the court.

The defendant in error, being the surety of Robert W. Snead, on a bond to John D. Davis, gave written notice to Davis to sue upon the bond. Davis, it is conceded, was not the owner of the debt, or personally interested in it, but was merely a commissioner and receiver, appointed under a decree of court, to make sale of property, to take bonds for the purchase money, and collect the same when due. The question we are to determine is, whether the defendant is released from his obligation by the failure of Davis to bring suit, and prosecute the same with due diligence to judgment and execution.

The decision of that question depends upon the true intent and meaning of the statute relating to sureties found in fourth and fifth sections, chapter 143, Code 1873. It is there provided that the surety, &c., of any person bound by any contract may if a right of action has accrued thereon, require the creditor, or his personal representative by notice in writing, forthwith to institute suit thereon. If such creditor or his representative shall not in a reasonable time institute suit against every party to such contract, who is a resident of the State, and not insolvent, and prosecute the same with due diligence to judgment and execution, he shall forfeit his right to demand of such surety or his estate, and all his co-sureties and their estates, the money due by such contract. This statute is substantially the same as that of 1794 found in the revised Code 1819, page 461, except that in the latter act it is

***Receivers—Powers.**—See Reynolds' Ex'or v. Pettyjohn, 79 Va. at p. 331, citing principal case.

Whether Receiver is a Creditor.—See Fair v. Core, 20 W. Va. 268.

Bond.—See Fletcher v. Hassler, 29 W. Va. 405.

provided it should not be so construed as to affect *bonds with collateral conditions, or the bond that may be entered into by guardians, executors, administrators, or public offices. Whereas, under the present statute, bonds with collateral conditions may be the subject of notice as in other cases, the revisors of 1849, no doubt regarded the saving with respect to official bonds as altogether unnecessary, as by no reasonable intendment could the statute be construed as applying to that class of securities.

This statute of 1794, was the first enactment ever adopted in Virginia, authorizing notice by a surety to a creditor to sue, and imposing upon the latter a forfeiture of all claims against the surety as a consequence of his failure to comply with the requisition.

The provision was no doubt intended in some measure as a substitute for the bill quia timet in a court of equity. In *Wright's adm'r v. Stockton*, 5 Leigh 179, Judge Carr said, "The mischief intended to be provided against by the statute was that a creditor having his debt secure, and being careless whether he made it out of the debtor or the surety, would often delay till the debtor became insolvent, and the whole burden was thrown on the surety. Nor has he any mode of protection except by the tedious and expensive proceeding of a bill quia timet in equity."

It will be observed that both by the act of 1794, and the present statute, the notice must be given to the creditor himself, and in the event of his death, to his personal representative. Under various provisions contained in the Code, proceedings may be instituted against a creditor or other persons by notice to his agent or attorney. But under the statute we are now considering, no such indulgence is allowed. The reason is obvious. The statute is very stringent in its operation. The effect of the failure to sue after notice is an absolute forfeiture of all

700 claims against every *surety upon the bond, or other instrument. It is to such surety an absolute extinguishment of the debt. It was therefore wisely provided, that the notice should be given to the creditor himself, and him only; and the release of the surety should be the result of the creditor's act and his only.

What then is meant by the word "creditor," both in legal proceedings and in popular acceptance? He is the person to whom the debt is owed; who has the absolute control of it. He may, if he pleases, release one or all of the parties; and if by his failure or refusal to do an act required by law, a forfeiture ensues, it is his loss and his only. As no one else can release the debt, so no one else can, without his consent, involve him in a forfeiture.

Is a commissioner or receiver appointed in the course of a judicial proceeding to collect money belonging to the court, a creditor within the true meaning and intent of the statute? Is he a creditor at all in any just acceptance of the term? Certainly the mere authority to collect does not make him so,

any more than in the case of an attorney at law, or sheriff or other mere ministerial officer.

A receiver, whether general or special, is generally recognized as an officer of the court. He is frequently spoken of as "the hand of the court;" and the expression aptly designates his functions, as well as the relation he sustains to the court. The property and money in his hands are in the possession and under the control of the court, and cannot be molested; or in any manner interfered with, except with its consent, by any other tribunal.

As was said by the supreme court of the United States in *Booth v. Clark*, 17 How. U. S. R. 331, the receiver is but the creature of the court; he has no powers except what are conferred upon him by the

710 *order of his appointment, and the course and practice of the court. He cannot even institute or defend actions except by authority. *Wilson v. Simpson*, 4 How. U. S. R. 709. In *Beverly v. Brooke*, 4 Gratt. 187, Judge Baldwin said: "A receiver is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having, in his character of receiver, no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. See also 2 Davis C. Pleas 1715-16. 1143; Goss v. Southall, rec'r, 23 Gratt. 825."

Nor are the powers of the receiver at all varied or increased by the fact that he is the obligee in the bond. The legal title and right of action are thereby vested in him; but he cannot sue except by the direction of the court which appointed him, and whose agent he is. He may any time be superseded and another appointed in his place to collect the money. *Clarkson v. Dodridge*, 14 Gratt. 42. By the sixth section of chapter 12, Code 1873, it is provided that every bond required by law to be taken, or approved by or given before any court, board or officer, unless otherwise provided for, shall be made payable to the commonwealth of Virginia. Under this section a receiver's bond may, and ought to be made payable to the commonwealth. It might with equal propriety be contended that where the bond is so payable, the commonwealth is the creditor, as that the receiver is the creditor where the bond is payable to him.

In all judicial sales the court is regarded as the vendor and contracting party, on the one hand, and the purchaser on the other. If the bond is payable to a commissioner or receiver, it is only so from the necessity of the case, because the court can act only through the instrumentality of its of-

711 ficers and agents, and *because there must be some one who in behalf of the court, may if need be bring the action at law.

The fact is, the entire authority of the receiver is limited to the single duty of collecting and paying over the money, and all who deal with him must be held to under-

stand the precise nature and extent of his powers.

To speak of such a person as a creditor involves a confusion of terms. If he be a creditor what are his powers as such? May he transfer or assign the debt or the bond? May he release, or compromise, or give acquittances without payment? May the claims be attached or garnished in his hands? None of these things will be pretended, and yet according to the present pretension, the receiver may do indirectly what it is conceded he cannot do directly; he may by mere inaction or neglect surrender or forfeit a security provided by the court for the protection of trust funds.

Let us suppose no statute had been ever passed authorizing a surety to give notice to a creditor, what would have been the remedy of this defendant, or any other surety similarly situated, who might apprehend loss or damage from the insolvency of his principal? All that he could do would be to file his petition in the court which appointed the receiver, asking such relief as was proper and necessary to his protection as surety. He must have pursued this course, or he must have filed an original bill in a court of equity in the nature of a bill quia timet. In either case, I apprehend, whether he proceeded by bill or petition, the real parties in interest—the parties entitled to the fund—must have been the parties to whom the notice was given, and upon whom the demand to sue is made. In such a case, no one supposes the receiver would be a necessary party, for the simple reason, he is a mere officer of the court, having no sort of personal interest in the subject-matter. Now, the statute

712 we have been considering *is merely cumulative. It was designed as a more expeditious and cheaper remedy for certain classes of sureties than the bill quia timet. But no change of parties was intended; the person who would be the party to the bill quia timet must be the person to whom the notice is given under the statute. That person is the creditor—the one to whom the debt is owing, and upon whom the forfeiture may justly be imposed.

It has been asked, what is the remedy of the surety in cases like the present, if the benefit of the statute is denied him? I do not say that such a surety cannot proceed under the statute. If he can do so at all, it is only by giving notice to the proper party, and that party is the creditor. But a more satisfactory answer has already been suggested. The surety may apply by petition to the court which has control of the receiver, and that court will always afford such relief as is just and equitable and consistent with the rights of all parties. It will be for that court to determine whether it will require the principal to pay the debt or give counter security for the relief of the surety, or whether it will require its receiver to institute suit upon the bond, and prosecute the same with due diligence to judgment and execution. The surety will thus be amply protected, without loss or damage to the parties primarily interested in the fund; but

if it shall be held that the surety is released from his contract by the failure of the receiver to sue after notice in the country, without the knowledge of the court or the parties concerned, the result will be a fatal blow to the most valued securities taken by courts of equity for the preservation of trust funds.

The present case is an illustration of the mischief which must flow from the doctrine advanced by the defendants' counsel. It is claimed that the notice to the receiver was given in 1866, upon the testimony of 713 *a single witness, who says he served a copy upon the receiver. The latter is dead, and no explanation from him can be had. It does not appear—it is not pretended that the court or the parties entitled to the fund were notified or had reason to believe that any such notice was given, or that the surety would claim to be released on any such ground.

During all this time, no doubt every body concerned regarded this bond as a valid and solvent security, so that no effort was made to hold the receiver liable for his supposed misconduct. And now upon this notice given in 1866, utterly unknown to everybody interested, given to an agent of the most limited power, we are told the surety is released, and the debt as to him is extinguished. I cannot give my assent to the doctrine, and upon this ground alone I should go for reversing the judgment of the court below.

But this is not the only ground. It is conceded that the receiver had no authority to collect the money, or to take any step with reference to it, until he gave bond with one or more sureties in the clerk's office in the penalty of \$14,000 for the faithful discharge of his duties.

It was of course necessary, that the bond should be accepted and approved by the clerk. What evidence have we that this was done? The testimony of a single witness, who being asked in leading terms "whether he ever became the security of John D. Davis in a bond executed by him as receiver in the suit of *Waugh v. Waugh*," answers "yes;" and this is all we have. Whether this bond was approved and received by the clerk; whether it had been given when this notice was served, we are not informed.

On the other hand, the clerk of the court being examined, states that he had searched the records of his office, and could find 714 no bond executed by Davis as *receiver; that he had no recollection that any such bond had ever been filed in his office, or brought to him for acceptance and approval. Upon such testimony as this, it cannot be fairly presumed that the receiver had ever given the bond; and his failure to sue or to take any steps for the collection of the money, confirms the presumption that he had not complied with this provision of the decree, and was not authorized to proceed in the matter. If the defendant insists upon the forfeiture, it is incumbent upon him to bring himself within the rule which requires satisfactory proof of every fact, necessary to show a right of action in the receiver.

I think he has not done so, and upon this

additional ground, the judgment must be reversed, and judgment entered for the plaintiffs in error.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in rendering judgment upon the demurrer for the defendant in error, Henry E. Smith. It is therefore considered by the court that said judgment be reversed and annulled, and that the said defendant in error do pay to the plaintiff in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here.

And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is considered by the court that the plaintiff in error recover against the defendant in error, Henry E. Smith, *the sum of \$1,335, with interest thereon from the 25th day of February, 1860, till paid, the debt in the declaration mentioned, and his costs in the said circuit court expended.
Judgment reversed.

716 *Helsley & als. v. Craig's Adm'r & als.

September Term, 1880, Staunton.

Curator—Action against, by Administrator.—H is appointed curator of the estate pending a contest over C's will; and whilst curator collects an ante-war debt well secured, in Confederate money. C's will having been established, H qualifies as executor, but is afterwards removed; and the administrator *de bonis non* with the will annexed, files a bill against H, as curator and his sureties seeking to subject them to the payment of said debt; and the defendants demur to the bill. **HOLD:** The administrator *de bonis non* with the will annexed, may maintain the suit against the curator and his sureties, under the statute. Code of 1873, ch. 118, § 24.

This was a bill in the circuit court of Shenandoah county, filed by Walton Craig, administrator *de bonis non* with the will annexed of Peter Craig, deceased, against Philip Helsley, and his sureties in his official bond, as curator of the estate of said Peter Craig. The bill stated the death of Peter Craig leaving a will, in which said Philip Helsley was appointed executor. That the probate of the will was contested, and Helsley was appointed curator of the estate. That the will was afterwards admitted to probate and Helsley qualified as executor; but was afterwards removed and the plaintiff qualified as administrator *de bonis non*, &c.

The bill further charged that whilst Helsley was acting as curator of the estate he collected a debt due the estate of Peter Craig, contracted before the late war, well secured on real estate, for which he had made himself liable. The prayer of the bill was that

*Reviewed in *Wissler v. Craig's Adm'r*, 80 Va. 22.

717 *Helsley and his sureties may be required to account for said debt and pay the same to the plaintiff; that it may be distributed according to the will of said Peter Craig amongst the legatees thereunder, and for general relief.

The defendants demurred to the bill; and on the 18th of April, 1879, the cause came on to be heard upon the demurrer, when the court overruled it, and a rule was made upon the defendants to answer the bill. And thereupon Helsley and his sureties applied to this court for an appeal; which was allowed. The only question on this appeal, was whether the plaintiff could maintain the suit.

Henry C. Allen and M. Walton, for the appellants.

A. Hunter and Joseph Spriggs, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on an appeal from a decree of the circuit court of Shenandoah county. The decree appealed from, is in these words:

"This cause coming on to be heard, this 18th April, 1879, upon the bill and exhibits and the demurrer thereto, was argued by counsel. Upon consideration whereof, the court being of opinion that the bill is sufficient, said demurrer is therefore overruled; and it is further ordered that a rule be awarded against said defendants to show cause why they should not answer the bill within 60 days from the rising of the present term of the court."

The sole question we have to determine is, whether the circuit court erred in overruling the demurrer to the plaintiff's bill.

718 *The bill is filed by William Craig, administrator with the will annexed of Peter Craig, deceased. It seems from the averments in said bill that there being a contest about the will of Peter Craig, the appellant Helsley was appointed curator of the estate during the pendency of the contest respecting the will. That the said curator collected the sum of \$2,938 in Confederate States treasury notes, of a debt due in a sound currency, and the object of the bill is to hold him and his securities liable for this amount in a sound currency.

The demurrer to the bill raises the single question, whether the appellee Craig, administrator with the will annexed of Peter Craig, had authority or was the proper party to institute a suit against the curator to call him to account for the fund alleged to have been improperly collected by him in Confederate States treasury notes, instead of a sound currency. And the only point raised by the demurrer is, that the curator can only be held liable to the administrator or executor for the property which came into his hands; and for no other liability. It is insisted that such liability, as is sought by this bill, to be enforced, can only be asserted by distributees or legatees, or creditors of the estate, and that the executor or administrator to whom

the estate is committed, cannot sue for such liability.

The whole ground of the demurrer, therefore, is, that the plaintiff in the bill cannot maintain this suit. This question depends upon the true construction to be given to the statute law on the subject.

The provision of the Code respecting the appointment of a curator and prescribing his duties and liabilities, is as follows:

"Such court may appoint a curator of the estate of a decedent during a contest
719 about his will, or during *the infancy, or in the absence of, an executor, or until administration of the estate be granted, taking from him bond in a reasonable penalty. The curator shall take care that the estate is not wasted before the qualification of an executor or administrator, or before such an estate shall lawfully come into possession of such executor or administrator. He may demand, sue for, recover, and receive, all debts due to the decedent, and all his other personal estate; and likewise may lease, or receive the rents and profits, of any real estate whereof the decedent or testator may have died seized and possessed of, lying within the limits of the county or corporation from the court of which the said curator may have received his appointment. He shall pay debts so far as such payment may not affect the priority in the order of payment prescribed by law, and may be sued in like manner as an executor or administrator; and upon the qualification of an executor or administrator, shall account with him for, and pay and deliver to him, such estate as he has in his hands or may be liable for."

It is plain, that by the express terms of this statute, the curator is responsible to the executor or administrator, when one is appointed, not only to deliver up such property as comes into his hands to be held and preserved by him as curator until there is an administration on the estate, but such executor or administrator may call on him for any funds for which he is liable or for any responsibility incurred by him in the exercise of the duties of his curatorship. To give any other construction to this statute, would be to ignore the plain words, "or is liable for," and would violate the plainest rules of construction.

To enforce such liability the executor or administrator is the party to call him to
720 account; and there is no *reason why he should be only accountable to the distributees, devisees, or creditors of the estate. Whatever liability is incurred by or fixed upon the curator may be enforced at the suit of the executor or administrator to whom the estate is afterwards committed.

It has been insisted, however, and this is the ground mainly relied on, that the appellee, William Craig, is a mere administrator de bonis non with the will annexed, of Peter Craig, deceased, and, as such, he has no authority to call the appellant to account, as curator, for assets wasted or converted by the latter; and in support of this position, the case of *Wernick v. Macmurdo*, 5 Rand. 56, is cited to show that an administrator

de bonis non is not authorized to proceed against a former executor or administrator for assets unadministered or converted. An examination of the opinions of the judges in that case will show that the decision was placed upon principles of law which have no sort of application to a curator whose powers are limited and plainly prescribed by the statute, before the determination of the contest about the will. The appellant's powers as curator ceased when he qualified as executor, and as such it was his duty to account for and charge himself with the property which came to his hands as curator. Having failed to do so, he will still be chargeable as curator. He is liable to any future administrator of the estate.

The language of the statute, above cited, is broad enough to embrace all administrators, whether an administrator de bonis non or otherwise. And for the most obvious reasons, before the determination of the curatorship, by the death of the insane or incompetent party, it was designed that the entire estate should pass into the hands of the personal representative, who should be responsible to the creditors, legatees or dis-

tributees; and further, that parties inter-
721 ested should *not be put to the expense and trouble of different suits against the curator and the personal representative. The curator is responsible to the administrator or executor, and the latter is liable to those entitled to the estate.

The court is therefore of opinion that the said circuit court did not err in overruling the demurrer to the plaintiff's bill, and that the said decree overruling the demurrer and awarding a rule against the defendants requiring them to answer the plaintiff's bill must be affirmed.

Decree affirmed.

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*Clem v. Holmes.

[36 Am. Rep. 793.]

September Term, 1880, Staunton.

1. **Seduction—Action by Father—Sufficiency of Declaration.**—In an action by a father for the seduction of his daughter, a count which avers she is under twenty-one years of age, and unmarried, and was so at the time of the se-

***Seduction of Daughter—Action to Recover for—Relation of Master and Servant.**—In *Fry v. Leslie*, 87 Va. 269, the court said: "This is an action *ex delicto*, as every action by a parent founded upon the seduction of his or her daughter must be. 4 Min. Inst. 440; *White v. Campbell*, 13 Gratt. 573; *Parker v. Elliott*, 6 Munf. 587; S. C., *Gilm.* 33. Such is the appropriate form of the action at common law, and our statute now carried into section 2896 of the Code, which provides that 'an action for seduction may be maintained without any allegation or proof of the loss of the service of the female, by reason of the defendant's wrongful act,' merely affects the *quantum* of proof. The action itself remains as it was, *i. e.*, it belongs to the same

duction, and the plaintiff then was and still is entitled to her attentions and services. **Held:** This is a sufficient averment of the relation of master and servant, between the father and daughter.

2. Same—Same—Evidence of Defendant's Pecuniary Condition.—In an action by a father for the seduction of his daughter, evidence offered by the father of the pecuniary condition of the defendant is competent.

3. Same—Same—Limitation of Action.—The statute, Code of 1873, ch. 145, § 1, which in an action for seduction dispenses with any allegation or proof of the loss of service of the female, by reason of the defendant's wrongful act, does not alter the rule as to the commencement of an action on the case by the father; and when the daughter lived away from her father's house at the time of the seduction, but returned and was confined there and nursed, the statute of limitation will only begin to run from that time.

class of actions as before the statute was passed. *Lee v. Hodges*, 13 Gratt. 726; *Clem v. Holmes*, 33 *Id.* 722." See also 1 Min. Inst. (4th Ed.) 223, 403; 4 Min. Inst. (2nd Ed.) 474 *et seq.*

In *Huddins v. Haskins*, 7 W. Va. 653, the court says: "The law is now well settled, that where the daughter at the time of her seduction is under 21 years of age and the father then was entitled to her services and attentions, the law conclusively presumes that the relation of master and servant exists between them, although at the time of her seduction she may be in the actual service of another, under a contract made by herself, for her own benefit." Citing the principal case and *Lee v. Hodges*, 13 Gratt. 726; *Riddle v. McGinnis*, 22 W. Va. 275; 21 Am. & Eng. Enc. of Law (1st Ed.) pp. 1014, 1016.

***Pecuniary Condition of the Defendant.**

—In *Riddle v. McGinnis*, 22 W. Va. 278, the court said: "All authorities, however, admit that the jury ought to consider not only the circumstances attending the commission of the wrong, but also the situation of the parties in life, and also the defendant's *rank and influence* in society and therefore, the extent of the injury, as the same is increased by his wealth, and that testimony tending to show his pecuniary condition is pertinent to the issue." See also *Pegram v. Stortz*, 31 W. Va. 304 and *Dent v. Pickins*, 34 W. Va. 243; 12 Am. & Eng. Enc. of Law (2nd Ed.) p. 47; 21 Am. & Eng. Enc. (1st Ed.) 1038.

†Same—Same—Statute of Limitations.

See also *Fry v. Leslie*, 87 Va. 269, and *Riddle v. McGinnis*, 22 W. Va. 275.

In *Allebaugh v. Coakley*, 75 Va. 628, the court said: "The mere fact that a remedy is given the sheriff by Code of 1873, ch. 49, § 46, for his protection and indemnity can impose no obligation upon him to resort to that remedy under peril of being barred of a right existing at common law, and under another section of the statute. This rule of law is somewhat illustrated by the case of *Clem v. Holmes*, 33 Gratt. p. 722, in which it was held that the statute giving the parent the right to sue for the seduction of his daughter without alleging or proving a loss of service, did not deprive him of the right to bring his common law action, making the loss of service the gravamen of complaint. In such case the period of limitation is to be computed not for the time of the seduction, but for the time the damage accrued. In many cases, indeed, the operation of the statute is made to depend upon the form of the action."

This was an action on the case in the circuit court of Shenandoah county brought in December, 1877, by David H. Holmes, against Joshua Clem, for the seduction of the plaintiff's daughter. The declaration contained two counts. The first count set out the case very fully, claiming that the daughter was plaintiff's servant, that he had been deprived of her services, and had been put to great expense, &c.

The second count is brief. It sets out, that heretofore, to-wit: on the — day of —, 1876, the said *defendant seduced and at divers other times between that day and the commencement of this suit, debauched and carnally knew Bell, who was then and still is under the age of twenty-one years, and unmarried, and who at the time of such seduction was a virtuous and innocent daughter of the plaintiff, and the plaintiff then was, and still is entitled to the comfort and benefit of her society, attentions and services, and by reason of said wrongful act of defendant, the plaintiff has sustained great loss and damage, to-wit, to the amount of \$3,000, and therefore he brings suit.

The defendant demurred to the whole declaration, and to each count thereof. He also pleaded "not guilty," and the statute of limitations of one year; and the plaintiff joined in the demurrer, and took issue on the pleas.

The court overruled the demurrer; and on the trial of the cause there was a verdict and judgment in favor of the plaintiff for \$700, with interest from the date of the verdict, and costs. And thereupon Clem applied to this court for a writ of error and supersedeas; which was awarded.

On the trial the defendant took two bills of exception. The first was to the admission by the court of evidence offered by the plaintiff to prove what was the value of the defendant's property.

The second exception was to the refusal of the court to give an instruction asked for by the defendant. After proof that the defendant had had sexual intercourse with the daughter for several nights in the latter part of September, 1876, whilst she was living at defendant's house with him and his wife, and rendering service for them, and during the absence of the wife; that this was the only sexual intercourse between the defendant and the daughter of the plaintiff;

that as the fruit of such sexual intercourse, the said daughter *gave birth to a female child on the 28th of June, 1877; that after the birth of the child the plaintiff removed his daughter to the house of his sister, and there expended \$80 or \$90 in her support and maintenance; and that the said daughter was born in September, 1857, the defendant moved the court to instruct the jury as follows: If the jury believe from the evidence that the seduction of * * * the daughter of the plaintiff occurred more than twelve months before the institution of this suit, they must find for the defendant, even if they believe from the evidence that the defendant did seduce the said daughter. But the court refused to

give the instruction; and the plaintiff excepted.

Henry C. Allen, for the appellant.

M. Walton, for the appellee.

STAPLES, J. This is an action on the case for the seduction of the plaintiff's daughter. The declaration contains two counts. It is insisted that the second count is defective, and that the circuit court erred in overruling the demurrer to it. The ground of objection is, that no relation of master and servant is set forth, but merely an allegation that the plaintiff as parent is entitled to the services of the daughter. The count avers that the daughter is under twenty-one years of age and unmarried, and was so at the time of the seduction, and the plaintiff then was and still is entitled to her attentions and services. This is a sufficient averment of the relation of master and servant; for the rule is well settled that whilst the daughter is under twenty-one years of age she is for the purposes of the action regarded as the servant of the father, even though she may not
725 be living with him at the time. *unless, indeed, he has renounced all claim to her services. *Lee v. Hodges*, 13 Gratt. 737.

But apart from these considerations, the second count in this case is copied from a form laid down in the 4th vol. of *Rob. Prac.* 626, which the author says was taken from the second count in *Lee v. Hodges*, already cited; and was held by this court to be good on demurrer. This would seem to be conclusive of the question. The circuit court therefore did not err in overruling the demurrer. See also 2 *Hilliard on Torts* 512.

The second ground of error is, that in an action for seduction, evidence of the pecuniary circumstances of the defendant is not admissible by way of enhancing the damages; and the circuit court therefore improperly allowed the plaintiff to adduce testimony showing the value of the defendant's estate.

It must be admitted there are very respectable authorities which fully sustain this view. It is so laid down in *Wood's Mayne on Damages* 661; and the case of *Hodsoll v. Tayler*, L. R. 9 Q. B. 79, is cited as authority; and Lord Mansfield is quoted as saying it should be immaterial whether the damage came out of a deep pocket or not. The learned counsel also cites *Dain v. Wycoff*, 3 Seld. R. 191, as sustaining the same rule. Unfortunately we have here none of the reported cases on the subject; but if the elementary writers are to be relied on, the great weight of modern authority is the other way—holding it to be competent to show the position and pecuniary condition of the defendant in aggravation of damages. *Field on Damages*, § 699; 2 *Greenl. on Evi.*, § 579; 5th *Wait's Actions and Defences* 668, and numerous cases there cited. 2 *Hilliard on Torts* 520.

It is a matter of some surprise there could ever have been a question as to the admissibility of such evidence.

726 *As has been well said, the damages in this action are not measured by the mere loss of service or the necessary expenses incurred; but they are given also to punish the seducer for the anguish and dishonor the outrage brings upon the parent. These damages are not merely compensating—they may be exemplary in their nature. The rank and condition of the parties; the injury to the most sacred feelings and affections; the shame and disgrace cast upon the family; and the anguish of mind in having a daughter whose society brings no comfort to the parent, and whose example may corrupt other members of the family, are all proper to be considered. This being so, the jury in fixing the amount of the recovery, may and ought to have reference to the pecuniary circumstances of the defendant. In all such cases the wrong is aggravated in proportion to the wealth and position and rank of the guilty party. All of which may be the instruments by which he more readily accomplishes his purposes.

A verdict which would be absolutely ruinous to a man in moderate circumstances would scarcely be felt by one possessed of a large fortune, and would be but an invitation to a renewal of the offence whenever the opportunity occurred for its commission. If the jury believe the plaintiff is entitled to vindictive damages they will the more readily give them where they are satisfied the defendant is able to pay, than they would be where the appeal is made that the verdict would reduce the defendant to bankruptcy and ruin. At all events it is better to place the jury in full possession of all the facts as to the condition and circumstances of the parties, than to leave them to grope their way in the dark, and to base their verdict upon fanciful conjectures and rumors. See *McAulay v. Birkland*, 13 *Ired. R.* 28, and cases already cited.

727 *The third ground of error, is the refusal of the court to give defendant's second instruction; and that is, the plaintiff is not entitled to recover, if the jury believe that more than a year elapsed between the time of the seduction and the time of bringing the action. This instruction is founded upon the idea that under our statute which dispenses with proof of loss of service, the father, where the daughter is under twenty-one years of age, may sue for the seduction itself, and base his claim for damages on the wrongful act, without alleging or proving loss of service. Hence it is claimed that the seduction being now the gravamen of the complaint the statute commences running so soon as the act is committed, and the action therefore must be brought within twelve months, and not after.

The argument is plausible, but it proceeds upon a misconception of the effect of the statute. At common law uniformly everywhere the right of the father to recover damages for the seduction of the daughter is placed, not on the seduction itself, but upon the loss of service; in which the father is supposed to have a legal right or interest.

The loss of service was therefore the gist of the action, and some services must be proved however trifling and valueless. In the case of *Barham v. Dennis*, Croke Eliz. 669, cited in 2 Rob. Prac. 556, the distinction was taken between the daughter's action for the trespass upon her, and the father's action for the wrong per quod servitium amisit. No action having been brought by the daughter within four years, she was barred; but it was held the father might nevertheless sue for the consequential damage resulting from the seduction; as to which the limitation commences to run only from the time of such loss.

The object of our statute was not to change this common law right of action, or 728 the period of limitation *in such cases.

It may be that the father can now sue for the seduction itself, and if he so declares, possibly the limitation will run from the commission of the offence. The remedy is merely cumulative, however, and is rather the effect of the statute than its design. The sole purpose of the statute was to dispense with proof of loss of service, which in most cases was treated as a mere consequence to the action, the form simply through which the injury was presented to the court. It can scarcely be supposed that the legislature in removing out of the way of the parent a mere legal fiction, intended to make so radical a change in the form of the action, or in the period of limitation, as practically in a majority of cases to defeat all right of recovery. I take it therefore that the father may still sue as at common law, making the loss of service the gravamen of his complaint and in such case the limitation is as at common law. In *Cooley on Torts* 232, it is said the time when the cause of action is deemed to have accrued, may depend on the form of the action itself. This may be either in trespass or in case. After stating the instances in which trespass must be brought for the wrongful act, the author proceeds to say: but if at the time of the seduction the daughter be abroad, and returns to the house of her parents, where expenses are incurred, and loss actually or by presumption of law, is suffered, in consequence of the seduction, the right of action is deemed to arise from this expense or loss; but the action must be in case for the consequential damage or injury. That is precisely this case. For the daughter was in temporary service at the house of the defendant, where the seduction was accomplished. She returned to her father's house and was there confined and delivered of a child, and expense and loss were incurred in nursing and taking care of her during that 729 *period, and from that date the limitation commences to operate.

Upon the whole case I think there is no error in the proceedings and the judgment must be affirmed.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

730

*Richardson v. Duple & al.

September Term, 1880, Staunton.

1. **Depositions Taken after Interlocutory Decree—Admissibility.**—Under the statute, Code of 1873, ch. 172, § 36, when there has been an interlocutory decree in a chancery cause, a deposition taken thereafter cannot be read as to any matter thereby adjudicated, unless it be as the foundation for a motion or petition to rehear the cause.
2. **Depositions—Right to Read.**—In such case if no interlocutory decree has been rendered, or even though one has been rendered, a deposition taken and returned before a final hearing, as to any matter not adjudicated, may be read. But the right is not an absolute right. The statute does not say the deposition shall be, but it may be read.
3. **Same—Depositions Taken after Commissioner's Report Filed—Admissibility.**—In this case the cause having been referred to a commissioner, and ample opportunity offered both parties to introduce their witnesses, and the commissioner had made his report and the cause was ready for a hearing, depositions afterwards taken by one of the parties as to a controverted matter in the report, was under the circumstances, properly disregarded by the court in deciding the cause.

This was a suit in equity in the circuit court of Clarke county, brought in July, 1877, by Aaron Duple to have a settlement of the partnership accounts of himself and Champ Shepherd. These parties had entered into a partnership in 1859 to carry on a mill. The partnership was continued until 1865, when it was dissolved, and Shepherd took possession of the books and accounts and proceeded to settle up the affairs of the partnership.

The assets consisted of debts due 731 *the concern, the most of them by open account. Some of these Shepherd collected, and others he put into the hands of S. J. C. Moore, attorney at law, to be adjusted and collected by him. Among the debts due the firm was one due from Francis McCormick, on which suit was brought in the name of Duple & Shepherd against McCormick's representative, and in September, 1874, a judgment was recovered for \$502.64, with interest on \$395.80, part thereof, from the 1st of January, 1870, and \$43.31 costs. Pending this suit Shepherd, in the name of Duple & Shepherd, assigned

*The principal case is followed in *Buster v. Holland*, 27 W. Va. 537.

†**Equity Practice—Reading of Depositions after Interlocutory Decree.**—The rule stated in the second headnote of the principal case was cited with approval in *Fisher v. Dickenson*, 84 Va. 318, and *Buster v. Holland*, 27 W. Va. 537. See also *Summers v. Darne*, 31 Gratt. 791; *Radford v. Fowlkes*, 85 Va. 820.

‡**Practice—Recommitting to Commissioner—Laches.**—A cause will not be continued and recommitment to a commissioner for further inquiry and report after his report has been returned and affirmed where the evidence which it sought to have brought before the commissioner might have, with the exercise of reasonable diligence, been brought before him before his report was returned. *Trevelyan's Adm'r v. Lofft*, 83 Va. 141; *Corey v. Moore*, 86 Va. 721.

this debt to John D. Richardson in payment of a debt of his own due to Richardson.

It appears that the firm had a large claim amounting to more than \$6,000 against the government of the United States, for flour, &c., furnished during the war, and it was agreed between the partners that Duble should apply to the government for payment, and if he did not receive more than one-half of the claim he should retain all he received; but if he received more than one-half, the surplus should be divided. Duble did apply to the government for the payment of the claim, and a large portion of it was allowed, but the government required an oath to be taken before payment. Duble took it for himself, and received one-half of the amount allowed, viz: \$1,561; but not being able to take it for Shepherd, and Shepherd not having taken the oath, his half has never been received by him; and he has since gone into bankruptcy.

The bill after setting out the partnership, and that the assets had gone into the hands of Shepherd, charged that Shepherd had collected a large amount of these assets and had applied his collections to payment of his own debts, without the knowledge or consent of the plaintiff. That among the uncollected debts

due the partnership is the judgment **732** against McCormick's *administrator; and that this is claimed by John D. Richardson under an assignment to him by Champ Shepherd for the payment of an individual debt. And making Shepherd Richardson, S. J. C. Moore and McCormick's administrator, defendants, he prays that the partnership accounts be settled; that for any balance ascertained by such settlement to be due to the plaintiff the uncollected assets of the firm may be appropriated; that until such settlement can be made McCormick's administrator be enjoined from paying to Shepherd, or his assignee, or Moore, the said debt; and that Moore be enjoined from disposing of in any way the claim or any of them in his hands or under his control. The injunction was granted.

Richardson answered the bill. He says, that on the 12th day of September, 1874, Duble and Shepherd executed a written assignment to him of their claim, then in suit against the estate of Francis McCormick, deceased. After such assignment the suit was prosecuted for his benefit, and judgment was obtained. He admits the assignment was made by Shepherd for the purpose of paying a debt to him (Richardson) due from said Shepherd individually. He says it was in the firm name of Duble & Shepherd, and, as he believes and alleges, with the full knowledge and consent of the plaintiff; and, as defendant has been informed and believes, the plaintiff has, after the said assignment had been made, and with the full knowledge that it had been made, ratified it and expressed his willingness that defendant should have the benefit of the said claim against McCormick's estate, claiming only that the costs should be paid when said claim was collected.

On the 10th of November, 1877, the court directed a commissioner to ascertain and report, 1st. What creditors there are of the

late firm of Duble & Shepherd whose claims remain unpaid, and the amount **733** *thereof. 2d. What assets there were of said firm at the date of the dissolution. 3d. What debts were due said firm, and how evidenced, whether by bond, &c.; what portion of said debts have been collected, and what disposition has been made of the proceeds; what portion thereof remains uncollected, how evidenced, what disposition has been made of the same, and under whose control they now are. 4th. He shall state and adjust the partnership accounts between said partners, showing what amounts are due said partners, or either of them, after providing for the payment of the partnership debts.

The commissioner gave notice that he would proceed, at his office, on the 5th of December, 1877, to take the accounts ordered; and the cause was kept open, by continuance and adjournment from day to day and from time to time, to the 28th of August, 1878, when he returned it to the court.

The commissioner's first statement is an account between the partners (Duble & Shepherd), and charging to each of them his debt to the concern as by the books of the firm, and charging Shepherd with the assets of the partnership collected by him or collected by the attorney (Moore) and paid over to Shepherd or upon his orders; the amount due, including interest, from Shepherd to Duble on the 1st of August, 1878, was \$1,445.07. The second statement is of the assets of the firm not yet collected, and after deducting for fee bills and for other expenses of the suit, \$315.13, the amount, including interest, is \$1,242.61. In this account of uncollected assets is included the judgment against McCormick's administrator, amounting, principal, interest, and costs, to \$749.78. Allowing Shepherd one-half of this sum of \$1,242.61 as his share of these uncollected assets, viz., \$641.30, and placing it as a credit on his debt to

734 Duble, he is still debtor on that *account \$803.77. The third statement is of the assets collected by Shepherd by himself or through Moore, and charging interest on the several debts from the time received, there was, of principal, \$2,000.40, and of interest, \$1,688, making, together, \$4,380.40; and this is the amount charged to him in the account between the partners.

The commissioner returned with his report the depositions of Shepherd and Duble, in which they speak of the assignment by Shepherd to Richardson of the McCormick debt, and both of them say it was by Shepherd, without the knowledge or consent of Duble; and these witnesses were cross-examined by S. J. C. Moore as the counsel of Richardson.

In May, 1879, Richardson, by his counsel, excepted to the report of the commissioner. 1st. In so far as it treats the claim against F. McCormick's administrator as assets of the firm of Duble & Shepherd, if it be understood as so treating it, the order of reference not covering such enquiry. 2d. Because A. Duble is not charged with \$1,561 received by him from the United States government on account of Duble & Shepherd.

3d. Because it does not appear Shepherd has been credited with his input into the firm.

On the 11th of November, 1878, the court made an order admitting as parties defendants, the representative of the assignee of Richardson and also another administrator of McCormick, and directing a commissioner to take an account of any other debts due by the partnership of Duble & Shepherd; and also appointing a receiver to collect the assets of the partnership, other than the judgment against McCormick, as to which it is said no order will be made until both administrators are before the court; and on the 22d of January, 1879, the commissioner reported two debts of the partnership, amounting to \$210.25.

735 *On the 13th of May, 1879, Richardson took the depositions of S. J. C. Moore, S. S. Moore, and himself, to prove that Duble was informed of the assignment by Shepherd to Richardson of the McCormick debt, and that he had again and again approved and sanctioned it, only insisting that the costs should be paid out of the claim when recovered.

At the May term of the court for 1879 the cause came on to be heard, when the court overruled the exceptions to the commissioner's report, and it as well as the second report, was confirmed, "the court being of opinion that no sufficient excuse appears in the said depositions taken on the 13th of May, 1879, or elsewhere in the papers in the cause, for the laches of the defendant Richardson in not taking said depositions before the return and filing of the commissioner's report, declines to reopen the matters determined by said commissioner's report." And it was decreed that the administrators of F. McCormick should pay to the receiver the amount of the McCormick judgment; stating it. The receiver was then directed to pay the fee bills and debts of Duble & Shepherd; and pay over the remainder, as well as the collections from the uncollected assets of the firm to Duble in part satisfaction of the amount due from Shepherd to Duble. But the receiver was directed not to collect \$342.21 of the McCormick debt, it being alleged that this sum had been collected in the manner stated in the decree. But the cause coming on again on the 5th of November, 1879, the court held the payment was not a valid payment on the McCormick judgment, and directed the whole amount of said judgment to be collected by the receiver and applied as directed by the decree of the May term, 1879. And thereupon Richardson applied to a judge of this court for an appeal; which was allowed.

736 *S. J. C. Moore, for the appellant.

M. McCormick, McDonald & Moore, for the appellee.

STAPLES, J. It is conceded that the assignment made by Champ Shepherd to the appellant was in payment of an individual debt due by the former to the latter. It is also conceded that the assignment is void unless it is made to appear that Shepherd

was in advance to the partnership, or that it was made with the assent of the appellee. And this upon the plain ground that a separate creditor who takes from one of the partners partnership assets for the payment of his separate debt without the knowledge or consent of the other partner, is guilty of a fraud and will be decreed to make restitution.

It is very clear that Shepherd was not in advance to the partnership at the time of the assignment, and it is admitted that the testimony fails to establish the appellee's assent to the assignment, unless the depositions taken on the 13th May, 1879, are proper to be read and considered by the court. The learned judge of the circuit court was of opinion that no sufficient excuse was offered for the laches of the appellant in failing to take these depositions until after the return and filing of the commissioner's report; and upon that ground he declined to reopen the report or to consider the evidence. The case therefore turns mainly upon the correctness of this ruling.

It appears that the decree for the settlement of the partnership transactions was entered at the November term, 1877. The commissioner after due notice to the parties concerned, commenced the account the 15th of December following, and closed it the 28th of August, 1878. In this report the debt against McCormick's estate which had 737 been assigned to the appellant, *is treated as still due to the partnership, and no exception was ever taken to this report, until the 20th of May, 1879, and the depositions relied on to sustain the exceptions were not taken until the 13th of May, 1879, about fifteen months after the account was commenced, and nearly nine months after it was completed.

The only excuse given for the long delay, the only explanation even suggested, is that set forth in appellant's exception; and that is, the order of reference to the commissioner, did not direct any enquiry into the matter of the McCormick debt as assets of the partnership. Appellant's counsel did not suppose the commissioner was authorized to pass upon the subject. It will be seen, however, that the decree of November, 1877, expressly required the commissioner to ascertain what were the assets of the firm at the date of its dissolution. What debts were due it, how evidenced, what portion had been collected, and what part remained uncollected, and what disposition had been made of the same. The partnership was dissolved in September, 1866, and the assignment to the appellant was not made until 1874.

The McCormick debt was therefore undoubtedly partnership assets at the date of the dissolution. It was directly involved in the subject of enquiry, submitted to the commissioner, who must of necessity have reported upon the debt, what disposition had been made of it, and who had the control of it. This of course brought up the whole question of assignment. The parties and their counsel seemed so to understand

it. As early as December, 1877, the appellee took the deposition of witnesses to prove that the assignment was without his consent, and these witnesses were cross-examined upon this very point by the appellant's counsel. But this is not *all. The appellee in his bill referred to the same matter, charged that his partner had no authority to use the partnership assets, in paying individual creditors, and made the appellant a party to the suit solely for the purpose of litigating and settling that question.

The appellant in his answer insisted that the assignment was valid, that it was made with the consent of the appellee, and on several occasions was ratified and approved by him.

Thus the parties were at issue upon the very point, and, as already stated, witnesses were examined in support of the averment of the bill, and upon this uncontradicted testimony, the commissioner based his report sustaining the claim of the appellee. The appellant might have taken his testimony at any time, whilst the account was being taken between December, 1877, and August, 1878; he might have taken it within a reasonable time after the report was completed and returned. Why he did not do so, it is impossible to say. In view of the facts already stated, he and his counsel must have known, it was their duty to know, that the assignment was being investigated by the commissioner, and would be the subject, in part, of his report.

There is no pretence of after-discovered testimony. The only witnesses examined on the 13th of May, were the appellant himself, and his two attorneys, each of whom was familiar with the facts, from the beginning, and one of whom conducted the cross-examination of the appellee's witnesses. It has been said, however, that the circuit court had no discretion in the matter; that the appellant had the right to take his testimony at any time before the final hearing. In support of this view, the provisions of the thirty-sixth section, chapter 172, Code 1873, and a decree of this *court in *Summers v. Darne*, 31 Gratt. 791, are relied upon.

The section of the Code referred to, is as follows: "In a suit in equity, a deposition may be read if returned before the hearing of the cause, or though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." This provision was, no doubt, adopted with a view to remove a difficulty, and some uncertainty in the practice growing out of the decision of this court in *Dunbar's ex'or v. Woodcock's ex'or*, 10 Leigh 628. 654; and in *Moore v. Hilton et als.*, 12 Leigh 1.

In the first-named case, the court held, that an opinion of the lower court given in the progress of an account upon exceptions to a report, or instructions to a commissioner, as to the propriety of allowing items of debit and credit, is not such a final decree, as precludes a party from taking new evidence touching the same question, with-

out having obtained a review or rehearing of the decree.

In *Moore v. Hilton*, it was held, that after an interlocutory decree on a hearing, neither party has the absolute right to introduce new evidence in respect to a matter decided; but the right to introduce and use such evidence as a ground for changing or setting aside such decree, depends on the sound judicial discretion of the court, and the sufficiency of the excuse for the failure to produce the testimony in due time; to be offered to the court upon a motion or petition for a rehearing.

Under the present statute, when there has been an interlocutory decree, a deposition taken thereafter, cannot be read as to any matter thereby adjudicated, unless indeed as the foundation for a motion or petition to rehear the cause.

740 *If no interlocutory decree has been rendered, or even though one has been rendered, a deposition taken, and returned before a final hearing as to any matter not adjudicated, may be read. But the right is not an absolute one. The statute does not say the deposition shall be, but it may be read.

It could hardly have been intended that after a cause had been referred to a commissioner and ample opportunity offered both parties to introduce their witnesses, and after the commissioner had made his report, and the cause was ready for a hearing, that one of them should have the absolute right at any time thereafter, to bring forward his testimony, deliberately or negligently withheld without cause from the commissioner, and demand it shall be read upon a controverted matter of fact, passed upon by the commissioner and made the subject of the report.

Such a construction would be but a premium for negligence, and would place it in the power of one or the other of the parties, in many cases to protract litigation almost indefinitely. Whether testimony thus delayed will be heard, must in every case depend upon a sound judicial discretion, to be exercised upon the facts of the case, the nature of the evidence, the reasons given for the delay, and a variety of circumstances which must be adjudged as they arise.

The maxim that the laws assist those who are vigilant, not those who sleep over their rights, applies not only to the operation of statutes, but to the action of suitors in the conduct of their causes.

In the case before us, the reading the appellees' depositions would have involved a continuance of the cause when it was ready for a hearing, a recommittal of the commissioner's report, and a reopening of the case for the introduction of other testimony, and a promulgation of the controversy.

741 The adoption of such rule *would not only be unjust in this particular case, but it would furnish an extremely bad precedent in other cases. I think therefore the circuit court did not err in proceeding to decide the case without reference to the appellant's depositions.

It may be proper to say, that the case of *Summers v. Darne*, 31 Gratt. 791, has no

sort of application to the present case. There a petition for a rehearing was filed, founded upon depositions previously taken. It was objected that the depositions could not be read; but this court held there is no rule of law prohibiting a party from taking his depositions even after an interlocutory decree, merely as a foundation for a motion or petition to rehear the decree. The depositions of course were only admitted in view and in connection with such petition showing a proper case for a rehearing.

There is but one other point to be considered, and that is whether the appellee is to be held to account to his co-partner Shepherd, for the money collected by him from the government at Washington. It very satisfactorily appears, indeed it is conceded, that Shepherd himself could not have collected any part of the fund, nor would his share have been paid to any one else in consequence of his supposed disloyalty. While on the other hand the appellee could have obtained payment of one-half, or his share of the money. This was well understood both by Shepherd and the appellee. It was accordingly agreed between them that the appellee should go to Washington, if he pleased, and at his own expense prosecute the claim, and if he succeeded in getting not more than his share or proportion, as one-half, he was entitled to retain it without accounting to Shepherd for any part of it. The appellee received from the government a sum not equal to his half, or anything approximating it. It is now claimed that this

release by Shepherd was without consideration. *and that he is entitled by virtue of his relation as partner to receive his share of what was so collected by the appellee.

Without now entering into an enquiry whether such an arrangement between partners could be enforced, as an executory contract, it is sufficient to say, that the agreement being made after the partnership is dissolved, and the appellee having actually received the money, he cannot be required to refund it, there being no suggestion of fraud, surprise or unfair dealing. It has become an executed contract, which in itself is sufficient consideration. For even a gift made perfect by the delivery is an executed contract, being founded on the mutual assent of the parties in reference to a right or interest passing between them. 2 Kent Com. 483; *Minor Institutes*, vol. 4, c. 31; 2 *Schouler Personal Property* 59. As between Shepherd and the appellee the transaction is perfectly valid. It is not Shepherd himself who is complaining, but the appellant, a separate creditor of Shepherd.

If it be conceded that the appellant could successfully impeach the arrangement as a surrender or release without consideration, still the fund is first liable to the partnership demands, before any payment can be made of the appellant's claim as a separate creditor. The report of the commissioner shows that the amount due the appellee as partner by Shepherd is largely in excess of

any supposed interest Shepherd might have in the funds received from the Federal government. In any view that may be taken, the appellant has no just cause of complaint. Upon the whole case, I think the decree should be affirmed for the reasons already stated.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

743 *Southern Mutual Insurance Company v. Taylor.

January Term, 1880, Richmond.

Absent *Burns, J.**

Mutual Fire Insurance—Failure to Pay Assessment—Effect on Policy.—T insured his house and a piano in the county of Franklin for \$2,200 in the Southern Mutual Insurance Company of Richmond. He paid the cash premium on the insurance, \$44, and gave his premium note for \$110. By one condition of the policy, and also in his application for the insurance, it is provided, that in case of loss or damage by fire or lightning, if any assessment on the premium note of the assured shall remain unpaid and past due at the time of such loss or damage, the policy should be void and of no effect. One assessment of \$27.50 had been made upon T's premium note, which T had paid. A second assessment of the same amount was made, of which he received notice, but neglected to pay it until his house was consumed by fire. He then offered to pay the assessment, but the company refused to receive it. Upon the evidence—*Held*: The assessment was properly made by the directors of the company, and T having failed to pay it before the house was burned, the policy is void.

This is a writ of error to a judgment of the circuit court of Franklin county, rendered on the 15th day of April, 1876, in favor of the defendant in error, James S. Taylor, who was plaintiff in the court below, against the plaintiff in error, The Southern Mutual Insurance Company, which was defendant in the court below, for the sum of twenty-two hundred dollars, with interest thereon from the 7th day of January, 1875, until payment, and his costs by him about his suit in that behalf expended.

The said suit was an action brought by the said Taylor against the said company, on a policy of insurance of which a copy is referred to in, and filed with, the declaration in said suit; the commencement of which said policy is in the words and figures following, to-wit:

"No. 5,014.

\$2,200.

"By this policy of insurance, the Southern Mutual Insurance Company of Richmond, Virginia, in consideration of forty-four dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, and a premium note of one hundred and ten dollars by the said com-

*He had been counsel in the cause in the circuit court.

pany received, do insure James S. Taylor, of Franklin county and State of Virginia, against loss or damage by fire and lightning, to the amount of \$2,200, on the following property, to-wit: his two-storied framed dwelling house, 46x18, with north extension, 28x18, situated in said county, 2½ miles southeast from Gogginsville, on Blackwater river—amount insured,..... \$2,000
 "Piano therein, amount insured,.... 200

"Total amount insured..... \$2,200

"For a more particular description and as forming part of this policy, by which the insured will be bound, reference being had to application and description. No. 5,014, on file in the office of this company."

Then follows the residue of the said policy which need not be here set out, except one clause thereof which is in these words:

745 "No insurance whether original *or continued, shall be considered as binding until the actual payment of the cash premium; but when a note is given for the cash premium, it shall be considered a payment: provided the note is paid when due. And it is expressly stipulated and agreed by and between the parties, that in case of loss or damage by fire or lightning to the property herein insured, and the note given for the cash premium or any part thereof, or any assessment or assessments on the premium note of the assured shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect. But the avoiding of this policy by the non-payment of the notes and assessments as above mentioned, shall not have the effect of releasing the assured from any of his obligations; and upon the payment of all claims as above specified, before any loss or damage shall have occurred to the property insured, then this policy to revive and be of full force and effect."

Then follow the conditions of insurance, referred to in the body of the said policy, but which need not be here inserted.

At March rules, 1875, the defendant demurred to the declaration, and plead the general issue to the action, and the plaintiff joined in the demurrer and in the general issue.

In April, 1875, the demurrer was overruled, and the issue was tried by a jury, which not being able to agree, a juror was withdrawn and the case was continued.

In November, 1875, the issue was again tried by a jury, when the defendant filed a demurrer to the plaintiff's evidence, which is set out in the record, but need not be here repeated, at least in full.

The first evidence so set out is the policy of insurance aforesaid, including the
 746 provision aforesaid, which *makes void the policy in the event that "the note given for the cash premium or any part thereof, or any assessment or assessments on the premium note of the assured shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and

of no effect. But the avoiding of this policy by the non-payments of the notes and assessments as above mentioned, shall not have the effect of releasing the assured from any of his obligations; and upon the payment of all claims as above specified before any loss or damage shall have occurred to the property insured, then this policy to revive and be of full force and effect."

The next evidence so set out is the testimony of the plaintiff Taylor himself, which need not be here repeated in full. In his testimony he set out his application for the policy which application concluded with these words:

"And the said applicant covenants and agrees with said company that the foregoing together with the diagram hereupon, is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured. And it is hereby agreed by and between the parties that in case of the loss or damage by fire or lightning to the property herein insured, and the note given for the cash premium or any part thereof, or any assessment or assessments on the premium note of the assured, shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect. But the voiding of my policy by the non-payment of the notes and assessments as above mentioned, shall not have the effect of releasing me from any of my obligation; and upon the payment
 747 *of all claims as above specified before any loss or damage shall have occurred to the property insured, then my policy to revive and be of full force and effect.

"(Signed). Jas. S. Taylor,
 "Applicant."

At the foot of his said application is a copy of the deposit note given by the applicant, which is in these words:
 "\$110.

"For value received in policy No. 5,014, dated the 1st day of March, 1871, issued by the Southern Mutual Insurance Co., I promise to pay the said company the sum of one hundred and ten dollars, in such portions and at such time or times as the directors of said company may, agreeably to the charter and by-laws of said company, require, to pay the expenses and losses. And I hereby waive the homestead exemption as to this obligation.

"(Signed) Jas. S. Taylor,
 "Applicant.

"P. O. address: Gogginsville, Franklin county."

The said witness, after setting out in his testimony the said note, then says: "I then paid the cash premium, I think \$44. A demand was afterwards made against me by the defendant of an assessment on this premium note, which I paid. The amount of another assessment was afterwards demanded of me. I received notice of this last mentioned demand through the mail.

"The notice I here produce in evidence, which is as follows:

748 *W. C. Carrington, President, &c.
"Office of Southern Mutual Insurance Co'y,

"No. 11 Main street,
"Richmond, Va., May 25, 1874.

"To Jas. S. Taylor, Gogginsville:

"In accordance with the resolutions appended, you are requested and required to remit to this office \$27.50, net amount levied by second assessment on your deposit note, No. 5,014, given for policy of same number for \$100. Please remit by check, draft, postal order, registered letter, or express, prepaid, and receipt therefor will be forwarded to you.

"At a meeting of the directors, held October 10, 1873, it was resolved, that—whereas the losses and expenses of the company absolutely required, not only the levying of another assessment, but the advancement of that levied January 15th, 1872, &c., it was ordered that the first assessment be extended to policies 18 months old, instead of waiting until they were 30 months old, notice of which 1st assessment has been sent you 60 days since.

"Resolved, That a 2d and further assessment of 25 per cent. net (of the original amount of the note) be made on all deposit notes now in force, and that the demand be made at once, on all such notes at have been running 18 months, and hereafter on all others, as they severally reach that age; provided, that the demand for the 2d assessment shall, in no case be made on any deposit note sooner than sixty days after the demand for the first assessment.

"Resolved, That any policy-holder, by returning his script and paying in cash 60 per cent. of his deposit note, may have it cancelled, and his policy continued in force until the end of its term: provided, that the policy-holders who have paid one or
749 both assessments may *have their notes cancelled by paying 60 per cent. less amount so paid in cash by assessment.

"Thus you will see, while the necessities of the company have forced an assessment to meet demands and enable the company to be in position to meet your loss or others, if they should occur, yet it has been so prosperous, that by above resolution you are given what is equivalent to a 40 per cent. dividend on your deposit note, and your risk carried without further cost for the full term. This is equal to a saving to you of about 40 per cent. from stock rates, and has given you, without interest, the use of that much money, which, to a stock company you would have had to pay in advance.

"Your attention is hereby called to the following provisions of the charter and conditions of your policy:

"Sec. 5 of charter. If any member (mutual policy-holder, shall fail to pay any assessment for the term of 30 days after a written or printed notice shall have been mailed to his, her or their address, the company may bring suit and recover the whole amount of such premium note or notes, and the company shall retain the same until 30 days after their policy may have expired that was issued on account of said note or notes; and the amount

that is not consumed in the payment of expenses and losses, shall be refunded to the parties entitled to the same.

"Sec. 6. Every policy issued by said company shall, of itself, create a lien on the real and personal property of the party whose property is insured by such policy, for the payment of all premium and cash notes given for the same.

"Condition of policy. And it is hereby expressly stipulated and agreed by and between the parties, that in case of loss or damages by fire or lightening to the property hereby insured, the note given

750 for the cash *premium, or any part thereof, or any assessment or assessments on the premium note of the assured, shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect. But the avoiding of this policy by the non-payment of the notes and assessments as above mentioned, shall not have the effect of releasing the assured from any of his obligations; and upon the payment of all claims as above specified, before any loss or damage shall have occurred to the property insured, then this policy to revive and be of full force and effect.

"To avoid the penalties above set forth, you are advised and requested to remit, at once, the amount required of you. No agent is authorized to collect any assessment except on receipt signed by the secretary.

"Very respectfully,

"J. E. Neiswanger, Sec'y.

"I received it by due course of mail. More than thirty days elapsed after I received the notice before my house was burned. I never did pay the amount of this assessment. I did not offer to pay it at any time within 30 days after I received the notice of the assessment. I notified the defendant that my house was destroyed, by letter, the same week in which my house was burned. Mr. G. H. T. Greer wrote the letter for me. The letter, now shown in evidence to the jury, is in the words and figures following, to-wit:

"Franklin Bank, Rocky Mount, Va.

"July 8, 1874.

"Southern Mutual Insurance Co., Richmond, Va.:

"Dear Sir:

"At request of Mr. James S. Taylor, I enclosed check on Planters Nat. bank for \$30 to pay *assessment on his policy. In doing so I have to say that Mr. Taylor's house was burned on the 5th inst.; but I hope that the payment of the amount of assessment, even at this time, will be all right, as the company loses nothing thereby, as it had the payment of the premium perfectly assured, and by the payment of the amount above, it gets all it could have gotten. Mr. Taylor's failure to pay sooner, was pure negligence, as he is a man of property, but engrossed in farming, forgot to pay. He does not know the exact amount of the assessment, but I suppose the \$30 will be enough.

"Please answer as soon as possible.

"Very resp'y,

"G. H. T. Greer, Cas."

The witness here states that he made proof of his claim for loss and sent it to the defendant, and exhibited to the jury a paper showing such loss, which is set out in his deposition, but need not be here inserted.

On his re-examination he states that "the defendant never made any objection to the notice of loss or proof of loss sent to it, nor to the time when it was sent. I believe from the papers I have seen of the defendant, that the assessment was not made to pay for expenses and losses of the defendant. I am able and willing to pay any proper assessment on the deposit note held by the defendant."

On his cross-examination he makes the following among other statements: "This company is a banding together of citizens for mutual protection, by which perfect security is guaranteed, and no money is required when losses are sustained above the bare expenses of the company. The reasons for insuring by the mutual plan, and in this company, may be briefly summed up: The

insured retain the control of their own money, *and are required to pay no assessment on their notes, except when actual losses render it necessary."

He exhibited a printed pamphlet to the jury in which, among other things not material to be here repeated, the following statement is made concerning the "Plan of business and resources of the Southern Mutual Insurance Company:

"This company, chartered by the Commonwealth of Virginia, insures property against loss or damage by fire or lightning, and does business on the mutual and joint stock plan. Policies are issued for a term not to exceed five years. Every person insuring on the mutual plan becomes a member of the company, is entitled to vote at elections for directors, has access to the books of the company, and pays only what is absolutely necessary to keep him insured, and thus saves what is paid to stockholders in the way of dividends, &c., when insured on the stock plan. Each person insuring on the mutual plan, before obtaining his policy, is required to deposit with the company his deposit note and pay a certain amount in cash. This deposit note is not negotiable, but merely assessable when, at any time during the life of applicant's policy, the cash means of the company are inadequate for the payment of its liabilities. So long as the company is enabled to discharge its liabilities, nothing will or can be collected on its notes, and they will be returned to the insured at the expiration of their policies, together with their proportionate share of the surplus cash earnings then in the hands of the company, determined by the amount of cash each has paid in virtue of his policy."

The testimony of the plaintiff as a witness, after embracing some other matters not material to be noticed here, was then closed, when H. G. Davidson was examined as a witness in behalf of the plaintiff, having been summoned under a subpoena duces

tecum *describing him "secretary of the Southern Mutual Insurance Company of Richmond, Virginia," and command-

ing him to bring to court with him such books of accounts or other writings of the said company, or exact copies of such parts thereof as show the financial condition of said company on the 10th day of October, 1873, and particularly all the assets of said company, and in what they consisted, and all the liabilities of said company, how they arose and to whom due; also all such books of account or other writings of said company, or exact copies of such parts of such books and writings as show the financial condition of said company on the 16th day of January, 1872, and particularly all the assets of said company and in what they consisted, and all the liabilities of said company, how they arose, and to whom due; and also all books of accounts or other writings, or such parts or exact copies thereof as show the amount of losses and expenses of every kind paid by said company for the year ending the 10th day of October, 1873, to whom due and in what amount such losses were paid, and to whom and for what and in what sums such losses were paid; all of the said books and writings now remaining with the said Davidson, as it is said, then and there to testify in behalf of said Taylor in a certain matter of controversy in the said court depending between the said Taylor, plaintiff, and the said company, defendant.

The said Davidson being sworn said, among other things: "I was formerly president of the defendant corporation and am now a director in the corporation, superintendent of agencies and one of the executive committee of the corporation," &c. "William C. Carrington is the president of the company. I think he was elected president the 8th of October, 1873." "I have no books or papers of the company to show its financial condition on the 10th of October,

754 1873. A subpoena duces tecum was served on me as the secretary of the company, to produce certain books and papers of the company. I am not the secretary of the company. I did not bring any such books or papers."

On his cross-examination he said: "It would have required a wagon to transport these books from the railroad here, and would have required an expert to have explained them. The books called for in the subpoena duces tecum would have filled an immense goods box. The withdrawal of these books from the office of the company would have caused a suspension of its business during their absence. I presume it would have taken all the clerks the company had, several weeks or longer, to make the extracts from the books called for by the subpoena. That is the reason I did not bring these books or make the extracts. 'The term cash premiums,' referred to in the card spoken of as one of the papers issued by the company, embraces all premiums in cash or in notes, or still in hands of agents not paid over. I do not know what is the usual proportion of cash and cash premium notes. The policy-holders usually avail themselves of the privilege of giving notes for the cash premiums. I have here the minute book of the board of directors of the defendant com-

pany. On the 10th day of October, 1873, the following entry was made in the minute book," and is read in evidence to the jury as follows:

"Office Southern Mutual Insurance Co.,

"Richmond, October 10, 1873.

"Board met pursuant to adjournment. Present: W. C. Carrington, president; H. G. Davidson, J. H. Martin, J. G. Cabell, Dr. H. McGuire and the secretary. The president and secretary reported upon a plan of assessment, which was adopted.

755 On motion *it was ordered that an assessment to net 25 per cent., be made on all policies over 18 months old."

On the 7th day of February, 1874, the following entry was made in the minute book, and was read to the jury as follows:

"Office Southern Mutual Ins. Co.,

"Feb'y 7, 1874, Richmond, Va.

"At a call meeting of the board of directors of the company, were present: W. C. Carrington, president; and Jordan H. Martin, Dr. J. G. Cabell, Dr. Hunter McGuire, Dr. H. G. Davidson, and the secretary.

"On motion, it was ordered that so much of the minutes of the meeting of the board, held October 10, 1873, as relates to the manner of assessments, be so altered and amended as to read and be entered nunc pro tunc, as follows:

"Whereas the losses and expenses of the company absolutely require, not only the levying of another assessment, but also the advancement of that levied January 15th 1872; and whereas it is desirable and right to make the burdens of the company bear equally on all mutual policy-holders; therefore,

"Resolved, That the assessment levied Jan'y 15, 1872, be so altered and amended as to make the demand therefor at once on all deposit notes that have been running 18 months, and hereafter on all others as they severally reach that age. (The second resolution need not be inserted here.)

"3rd Resolved, That a second and further assessment of 25 per cent. net be made on all deposit notes now in force, and that the demand for this assessment be made at once on all such notes as have been running 18 months, and hereafter on all

756 others as they reach that *age: provided, that the demand for the second assessment shall in no case be made on any deposit note sooner than sixty days after the demand of the first assessment.

"4th Resolved, That any policy-holder by returning his script and paying on cash 60 per cent. of his deposit note, may have it cancelled and his policy continued in force till the end of its term: provided, that policy-holders who have paid one or both assessments, may have their notes cancelled by paying in 60 per cent. less amount so paid in cash by assessment."

The proceedings of the meetings of the directors in which these entries are made are signed by W. C. Carrington, president, and J. E. Neiswanger, secretary.

The plaintiff paid the amount of the first assessment on his deposit note on October 9, 1873.

The testimony of H. G. Davidson was here closed. After which several other witnesses testified in behalf of the plaintiff, but their testimony need not be stated here.

Then the defendant introduced as evidence to the jury:

1st. The charter of the said defendant (the Southern Mutual Insurance Company).

2d. The deposition of Roger W. Stegar, a clerk in the office of the Southern Mutual Insurance Company, who made the following statement: "There was an assessment made on said Taylor's deposit note prior to the 25th day of May, 1874, and on said day I gave notice of this assessment to said Taylor, by depositing the notice in the post office at Richmond, Va., in an envelope properly stamped, addressed to said James S. Taylor, Gogginsville, Va. This was the second assessment made on this note, the first one having been paid. I append hereto a blank copy of the notice which was

757 *properly dated and filled up and sent to him as I have stated."

And this being all the evidence, the defendant demurred to the same and the plaintiff joined in the said demurrer; whereupon the jury found the following verdict: "That if the court shall be of opinion that the law is for the plaintiff upon the demurrer to the evidence, then we find for the plaintiff and assess his damages at \$2,200. with interest thereon from the 7th day of January, 1875, until payment; and if the court shall be of opinion that the law arising upon the demurrer to the evidence is for the defendant, then we find for the defendant."

On the 17th day of November, 1875, the court, not being advised of its judgment to be given on the said verdict, took time until the next term to consider thereof.

At the next term, to-wit: on the 15 day of April, 1876, the court rendered judgment on the said verdict in favor of the plaintiff. To the said judgment, on the petition of the defendant, a writ of error and supersedeas was awarded by a judge of this court.

Harrison, Burnell and Meredith, for the appellants.

D. P. Strouse, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

The only question of controversy in this case is, whether the policy is void by reason of the failure of the insured to pay the amount of the second and last assessment on his premium note; as required by the board of directors of the company?

758 *There is no question whatever but that, by the express terms of the policy, it was stipulated and agreed by and between the parties thereto, that in case of loss or damage by fire or lighting to the property therein insured, and the note given for the cash premium or any part thereof, or any assessment or assessments on the pre-

mium note of the assured shall remain unpaid and past due at the time of such loss or damage, the said policy shall be void and of no effect; and that, by the express language of the application on which said policy was issued, which said application was subscribed by the plaintiff, James S. Taylor, the applicant, it was agreed by and between the parties, that in case of loss or damage by fire or lightning to the said property, and the note given for the cash premium or any part thereof, or any assessment as aforesaid shall remain unpaid and past due at the time of such loss or damage, the said policy shall be void and of no effect.

Nor is there any question whatever but that, by a resolution of the board of directors of said company held October 10th, 1873, it was, among other things, resolved, that a second and further assessment of twenty-five per cent. was made on the said plaintiff's deposit note of one hundred and ten dollars; that on the 25th day of May, 1874, a letter was addressed and sent by the secretary of said company to the said plaintiff, James S. Taylor, at Gogginsville, enclosing a copy of the said resolution and other proceedings of the said board, the commencement of which letter was in these words: "In accordance with the resolutions appended, you are requested and required to remit to this office (of Southern Mutual Insurance Comp'y, No. 11, Main street, Richmond, Va.,) \$27.50, net amount levied by second assessment on your deposit note, No. 5014, given for policy

of same number for \$110. Please remit *by check, draft, postal order, registered letter or express, prepaid, and receipt therefor will be forwarded to you;" in which letter also were included these words: "your attention is hereby called to the following provisions of the charter and conditions of your policy: then followed copies of sections 5 and 6 of the charter, and that condition of the policy which declares as aforesaid that, "it is hereby expressly stipulated and agreed by and between the parties, that in case of loss or damages by fire or lightning to the property hereby insured, and the note given for the cash premium or any part thereof, or any assessment or assessments on the premium note of the assured, shall remain unpaid and past due at the time of such loss or damage, this policy shall be void and of no effect;" and the conclusion of which letter was in these words: "to avoid the penalties above set forth you are advised and requested to remit at once the amount required of you. No agent is authorized to collect any assessment except on receipt signed by the secretary."

Nor is there any question but that the said letter was duly received by the said Taylor, and that he did not comply with the request therein contained; his testimony before the jury on that subject being in these words: "I received it (the letter aforesaid) by due course of mail. More than 30 days elapsed after I received the notice before my house was burned. I never did pay the amount of this assessment. I did not offer to pay it at any time within thirty days after I received the notice of the assessment."

Nor is there any question but that the said Taylor was fully informed that it was the duty of the board of directors to make assessments on the deposit notes of the insured to meet the expenses and losses of the company; that two such assessments had been so made on the said note of the said Taylor, one of which *assessments had been actually paid by him, and the other had never been objected to by him before the institution of this suit; but on the contrary he had always before that time assented to its binding obligation on him, and been willing to pay it; a letter having been written at his request, on the 8th day of July, 1874, by G. H. T. Greer, cashier of the Franklin bank, Rocky Mount, Va., to the Southern Mutual Insurance Company, Richmond, Va., which letter was read in evidence to the jury on the trial of this cause, and is in the words and figures following, to wit:

"Dear Sir:

"At request of Mr. James S. Taylor, I enclose check on Planter's Nat. Bank for \$30, to pay assessment on his policy. In doing so, I have to say that Mr. Taylor's house was burned on the 5th instant, but I hope that the payment of the amount of assessment, even at this time, will be all right, as the company loses nothing thereby, as it had the payment of the premiums perfectly assured, and by the payment of the amount above, it gets all it could have gotten. Mr. Taylor's failure to pay sooner, was pure negligence, as he is a man of property, but engrossed in farming forgot to pay. He does not know the exact amount of the assessment, but I suppose the \$30 will be enough. Please answer as soon as possible.

"Very resp'y,

G. H. T. Greer, Cas."

The company refused to receive the money thus sent to it, and insisted that the said policy had become void and of no effect by the default of the said Taylor in complying with its terms and conditions, and refused to pay to him the amount

of the insurance or any part *thereof. He therefore brought this action to recover the same.

The case was tried upon the general issue. There was a demurrer to the evidence by the defendant, in which the plaintiff joined. The jury found a conditional verdict, in the usual form in such cases; and the court rendered judgment thereon in favor of the plaintiff, for the amount of the insurance with interest and costs.

Is there any error or not in that judgment? Whether there be or not depends upon whether the second assessment of twenty-five per centum, made by the board of directors on the plaintiff's premium note of one hundred and ten dollars, in the payment of which assessment default was made by him, was made by the said board fraudulently or not; or with or without power to make it; and whether the fact so appears in the record?

If it appear in the record that the said assessment was made by the said board fraudulently, or without power to make it, then

there is no error in the judgment, and it must be affirmed. But if it do not so appear, then there is error in the said judgment, and the same must be reversed.

The court is of opinion that it does not so appear, and therefore that the judgment must be reversed and judgment rendered for the defendant upon the demurrer and evidence.

There is not a particle of evidence in the record tending to show that there was any fraud on the part of the said board of directors or any of them in making the said assessment. The board which made it consisted of W. C. Carrington, president, and Dr. H. G. Davidson, J. H. Martin, Dr. J. G. Cabell, Dr. Hunter McGuire, and the secretary. They constituted the board on the 10th day of October, 1873, when the said

762 *second assessment was originally made; and also on the 7th day of February, 1874, when the order previously made on the subject was altered and amended. If it be proper for us to speak from our personal knowledge of the character of these gentlemen, we might express the opinion that they were incapable of acting fraudulently as members of the said board. Nor does it appear from the record that the said assessment was improperly made, or made when there was no occasion therefor, in the execution of the purposes for which the said company was chartered and organized.

The company was a "Mutual Insurance Company," composed of the insured themselves, each one of whom was a member of the company. The directors are the representatives of the members of the company, being elected by them. The presumption therefore is, in the absence of evidence to the contrary, that the acts of the board of directors are free from any just ground of objection.

The property in this case was insured for the sum of \$2,200; two thousand being for the building and two hundred for the piano. The judgment recovered was for the whole sum, with interest and costs. The insurance was on the 1st day of March, 1871, and for five years therefrom. The insured understood perfectly the charter of the company and the terms of the policy of insurance and the conditions thereto annexed. He made no objection to any of them, but elected to have his property insured by that company, and thus to become a member of it. The consideration of the insurance was, the payment of a policy fee of \$2.50, and a cash premium of \$44, and the execution and delivery of a deposit note for \$110, which was subject to the assessments of the board of

763 directors to meet the losses and expenses; any surplus of which that *might remain at the expiration of the term of the insurance was to be returned to the insured. One assessment was afterwards made and paid, being 25 per centum of the deposit note, amounting to \$27.50. Another assessment of the same amount was afterwards made by the board of directors, of which due notice was given to the assured, who made not the slightest ob-

jection thereto, but failed to pay it in due time, though he was warned in writing by the secretary of the company at the time of making the demand, of the consequences of default. After setting forth all the particulars of the demand in the body of his letter, the secretary thus concludes it: "To avoid the penalties above set forth, you are advised and requested to remit at once the amount required of you," &c. Notwithstanding which he failed to remit it, and even failed to make any reply, written or oral, to the demand. Had he complied with the request and paid the second assessment, his whole payments on account of the insurance would together have amounted to about one hundred dollars; in consideration of which he would at once have received the whole amount insured, two thousand two hundred dollars. After the loss of the property insured, he offered to pay the amount of the second assessment, and in the letter of Mr. Greer enclosing a check for the money, he said: "Mr. Taylor's failure to pay sooner was pure negligence, as he is a man of property, but engrossed in farming forgot to pay." The company refused then to accept the payment and insisted that the policy had, by its express terms, become void and of no effect, by the failure of the insured to pay in due time.

The present suit was therefore then brought by the insured against the company; and was brought not in the city of Richmond where the company was located, and where

all their books were, and where they 764 transacted *all their business, but in the distant county of Franklin, the place of residence of the insured, in which by law, the action could be brought. In that action the assured, for the first time, raised the objection that the assessment was not duly made; that there was no occasion for it to raise the means for payment of the losses and expenses of the company; and raised it under the general issue. He might at any time, if he had any doubt about the correctness of the assessment, have called at the office of the company in Richmond, examined their books and papers, and satisfied himself therefrom, and from explanation, if necessary, by the officers of the company, of the correctness of the assessment. But he failed to do so; and the company could not of course carry all their books and papers from Richmond to Franklin county, and produce them on the trial, with somebody to explain them—and all this for the purpose of showing their right to the amount of the second assessment of \$27.50. There were two trials of the case. On the first there was a hung jury—on the second there was a verdict for the plaintiff; or rather a special verdict, on which judgment was ultimately rendered for the plaintiff, and that is the judgment to which the writ of error in this case was awarded.

A great many books and cases were referred to by the learned counsel in the argument of the case before this court, which or most of which we have examined; but we do not deem it necessary to notice them in detail in this opinion. There are few or no

cases on the subject in this court, and those decided by the courts of other States, are generally affected, more or less, by the legislation of the States in which they occurred. It is perhaps enough to say on this subject, that we have seen no case which can be considered as authority in conflict with 765 the foregoing opinion, or any *part thereof. We are therefore for reversing the judgment of the court below, as before stated.

ANDERSON, J., was not prepared to concur in or dissent from the opinion of Moncure, P.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore it is considered that the same be reversed and annulled, and that the plaintiff in error recover against the defendant in error its costs by it expended in the prosecution of its superseas aforesaid here; and this court proceeding to give such judgment as the said circuit court ought to have given, is further of opinion that the law arising upon the plaintiff's demurrer to the defendant's evidence is for the plaintiff, and that the said evidence is not sufficient in law to maintain the issue joined on the part of the defendant. Therefore it is further considered that the defendant take nothing by his bill; that the plaintiff go thereof without day and recover against the defendant in error (the plaintiff in the court below) its costs by it about its defence in the said circuit court expended. Judgment reversed.

766 *Poindexter v. The Commonwealth.*

January Term, 1880, Richmond.

1. *Venire Facias—Sufficiency.*†—Upon an indictment of P for the murder of C, before the jury is called the prisoner moves the court to quash the *venire facias*, and return thereon, for errors and irregularities appearing thereon; the only ground

*NOTE FROM OFFICIAL ADDITION.—This and the next two cases should have appeared in 32 Gratt.

†*Criminal Law—Venire Facias—Remoteness.*—The ruling of the court in the principal case as to the sufficiency of the writ is cited with approval in *Baccigalupo v. The Commonwealth*, 33 Gratt. 807; *Albert Mitchell v. The Commonwealth*, 33 Gratt. 845. See also *Whitehead v. The Commonwealth*, 19 Gratt. 640.

Failure to comply with the statute requiring the jurors to be summoned "remote from the place where the offence is charged to have been committed," has been held fatal error. *Whitehead v. Comm.*, 19 Gratt. 640.

In *Lawrence v. Comm.*, 81 Va. 484, the word "remote" was held to a relative term depending on the density of the population of the particular locality.

In *Craft v. Comm.*, 24 Gratt. 602, all parts of the county outside of the corporate limits were held remote.

of error is that the act requires the jurors to be summoned, &c., "remote from the place where the offence is charged to have been committed;" and the language of the *venire facias* is—"where the felony was committed." HELD: This was no error.

2. *Same—Same.*—A jury not having been obtained from the twenty-four persons summoned under the first *venire facias*, a *tales* is issued directing the persons named by the judge to be summoned—"who reside remote from the place where the felony was committed." HELD: The introduction of these words into the *tales*, if not required by the statute, is in accordance with the policy of the law, and does not invalidate the *venire*. And in a *venire facias* sent to a distant city, the insertion of these words is immaterial.

3. *Evidence—Admissibility.*—After the Commonwealth had introduced evidence of the affray at the factory of Childrey, which occurred between 11 and 12 o'clock, where C had come to see P, the Commonwealth asked the witness whether he had any conversation on that morning with P concerning any difficulty between himself and deceased, occurring that morning, and if so, what was it? To which question and answer thereto, the prisoner objected. And the attorney for the Commonwealth announced that he intended to follow the question up by evidence that the prisoner had conspired with another on the morning of the homicide to whip the deceased. The court overruled the objection, and the witness stated what the prisoner told him of a difficulty he had had with C, and that he had whipped him. HELD: It was competent evidence.

4. *Same—Same.*—It having been proved that C had come to the factory of Childrey between 11 and 12 o'clock, and demanded an apology from P, which P refused to give, and thereupon C had attacked P with a cane, and P had shot him, the Commonwealth offered evidence to prove the particulars of an assault made by the prisoner on the deceased at the store of Wingo & Co., where C was employed, between 9 and 10 o'clock of the same day of the homicide at Childrey's, in which the accused beat the deceased. HELD: The occurrences were so connected that the evidence of what occurred at the store of Wingo & Co. was competent.

5. *Trial—Jurors—Objections after Verdict.*‡—The objection to a juror that he was not a com-

‡*Same—Jurors—Competency—Objection.*—Under Code 1873, ch. 158, 20, objection to juror for disability created by the constitution, comes too late after verdict. *Puryear v. The Commonwealth*, 83 Va. 51, citing principal case; *Hite v. Commonwealth*, 96 Va. 495; *Simmons & Winch v. McConnell*, 86 Va. 494. Nor can objection be made after the juror is sworn, unless by leave of court. *Spurgeon v. The Commonwealth*, 86 Va. 652.

See generally on this question 4 Min. Inst. (2nd Ed.) 738; 12 Enc. of Pl. & Pr. 437; Code of 1887, §§ 3155, 4048; *Toel v. The Commonwealth*, 11 Leigh 714; *Thompson v. The Commonwealth*, 8 Gratt. 637; *Dilworth v. The Commonwealth*, 12 Gratt. 689; *Bristow v. The Commonwealth*, 15 Gratt. 634; *Reynolds v. Richmond, etc., Ry. Co.*, 92 Va. 400; *Gray v. The Commonwealth*, 92 Va. 772; *Hendrick v. Comm.*, 5 Leigh 707; *Montague v. Comm.*, 10 Gratt. 767.

Same—Murder—Provocation—Instruction.—In *Honesty v. The Commonwealth*, 81 Va. 296; it was held not error to give an instruction to the jury that "to render provocation a defence to

petent juror, because he had not paid his capitation tax of the previous year, comes too late after a verdict of conviction in a criminal trial; and is not good ground for setting aside the verdict, and granting a new trial to the prisoner.

6. **Case at Bar.**—Upon the facts in this case the prisoner was properly convicted of voluntary manslaughter.

At the March term, 1879, of the hustings court of the city of Richmond, John E. Poindexter was indicted for the murder of Charles C. Curtis. He was tried in May and the jury found him guilty of voluntary manslaughter, and fixed the term of his imprisonment in the penitentiary at two years; and the court sentenced him accordingly. And thereupon the prisoner applied to this court for a writ of error and supersedeas; which was allowed.

In the progress of the trial the prisoner took a number of exceptions to rulings of the court; all of which are set out in the opinion of the court delivered by Judge Moncure.

Wm. L. Royall and John B. Young, for the prisoner.

The Attorney-General, for the Commonwealth.

768 *MONCURE, P., delivered the opinion of the court.

This case has been argued with great ability by the counsel on both sides. We listened to the argument very attentively and anxiously, have considered it very maturely, and have agreed in an opinion in the case; which opinion we will now proceed to deliver. We will dispose of the several assignments of error in the order in which they are made in the petition for a writ of error in the case:

1. The first assignment of error is: that the hustings court erred in overruling the petitioner's several motions to quash the original, and each of the other writs of venire facias, issued on the trial of the case, which constitute the subjects of his first, second and third bills of exceptions referred to in the said petition.

In the first bill of exceptions, it is stated that on the trial of the cause, before the jurors were called, the prisoner moved the court to quash the writ of venire facias, and the return thereon, for errors and irregularities appearing thereupon, and in this connection, objected to the list furnished by the judge to the sergeant of the jurors to be summoned under said writ, on the ground that said list was not made according to law. Then follow in said bill a copy of said writ and the return thereon and the said list and certificate of the clerk thereto, which need not be here repeated. The venire facias commanded the sergeant of the city of Richmond to "cause to come before the judge of the hustings court of the city of Richmond, at the court-house thereof, on the 17th day of April, 1879, twenty-four persons

of your corporation, to be taken from a list furnished by the judge of said court, and who reside remote from the place where the felony was committed, and who are qualified in other respects to serve as jurors, of which John E. Poindexter stands indicted," &c. But the court overruled said motion to quash, and said objection to said list, and directed the jurors to be called who were summoned under the same; to which rulings of the court the prisoner excepted, and tendered his said bill of exceptions; which the court signed, sealed and enrolled accordingly.

The said court manifestly did not err in the rulings, or any other of them, referred to in the said first bill of exceptions.

In the second bill of exceptions, it is stated that on the trial of the cause, before the jurors summoned under the writ of venire facias which issued on the 17th day of April, 1879, the prisoner by his counsel moved the court to quash the said writ of venire facias and return thereon, for errors, defects and irregularities apparent thereon. The said writ and return thereon are inserted in the said second bill. The said writ commanded the said sergeant, to "cause to come before the judge of the hustings court of the city of Richmond, at the courthouse thereof, on the 18th day of April, 1879, two hundred persons of your corporation, to be taken from a list furnished by the judge of said court, and who reside remote from the place where the felony was committed, and who are qualified in other respects to serve as jurors, of which John E. Poindexter stands indicted, &c. And in this connection it is certified (in the said second bill), that the list furnished by the judge to the officer, in conformity to the direction of said writ, contained the names of two hundred persons to be summoned as aforesaid. But the court overruled the said motion to quash; to which decision of the court the prisoner excepted, and tendered his said bill of exceptions thereto, which was signed, sealed and enrolled accordingly.

770 *The objection made to the venire facias set out in the second bill of exceptions is: that it contains the words, "and who reside remote from the place where the felony was committed," which are not in that part of the act of the general assembly under which the said venire facias was issued; and it is contended, that the insertion of the said words in the said venire facias, rendered it fatally defective.

The act in question is section 4, on page 340, of the Acts of Assembly of 1877-78: which, or so much of it as need be here stated, is as follows: "In a case where the punishment may be death, the writ of venire facias shall require the officer to summon 24 persons in the manner provided in section three of this chapter; and in any case of felony, where a sufficient number of jurors for the trial of the case cannot be had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so

murder in the first degree, it must be shown that the prisoner, at the time of the fatal blow, was deprived of the power of self-control by provocation he had received, and that in deciding whether this was the case, all the circumstances must be considered." Citing the principal case.

many persons as may be deemed necessary to complete the jury."

The venire facias which is first to be issued under the said fourth section is expressly required to contain the words: "residing remote from the place where the offence is charged to have been committed." The direction contained in the same section, for the issuing of another venire facias in the same case, if necessary, follows immediately, and without a full stop, but only a semicolon, the direction in regard to the issuing of the first venire facias. It does not repeat the words in question expressly used previously in the same section. But if it does not imply that the persons to be summoned under the subsequent venire facias are to possess the same qualification in that respect with the persons directed to be summoned under the first venire facias, it certainly does not imply that they are not to possess

771 *such qualification. The words of that part of the section are, "the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the jury." If it be not implied by these expressions, (and we do not mean to say that it is), that the jury is to be completed of persons possessing the same qualification in regard to residence prescribed as to persons directed to be summoned under the first venire facias, can the contrary be thereby implied? Can remoteness of residence from the place where the offence is charged to have been committed, be any valid ground of objection to a person summoned from the bystanders, or from a list to be furnished by the court for the purpose of completing the jury? In making out a list of persons under the said fourth section, from which are to be summoned so many persons as may be deemed necessary to complete the jury, as aforesaid, is it any just ground of objection to a person put upon that list, that he resides remotely from the place where the offence is charged to have been committed? If the court in making out the list, has to choose between persons residing remotely from the said place or in the immediate vicinage, is it any just ground of objection to the action of the court in that respect, that it pursued the declared policy and command of the law in regard to the first venire facias, and chose the persons residing remotely from the said place? Or if the officer, in summoning persons named in said list, is influenced in making his selection, by the same policy and command of the law, can it be a just ground of objection to his conduct that he did so? In this case, the court named two hundred persons, exactly the number required to be named in the list, and the officer was required to summon the whole number named; so that he

772 had to *make no selection, and the question therefore does not arise as to him. Whether the court, in making out the list, made any such selection, or had any opportunity of doing so, the record does not inform us. But it is a wholly immaterial

question, and it is no valid ground of objection to the second venire facias aforesaid that it contains the words: "and who reside remote from the place where the felony was committed."

The said court therefore manifestly did not err in its rulings referred to in the said second bill of exceptions.

In the third bill of exceptions, it is stated, that on the return of the sergeant upon the two writs of venire facias which were issued in this cause on the 18th day of April, 1879, directing him to summon jurors from Alexandria and Fredericksburg, and before calling the jurors under said writs, the prisoner by his counsel moved the court to quash the said writs, and each of them, and challenged the array of jurors summoned under the same, upon the grounds that the said writs were issued without authority of law and are also illegal and void for errors, irregularities and imperfections upon the face thereof and the returns thereon. Then follow, in said bill, a copy of said writs and the returns thereon. In one of the said writs the sergeant was commanded to cause to come before the judge of the hustings court of the city of Richmond, at the courthouse thereof, on the 21st day of April, 1879, twenty-five persons of the city of Alexandria, each one of whom is twenty-one years of age, and who are in other respects qualified to serve as jurors, and who reside remote from the place where the felony was committed of which John E. Poindexter stands indicted, to recognize on their oaths whether the said Poindexter be guilty of the felony aforesaid or not," &c. The other of the said two writs was to the same effect and in the

773 *same form, except that it applied to Fredericksburg, instead of Alexandria. These writs were duly returned by the said sergeant or his deputy, with the names of the persons endorsed thereon who had been summoned by him, in accordance with the said writs respectively; it being stated in the returns on said writs that the said persons were so summoned by him. But the court overruled the said challenge and motion to quash, and directed the call of the jurors under the said writs to be proceeded with; to which opinion and decision of the court, the prisoner by his counsel excepted, and tendered his said bill of exceptions; which the court signed, sealed and enrolled accordingly.

The said court did not err in the rulings on any of them referred to in the said third bill of exceptions. The said court was authorized by law to order the said writs to be issued when it did, and the said writs were legal and valid, in form and substance. The only objection made to them seems to be, that they command the sergeant to summon persons as jurors "who reside remote from the place where the felony was committed, of which John E. Poindexter stands indicted." If these words can have any meaning or effect, in the connection in which they are here used, we have already shown that they are in accordance with the declared policy and spirit of the law, and are there-

fore unobjectionable. If they have no meaning or effect in the said connection; if all persons residing in Alexandria and Fredericksburg respectively, reside remotely from the place where the said felony was committed, then all such persons were equally competent and eligible in that respect to serve as jurors in the trial of the said felony, and the words in question are wholly useless, and do not at all affect the other portions of the said writs, which must have precisely the same effect as if the said 774 words had not been *inserted in the writs. The maxim, utile per inutile non vitiatur, applies to such a case.

We think there is nothing in Wash's case, 16 Gratt. 530, or in Whitehead's, case 19 Id. 640—which cases were cited and relied on by the counsel for the plaintiff in error—which is in conflict with anything that has been said in this opinion; and that it is unnecessary to state here, the points or any of them decided in those cases or either of them.

2. The second assignment of error is in these words: "The admission by the court of evidence of the fact, that a prior difficulty had occurred between your petitioner and said Curtis on the same morning on which the killing of the latter by the former occurred, which forms the subject of the indictment, and for which latter alone your petitioner was legally on trial."

This assignment of error depends upon the fourth and fifth bills of exceptions; the substance of which so far as material to the present enquiry will be now stated.

In the fourth bill of exceptions it is stated, "that on the trial of the cause, the Commonwealth introduced a witness by the name of Allen M. Lyon, who testified as follows:" Then follows, in the said bill, the testimony of the said witness, the substance of which, so far as seems to be material to be set out here, is as follows: "I was present at the shooting of Charles C. Curtis by the prisoner. It occurred between 11 and 12 o'clock, in the morning of the 3d of March, 1879, at Childrey's factory, corner of 24th and Main streets, in the city of Richmond." The witness then proceeded to describe the situation of the office in which the shooting occurred. "The prisoner was a clerk in my office. I was sitting in the front office with my back to a partition, near the door leading into the next office, where Mr. Poindexter was.

775 In that partition there is *a window. I saw the two gentlemen enter at the Main street entrance. Young Mr. Wilson and I were in there. He was in the corner next the street. I said, 'How are you, McGuire?' Curtis came in first. McGuire asked where Poindexter was. I nodded my head to the door leading to the inner office and said, 'He is in there.' The window is about four feet high. There is no glass to it, but a frame for a wire screen, but it was not up. You can converse from one room to the other and can easily hear what is going on. I was sitting there, as I have described, and I saw Curtis go up to the window, almost immediately after they entered, and ask Poindexter a question, which I did not under-

stand at the moment; and Poindexter replied, 'You can't get one.' Curtis immediately passed across my feet, through the door, and into the room where Poindexter was. Some remark attracted my attention, I don't know what it was; and I jumped up and went into the inner office. Mr. Curtis had stopped, and was standing with his stick upraised. Mr. Poindexter had the pistol in his hand, and said, 'If you strike me with that stick, I will shoot you.' McGuire then said, 'Hit him, hit him; knock him in the head. knock him in the head.' Curtis immediately advanced and struck him. Poindexter firing, the striking and firing continuing, until Curtis fell. I was standing against the door." Witness was shown the pistol, and described the wounds in the body and head of the deceased. He stated that Curtis' back was to him, about eight feet distant. That Poindexter was facing towards witness, and seven or eight feet further from witness than was Curtis. Witness also described the location of the furniture in the room. Both of the rooms are about fifteen feet long and eleven feet wide.

The width of the room, in the clear, 776 was stated to be about six feet *one and a half inches between two long desks running along its sides.

The witness was then asked by the Commonwealth's attorney the following question:

Had you any conversation on that morning with the prisoner, concerning any difficulty between himself and the deceased, occurring on that morning; and if so, what was it?

To which question and any answer thereto the prisoner by his counsel objected. And thereupon the Commonwealth's attorney announced that he intended to follow the question up by evidence that the prisoner had conspired with another, on the morning of the homicide, to whip the deceased. Notwithstanding which the prisoner still objected to said question and any answer thereto. Nevertheless the court overruled the objection, and permitted the witness to answer the question, which answer is in substance as follows:

Answer. "I had; soon after getting to my office, say about 9½ o'clock A. M., he (the prisoner) told me, that he had had a difficulty with a young man up town by the name of Curtis, at Wingo, Ellett & Crump's store, corner of 10th and Main streets, and that he had horsewhipped him. I think I asked him what for. He said that he had insulted a young lady, friend of his, that went in there to see about some shoes, and that she had carried a pair of shoes there to have something done to them; that on taking them out of the bundle, he had remarked on the size of them, and said that it was a very pretty little foot that went in it. Some similar remark was repeated several times, and she had asked him, please to make no remarks on her foot, to wrap them up and give them back to her; that then Curtis had repeated it was a pretty little foot and asked her to stick it out and let him look at it, or let him see it; and some similar remark, and she paid

777 *him. She laid down the money to pay what she owed him, and started to the

door, and as she got near the door he remarked, she hadn't left the right change. She asked how much mistake she had made, and he said she owed one dollar and seventy-five cents and had only paid seventy-five cents. She came back to give him the additional amount, and he turned to her and remarked, 'O yes, here it is,' opened his hand and showed her the other dollar. They then went to the phaeton, and he helped her in, and in putting her in squeezed her arm. That is about all he said. Half an hour later had another little conversation with the prisoner. I went out into the yard or somewhere, and coming back I said, 'John, the first time you go up town, that young man will be shooting you, if you don't look out.' Said he 'O no, that is all settled; there'll be no more of that.' That's about all I believe."

To which ruling of the court, in permitting the said question to be asked and said answer to be given, the prisoner excepted, and prayed that his said bill of exceptions (to-wit: the fourth), might be signed, sealed and enrolled, which was done accordingly.

In the fifth bill of exceptions it is stated in substance, among other things, as follows, to-wit: that after the proceedings set forth in said bill of exceptions No. 4, which are here referred to as if here repeated at large, the said witness, Allen M. Lyon, proceeded with his testimony, substantially as follows:

He produced a diagram of the room in which the homicide occurred, which is annexed to his evidence as part thereof. He explained the location of the outer and inner offices, and the position of the parties and the furniture, as appears on said diagram. "I suppose if the door had been shut it would have touched my back." "Poindexter's

778 face was towards me, but *I cannot say that he saw me. I did not see Mr. McGuire in the inner office at all." "The distance from where Curtis, the deceased, stood talking to Poindexter at the window to the door leading to the rear office, is eighteen feet; from where Poindexter stood to the same point, is fifteen feet. When Curtis fell, his head struck one of the stools as I show in the diagram. I advanced to him and reached out my hand as if to take hold of him. I saw that he was shot in the head, and started immediately for a doctor." "As he fell," "the stick dropped from his hand and lay by his right side. When Curtis fell, Poindexter said, 'My God, I did not want to shoot the man; can't some of you do something for him.' I heard him say this just as I was going for the doctor. I have no doubt of my own position. One of the balls went through my sleeve and struck the door. I found four balls in Curtis' body. I did not understand at the time what Curtis said; it came to me afterwards that he said, 'I want an apology.' I thought at first he said something about 'policy.' There was some expression, I don't know what it was, before I went in. Curtis had halted. Just as I came in, Poindexter said, 'If you strike me with that stick I'll shoot you; I'll shoot you.' Curtis said, 'I am unarmed.' McGuire said, 'Hit him; hit him; knock him in the head,

or 'kill him; kill him.' I rather think the expression was, 'Hit him,' I am positive. I know he used the expression 'Knock him in the head.' When that was uttered, I thought McGuire was in the outer office. I did not go up to Curtis because I was right in the line of the pistol. When I first saw Poindexter he was near the end of the room. He had retreated from the window. I could not see him at the window, but if he was there, as McGuire says he was, he had fallen back from that position towards the end of the room by a window with bars *over it."

"I thought nothing of the size of the combatants while the conflict was going on. When I saw Curtis' bosom exposed, I thought he was a tolerably good sized man. He was, in my judgment, a larger man around the chest than Poindexter. The blows were delivered with rapidity and force. No shot was fired until McGuire's exclamation, and Curtis advanced and struck Poindexter. I feel positive Curtis struck first; cannot say how often he struck. The blows and shooting were in rapid succession. Poindexter could fall back no further after he warned him. He had then fallen back as far as he could. The whole thing was very rapid. I saw no wavering of blows on the part of Curtis until he fell. I could not have told he was struck until then. Poindexter has lived with me over six years. I never looked upon him as a robust man. I looked upon him as a delicate, and as a quiet and peaceable man. Poindexter was a taller man than Curtis, but my impression was that Curtis was the larger man. Curtis had room for a pretty free use of the stick. Used it overhand. Have seen the prisoner with a pistol before on occasion of his going to a farm belonging to him about Bosher's dam, eight or nine miles above the city. He visited that place after he was done his daily work with me. Generally went up in the evening, and I believe on such occasions carried a pistol. I do not identify the pistol as the one I had ever seen before. The prisoner was not going to Bosher's dam that morning. Do not know I ever saw it in the desk. Have gone in their often." Witness was shown the pistol with seven chambers, six empty and one loaded. The witness said "he did not really know how many shots were fired, and that he did not know which end of the stick Curtis held. The rapidity of the firing was illustrated by snapping his thumbs, at intervals of about two seconds." A

780 copy of the *diagram referred to in the testimony of this witness is made a part of the record and embodied in this bill of exceptions.

John J. Wilson, another witness, testified "that he was present at the killing. When Mr. Curtis came in he was at the window in the front office, looking on Main street. Heard McGuire ask Mr. Lyon if Poindexter was in—McGuire came in first. Did not hear anything until I heard Poindexter exclaim to Curtis, 'Stand back.' Got up and saw no more until I saw them strike and shoot. Curtis struck first. Can't tell the number of blows and shots. Heard Poindexter exclaim

'Good God, I didn't want to kill the man.' Heard him ask for some ice. I first got up and witnessed the striking soon after I heard Poindexter warn Curtis, 'Stand back.' I looked at it through the window in the partition. The blows and firing were both rapid. Could not tell the number. I saw no one at this time but myself in the front office. I did not see Mr. McGuire except when he first came in."

And thereupon the Commonwealth's attorney introduced another witness, Francis H. McGuire, who testified, in substance, as follows: "I was present at the killing of Charles C. Curtis by the prisoner at the bar. It occurred on Monday. Cannot recall the date. It was in Richmond, Virginia, at the factory of John K. Childrey on Main street, about eleven o'clock A. M. Reaching the factory, Mr. Curtis and I were together. I opened the door on Main street and stepped in. I preceded Curtis. He followed immediately. I stepped up to Captain Allen M. Lyon who was sitting in the front office. I think his feet were on a stove. The office consists of 3 compartments. The first we entered. It is six by ten or twelve feet, I should say; may have been larger. I have never been in it before or since. The second office

781 was cut off by a partition *from it. I went up to Captain Lyon and asked him where Mr. Poindexter was. Before I heard his reply I discovered that Mr. Curtis had seen Poindexter. Mr. Poindexter was behind a counter in the adjoining room, looking through a window. Mr. Curtis advanced to the window and said to Poindexter, 'I demand an apology for your conduct this morning.' I am sure he said this. Whether he added, 'full and immediate,' I cannot say. I heard Poindexter's reply. It was, 'I won't apologize.' That is my recollection; but I cannot be certain about it. I still stood near Captain Lyon, who was still sitting, but I turned toward Curtis and Poindexter. Captain Lyon and I were both nearer to the door of the office in which Poindexter was than was Mr. Curtis, though not in a line between him and it. The demand was made, and the reply given through the window. I was facing towards Curtis. When I heard Poindexter's reply, I said, 'You must get in there,' or 'Get in there.' Curtis passed to the door and I followed him immediately."

The witness described the inner room as follows: "It contains a long desk, extending its whole length, I believe on the side next to the first room. My impression is, the room is about the same size as the outer one. There are some pieces of furniture on the opposite side. I am not certain whether it is a safe or desk. It may be both. I think there was a tall stool. My recollection about the stool is very indistinct, but as Curtis advanced into the room, my impression has always been that Poindexter got off the stool, with his left hand up, and his right hand at his hip. (Witness took the position.) I followed Curtis into the room. My object in following him was to prevent any interference. Curtis advanced with his stick raised, and I got further

into the room—to see more distinctly. When

Poindexter got off the stool and took 782 the attitude *I have described, I think Curtis faltered—hesitated. I heard him say, 'I am unarmed.' At the same time he turned his head over his shoulder and cast an enquiring look at me. My impression is I could not see Poindexter's right hand because of Curtis' body being between me and it. I was aware a pistol had been drawn by Poindexter. I said in response to the enquiring look, 'You must beat him,' or 'beat him.' Curtis then turned his glance, immediately advanced, and struck Poindexter; and Poindexter fired; and the striking and firing continued until Curtis fell. My impression is five shots were fired. They were very close together; sufficiently close for one to belabor the other with a stick; for Curtis to strike him fairly and strike him well. Curtis fell rather on the left side of the office as he went in, and fell over to the left. Did not fall in a lump, but collapsed gradually. I caught him by the shoulders before his head touched the floor, I think. I then went out for a doctor. He never spoke after he was shot. He looked in my face with an expression of great pain. Curtis was about my size. I weighed 125 pounds when I last weighed. I saw no marks or bruises on Poindexter. Had no opportunity to do so. Curtis had no arms to my knowledge. He made no effort to draw any. I could not say whether a lick was struck before the shot was fired. The two were very nearly contemporaneous I think. The witness here identified a hickory stick produced to him as that used by Curtis. Said he aided him in selecting it as they came down the street to Childrey's factory. I thought there was also a negro in the office. I was the adviser of Curtis in this case. When Curtis turned his face to me they were not in striking distance of each other. He made the remark, 'I am unarmed' before he looked at me, and

783 then turned his head; when I *replied, 'You must beat him.' He then turned immediately and attacked Poindexter. I looked at the wounds when Curtis was on the floor. My impression is there were three wounds on the left breast, and one on the right, and one over the left eye. When Curtis advanced upon Poindexter, his stick was raised. I think he advanced immediately with his stick raised, as he got into the room. Before he got within striking distance the pause occurred. My recollection is, that during the combat, Mr. Poindexter retreated to the wall. That is to say, within a few inches of the wall, but whether he was there at the end I cannot say. The blows continued rapid, continuous and unremitting until Curtis fell. I saw no diminution in the force of them until he fell. After Curtis came into the door, Poindexter could not get out of the room except by passing Curtis. I think Curtis' head struck nothing; it may have struck a piece of the furniture as it went down. Immediately after Curtis fell, Poindexter exclaimed in tones of great distress, 'I did not mean to kill the man, you all do what you can for him,' or words to that effect. We gathered around him, and I went at once for a physician.

After I returned, I said, 'We are all going to stand up to this thing and I had better get an officer of the law,' and Poindexter told me where I could get one, and I went and brought him. Poindexter was there when I returned. Meanwhile a policeman had come in and arrested him. I saw no evidence of Curtis having been struck until he fell. I saw no blows strike Poindexter elsewhere than on his raised arm. The parties were very close together when the shots were fired. Poindexter might possibly have passed into the rear room by the door opposite the one by which we entered, as Mr. Curtis was passing from the window to the door of the room in which Poindexter was; but to

784 do so he must have *moved rapidly, and started immediately upon Curtis demanding the apology. I was nearer to Curtis than Mr. Lyon was. I was about 3 or 4 feet to the front and left of Mr. Lyon, and was the first to get to Curtis when he fell, and caught his head before it reached the floor. I was not armed. This is the first time I have ever stated this or been asked the question. I gave no intimation there as to whether I was armed. Poindexter must have seen me. I was conscious that Poindexter had drawn a weapon, though I did not see it, or hear the expressions, 'Stand off,' or 'if you strike me with that stick, I'll shoot you.' I gave the direction to Curtis to 'hit him,' or 'beat him,' as emphatically as I could, and when I did so was fully aware that Poindexter had drawn a pistol. After Curtis fell, I said 'raise the window and let him have some fresh air.' Mr. Allen M. Lyon said 'You ought to have kept him in the fresh air when you had him there.' I said 'I must be allowed to differ with you as to that.'

Then the Commonwealth introduced another witness, William M. Colgin, who testified:

"I am a policeman. I made the arrest of Poindexter. Got to the office either 25 minutes after 11 o'clock or 25 minutes to 12 o'clock. Mr. Allen M. Lyons let me in. I asked who did the shooting. He told me it was Mr. Poindexter. I spoke to Poindexter and arrested him. He said he was the man. Asked me if I thought the man would die. Told him I thought he would. Asked for his pistol, and he ran his hand in his pocket and handed it to me. The pistol was exhibited. Poindexter asked me if I thought it necessary he should be arrested. Said he had sent for a magistrate and thought it could be settled there. Afterwards, Squire Judson Cunningham came and I got the cane and whip from him. Poindexter, in talking of it, said there would have been no occasion for the shooting if *it had not been for that man there, pointing to Mr. McGuire."

785 Then the Commonwealth introduced Dr. William H. Taylor, coroner of the city, as a witness, who described the wounds upon the body and in the head of the deceased, and exhibited the bullets extracted from the body and brain of the deceased. He described the wound in the head as necessarily fatal. The wound in the right lung as not necessarily

fatal, but very dangerous. And that none of the wounds but that in the head would necessarily have stopped the fight.

And then the Commonwealth introduced V. S. Carlton, who testified as follows:

"I knew the deceased; had been employed in the store of Wingo, Ellett & Crump with him over a year. The store is at the corner of Main and 10th streets; the store is about 30 feet long. In it are four counters, two on each side, set end to end with a break between for persons to pass. On the further end of the rearmost counter, on the left-hand side as you enter from Main street, sets the desk. On the morning of the 3d of March, 1879, about 8 o'clock, I went to the store. About 9 o'clock Mr. Curtis arrived, returning from his breakfast. About half-past nine o'clock a.m., Curtis was at the desk putting down the day of the month. I was standing near him. The prisoner and his brother Thomas came in."

Here the witness was asked by the attorney for the Commonwealth to state what occurred after the Poindexters came in the store, avowing it to be his purpose to prove by the witness the particulars of an assault made then upon the deceased by the accused, in which the accused beat the deceased, and the defendant, by his counsel, objected to this line of interrogatory, and to the introduction by the Commonwealth of any evidence of an assault by the accused at

786 that time, and to the *particulars of any such assault; nevertheless the court overruled the objection, and allowed the witness to proceed as follows:

"His brother stopped near the door. Prisoner came up to where I was standing, and addressing me asked: 'Is this Mr. Curtis?' I said, 'I am not,' and pointed him to Mr. Curtis. He then addressed Curtis in a similar way, and Curtis said, 'That's my name.' Prisoner then said, 'You insulted a lady here on Saturday, who came here with Mrs. Crump.' Curtis replied, 'I am not aware of it, sir; and if I did, I beg her pardon.' Poindexter said, 'You did, sir,' and then drew a horsewhip from under his coat and struck him eight or ten pretty severe blows with it over his shoulders. Poindexter was standing in front of the counter and Curtis behind it when the striking began. Curtis stooped, raised his left arm, and proceeded along behind the counter towards the opening between the two. Reaching the opening, he came out into the aisle of the store, and told Poindexter 'he would like him to explain. He did not know what it meant. He didn't understand it.' Poindexter said he had no explanation to make, and shook his fist in his (Curtis') face. I never heard Curtis ask who the lady was. Then John E. Poindexter and Curtis walked towards the door to where Thomas Poindexter was standing, and the three went on towards the door together. I followed behind Curtis. I heard no more conversation between them. I think, in fact am pretty certain, although I will not swear to it, that deceased and Mr. John E. Poindexter shook hands before the gentlemen left the store.

The name of the lady was not mentioned at this time, nor did I hear Curtis at that time say he knew who the lady was. After the Poindexters left he seemed very much excited, and in about half an hour left. Between the time they left and his going
787 *out, he had been attending to his usual duties and overlooking some shoes. He went and was absent about half an hour. When he returned he told me he knew who it was. He did not call any names then. I did not ask him, nor did he tell me, how he got the information. Then he went out again, and I never saw him any more until I saw him at Mr. John W. Cringan's, dead. He was about my size; might have been a little taller, but not so stout. In my opinion he weighed from 120 to 125 pounds. I think the prisoner was taller than the deceased; cannot say what was the difference in their sizes. Curtis showed no disposition to fight Poindexter, or to return the fist-shaking by a blow. There was nothing to prevent his assaulting Poindexter if he had chosen to do so, as they went down the store together."

To which ruling of the court in permitting said question to be asked and allowing the answer thereto to go to the jury, the prisoner excepted, and prayed that his bill of exceptions, (to-wit: the fifth,) might be signed, sealed and enrolled, which is done accordingly.

The same question, in effect, is presented by the fourth and fifth bills of exception, viz: Whether the occurrences which took place as before mentioned in the same city of Richmond, on the same day, to-wit: the third day of March, 1879, one of them at the store of Wingo, Ellett & Crump, at the corner of 10th and Main streets, at 9½ o'clock A. M.; and the other of them at Childrey's factory, corner of 24th and Main streets, between 11 and 12 o'clock on the same morning; there being an interval of about two hours between them; and the distance between the two places being fourteen squares—were so connected together and were of such a nature as that evidence of the former, which took place at the store of Wingo, Ellett & Crump, was admissible for the

788 purpose for *which it was offered and introduced by the Commonwealth and admitted by the court, as mentioned in the fourth and fifth bills of exception aforesaid?

The court is clearly of opinion that the said occurrences were so connected, and that the said evidence was so admissible.

The interval of time between the said occurrences was very short compared with their importance—just two hours. The distance between the places where they respectively happened was fourteen squares of the city of Richmond. The parties were perfect strangers to each other when the first occurrence took place. Curtis seemed to be wholly unconscious of having given any just cause of offence in the matter for which the violent assault and battery committed upon him by Poindexter on that occasion was so committed. He was not called upon for an explanation or an apology in regard to the

matter for which the said assault and battery was committed. He bore it without resistance and without a murmur of complaint. He even took friendly leave of the perpetrator of it, and offered to apologize to the person who seemed to have taken offence at something which he was charged with having done or said on a former occasion, though he by no means admitted that he intended to give any such offence. Very soon after Poindexter left the store of Wingo, Ellett & Crump, after committing the assault and battery aforesaid, Curtis became very much excited and went out to enquire who it was that had done him so much violence, for he was then a total stranger to Poindexter. In a short time he made the discovery and returned; and soon again went out and with his friend McGuire went down to the place of business of Poindexter to get from him an apology for the great wrong which he had done to Curtis. They carried no deadly

789 weapons with them. Neither *of them was armed, except that Curtis carried with him a stick, apparently of ordinary size, which they procured in their walk to see Poindexter. Curtis demanded an apology of Poindexter; and if it had been accordingly given, the whole difficulty would doubtless at once have been completely and peacefully settled. Certainly if Curtis would have been satisfied with such a settlement, as it seems he would have been, Poindexter ought also to have been. But the latter refused to apologize, and the former had either to use his stick in striking Poindexter, or else to return as he came without receiving any satisfaction. Curtis advanced to use his stick, when Poindexter drew his pistol, which was a seven shooter, and threatened to kill Curtis if the latter struck him with the stick. The latter said he was unarmed, and seemed to doubt whether he would strike. But McGuire urged him to strike, which he accordingly did. And the striking with a stick on the one side, and firing with a pistol on the other, continued until Curtis had received five wounds, one of which was mortal, though Poindexter seems not to have been seriously hurt by the blows he received in the conflict.

Now the first occurrence aforesaid plainly led to, and was the cause of the second, as was well understood by Poindexter: and evidence of the former was clearly admissible evidence on the trial of Poindexter for the homicide of Curtis. The hustings court therefore did not err as alleged in the second assignment of error.

3. The third and last assignment of error is in these words: "The next error assigned is the refusal of the court to set aside the verdict and grant your petitioner a new trial." This motion was based upon several grounds, and its refusal by the court forms the subject of the sixth bill of exceptions.

790 *The grounds on which the motion for a new trial was based, as above mentioned, are five in number, and are the following.

"First. Because the court erroneously ad-

mitted as evidence to the jury the testimony of V. S. Carlton and of other witnesses concerning an assault made upon the deceased by the prisoner, between 9 and 10 o'clock on the morning of the day on which said homicide was committed; the prisoner alleging that said proof failed to show such a legal connection between the said assault and the subsequent killing as would justify admitting as evidence without limitation the said assault of the morning, and the particular circumstances attending it, and because the admission of said evidence operated to greatly prejudice the prisoner before the jury on said trial.

"Second. Because the verdict is contrary to the law and the evidence.

"Third. Because one of the jurors, O. J. Doggett, had formed and expressed, previously to his being summoned on the jury, such a decided and substantial opinion touching the guilt of the prisoner as disqualified him from being a competent juror.

"Fourth. Because two of the jurors from Fredericksburg, to-wit, J. E. Woody and George H. Peyton, Jr., were and are not competent jurors according to the Constitution and laws of Virginia, in this, to-wit: that neither they nor either of them are or were entitled to vote or hold office in their respective corporations at the time they were sworn upon and acted as jurors in the trial of said cause; and grant him a new trial.

"Fifth. Because Richard S. Windsor, one of the jurors summoned from the city of Alexandria, is not now and was not a competent juror according to the Constitution and laws of the State of Virginia, in this to-wit: that he is not now and was not
791 entitled to vote *or hold office in his corporation at the time he was sworn and acted as a juror in the trial of this cause."

The first of the aforesaid grounds has already been fully considered and has been clearly shown to be unfounded. It was certainly not a good ground for setting aside the verdict and granting a new trial and will therefore be dismissed from further consideration.

The fourth ground alleged for said motion will be next considered, following the order pursued in the petition for a writ of error in this case, to-wit; that J. E. Woody and George H. Peyton, Jr., two of the jurors who tried the accused, were not competent jurors according to the Constitution and laws of Virginia, in this, to-wit: that neither they nor either of them are or were entitled to vote or hold office in their respective corporations at the time they were sworn upon and acted as jurors in the trial of said cause.

Without considering whether the two jurors above objected to as incompetent were in fact incompetent or not when they were accepted and sworn and served on the jury, it is sufficient to say that no objection was made to them or either of them by the accused until after a verdict of guilty was found against him by the jury; when, for the first time, an objection was made to their competency by the accused, by making it the

fourth ground, which we are now considering, of his motion to set aside the said verdict and grant him a new trial. The court is of opinion, that the said objection was made too late, and was then properly overruled. The accused accepted these two jurors; had the benefit of having them on the jury which tried him; and being disappointed by the verdict of "guilty" which was found against him, he then, for the first time, objected that these two jurors were incompetent as such because they had not paid their capitation

tax for 1878, the year preceding that
792 in which the trial *took place. The proper time for objection to the said jurors was before they were sworn on the jury. No such objection was then made. The only objection made by the accused to the veniremen or any of them summoned from Alexandria and Fredericksburg, was by a motion to quash both of the two writs of venire facias under which they were summoned and the returns thereon for alleged errors and irregularities apparent upon the face of them; which motion the court overruled. And of the veniremen so summoned and attending, a panel of sixteen qualified jurors, free from exception for the said trial was completed, and the prisoner having stricken from the said panel the names of four of the said jurors, the remaining twelve constituted the jury for the trial of the prisoner, by which he was accordingly tried and found guilty; after which, for the first time, he made an objection to the jurors in question. If he did not know whether they had paid their capitation taxes of the preceding year, and cared about availing himself of any such ground of objection, if it existed, he could easily have enquired into it of them or otherwise before they were sworn, and then acted accordingly. But he made no such enquiry; doubtless because he cared nothing about it; or preferred to have the benefit of the objection, if he could make it in the event of a verdict being found against him. By the Code, ch. 158, § 20, it is provided, that "no exception shall be allowed against any juror after he is sworn upon the jury, on account of his age or other legal disability unless by leave of the court." The principle of this section, is applicable alike to civil and criminal cases. Certainly no such exception can be allowed after verdict. It matters not whether the ground of exception be constitutional or legal. In either case it may be given up by the party entitled
793 to the benefit thereof. An if *not made before verdict it will be considered as having been given up.

The court is therefore of opinion that the said fourth ground for said motion is not well founded and must be overruled.

The fifth ground alleged for said motion, to-wit: the incompetency of Richard S. Windsor as a juror, seems to have been abandoned by the plaintiff in error, as no notice is taken of it in his petition for a writ of error, which seems to have been because the capitation tax which he had failed to pay was that of 1877, and not that of 1878, the year next preceding the trial; and so the case was not

one of incompetency, even on the ground relied on by the plaintiff in error.

The third ground alleged for said motion, following the order aforesaid, will next be considered, to-wit: "Because one of the jurors, O. J. Doggett, had formed and expressed, previously to his being summoned on the jury, such a decided and substantial opinion touching the guilt of the prisoner as disqualified him from being a competent juror."

O. J. Doggett at the time of the trial, resided in Fredericksburg, and was one of the jurors summoned from that town. So far as the record shows, he is a gentleman of high character, and had no prejudice whatever against the accused, but on the contrary knew him well and was friendly towards him. The court certified that the said Doggett when examined on his voir dire, on the 21st day of April, 1879, answered the questions put to him as follows, to-wit:

"To the court: I cannot say I have formed a substantial opinion; have read the evidence; have no prejudice against the prisoner; have no substantial opinion: only read the newspaper accounts, and could not form a positive opinion. Am satisfied I can give *the accused a fair and impartial trial. Have no conscientious scruples about inflicting capital punishment."

"To prisoner's counsel: Have read the evidence disconnectedly, not studiously, or with care. I may have an impression, but have no opinion. That is, I have not any fixed opinion."

And thereupon the juror was accepted and took his seat in the jury box.

After a verdict was found by the jury, a motion was made by the prisoner to set it aside, and the third ground on which said motion was made, as we have seen, was that said Doggett, one of the jurors, had formed or expressed, previously to his being summoned on the jury, such a decided and substantial opinion touching the guilt of the prisoner, as disqualified him from being a competent juror.

The testimony of several witnesses was taken before the court upon this question and forms a part of the record. On behalf of the Commonwealth the testimony of the juror Doggett was taken, and on behalf of the prisoner was taken the testimony of George E. Chancellor, John R. Dickerson, and E. D. Cole. Without setting out this testimony, or even the substance of it, it is enough to say that it affords no sufficient ground for setting aside the verdict and granting a new trial in the case. The statement of the juror upon his voir dire, supported as it is by his own testimony, counterbalances the testimony on the other side, and shows that he was a competent juror and trustworthy as such.

The court is therefore of opinion, that the said third ground for said motion is not well founded and must be overruled.

It now only remains to consider and dispose of the second ground relied on by the prisoner in support of *his

motion to set aside the verdict and grant him a new trial; which is,

"Second. Because the verdict is contrary to the law and the evidence."

Besides the evidence which has already been substantially set out in this opinion, being the testimony of the witnesses Aller M. Lyon, F. H. McGuire, William M. Colgin, Dr. William H. Taylor, John J. Wilson, and V. S. Carlton, the Commonwealth then introduced another witness, Wilson Price, who is a shoemaker at Wingo, Ellett & Crump's, and was present in their store when the occurrence took place there between John E. Poindexter and Curtis, as hereinbefore narrated. His account of that transaction corresponds, substantially, with that hereinbefore given.

The Commonwealth's attorney then exhibited to the jury the cane used by the deceased. It is a hickory stick two feet nine and one-half inches in length, and about three inches in circumference at the large end, and two inches in circumference at the lower end, with several prominent knots upon it, and a ferrule at the end, and the skin upon it about midway was split for about six inches. It had the appearance of being new. The pistol is a pocket pistol of Smith & Wesson's make, carrying seven balls. Six of the barrels had been discharged, and one barrel remained loaded. The pistol and whip were also exhibited to the jury.

And the Commonwealth thereupon rested.

Whereupon the following testimony, substantially, was introduced for the defence:

Bazil Gordon testified: "I witnessed a portion of the difficulty at Wingo, Ellett & Crump's store. I went in there about nine o'clock in the morning. I recognized four gentlemen, and saw Mr. John E. Poindexter shake his fist in Curtis' face, and say, 'I'll teach you how to behave to ladies.'"

The parties went towards *the door. Curtis said he would apologize to the lady. Poindexter said the lady should never come into the store again—that she should not speak to Curtis nor he to her. Curtis said, then he would apologize to him. Then they shook hands and the Poindexters went out of the door. My impression from what I saw was, that the affair was over. I saw no blows. I did not pursue the matter or make any further enquires about it. I think Curtis extended his hand and Poindexter grasped it. This was near the door as they were parting." I "had known Mr. Curtis very well. Left the store in half a minute after handing Curtis a shoe. I thought Curtis was excited when I had the conversation about the shoe with him. Knew both parties, one about as well as the other."

Thomas Poindexter, another witness for the defence, and a brother of the accused, then fully testified as to the occurrence which took place at the store of Wingo, Ellett & Crump as before mentioned. Before he did so he stated that he and his brother lived together at No. 1104, Broad street. "Saw brother the night before the difficulty.

He came home about 12 o'clock at night. I was about to retire. Soon after he came in, he asked me if I knew a man by the name of Curtis, at Wingo, Ellett & Crump's. I replied I did not. He then said he had grossly insulted Miss Cottrell, and went on to tell me the particulars of the insult," which were related to him by Miss Cottrell, and need not be here repeated. "He seemed very much excited, and thought her very grossly insulted. He then said, 'I will go down there and see that man, and demand a written apology, and if he declines giving it, I will thrash him or horsewhip him; I don't know which. Asked me to go with him, simply to keep any one else from attacking him. I said I would. Next morning I

797 started from home, on my way down *town to my office, and had got beyond the yard gate. Brother came to the front door and called me. He came up with me and said, 'I reckon we had better see that man this morning.' We walked through the capitol square. On the way he said, 'I think that fellow deserves a whipping, and I think I'll whip him.' When we got to Wingo, Ellett & Crump's store, brother went on ahead of me. On entering, I noticed three persons, Mr. Carlton whom I knew, Mr. Curtis, and a negro in the back part of the store. Mr. Carlton and Mr. Curtis were at or near a desk, resting on the further end of the counter, on the left-hand side of the store as you go in. Brother walked up to where they were standing, and asked, 'Is Mr. Curtis here?' &c. He then proceeded to detail what transpired on that occasion, and his statement on the subject corresponds substantially with the testimony of the other witnesses on the same subject, which has been already referred to. He testified to one expression of his brother on that occasion which is not mentioned in the testimony of either of the other witnesses. He said that, "As he, (Curtis) came from behind the counter brother nearly met him, and said, 'Damn you, I'll teach you some manners.'" After stating what occurred in the store, the witness said: "When we left the store, I was satisfied the difficulty was ended. Curtis did not tell my brother he would apologize before he struck him. No demand for an apology was made," &c.

Isabella Cottrell, another witness for the defence, then fully testified in the case. She detailed what she said occurred between Curtis and herself, on three different occasions on which she visited the store of Wingo, Ellett & Crump, in January and February, 1879, for the purpose of buying or exchanging shoes, or having them fixed

798 or repaired; and she complained *of what she said he did or said on two of those occasions, the first and the last, which she characterized as impudent; the most objectionable of which seems to have been, that on helping to get in the phaeton, in which she rode to and from the said store on the last of said three occasions, in company with her aunt, Mrs. Bowles, he squeezed her arm. She said: "This occurred on the Friday before the tragedy. I saw Mr. Poindexter the Sunday afterwards. He

drove out to my house, and sent a messenger up stairs to know if I would like to drive with him up the country to my brother's. He was going to his farm, and then to my brother's, who resided about ten miles above the city. I went with him. On the way up, I related the circumstances which took place at the store. I then related all except one thing, about the young man squeezing my arm, which I told him afterwards at home. He expressed his indignation at such conduct. I do not remember how, but very freely. We both agreed he had been very rude. We stopped at his farm a short while, then drove to brother's. Found no one at home except two gentlemen who lived with brother, and returned home directly. I reside with my brother-in-law, Mr. Alvis, about one mile from town, near the new reservoir. He spent the afternoon and evening with me. I think it was in the evening just before tea, we were sitting in the parlor together. I occupied a rocking-chair just immediately in front of the fire, and I think he was sitting to my left. He took up a book I had been reading, in which was a letter of mine; and I remarked to him, that he should not read that letter. He said that he would, and I told him that he should not, and attempted to get the letter from him. He held the letter off from me in his left hand. I started to grab it, and at the same time I got up.

When I did so he caught my arm and

799 made me *sit back in the chair. Then

I turned to him and said, that reminds me of some more of that young man's impudence at the shoe store. Then I said to him, 'He squeezed my arm in a very ungentlemanly manner when I got into the phaeton.' He had been laughing and in a very good humor before, but I noticed his expression changed immediately, and he said to me, 'He did?' I said, 'He did.' I noticed he was very angry when he said to me, 'I'll horsewhip that fellow.' He said, 'What day were you at the store?' I replied, 'Last Friday.' Then he asked me for a description of him. He said, 'Is he a bigger fellow than I am; for if he is, I might be afraid to attack him?' I said, 'You are taller, but I expect that he is the heavier, and probably the stronger of the two.' That was the impression I had of the young man. Then I turned to him and said, 'Give me my letter.' He said, 'I won't do anything of the kind; I intend to read it,' in a jocular manner. Then the tea-bell rang and nothing more was said on the subject. Nothing else ever passed between us on the subject. He left my house about 11 o'clock P. M., or just before that hour. I think it was between 2 and 3 o'clock the next afternoon I heard of the occurrence from Mr. Thomas Poindexter. When I first saw him I was very much excited, for I knew something very unusual had occurred to bring him to my house at that hour of the day. He was not in the habit of visiting me, and I could not conjecture the object of his visit. What Mr. John E. Poindexter had said the evening before about his purpose to attack Mr. Curtis, had made no impression upon my mind, and I did not think he intended to carry out his threat. Have known the pris-

oner ten years." Being asked the direct question, she admitted she was engaged
800 to be married to the *prisoner, and had been for two years, and that he visited her two or three times a week regularly.

In her cross-examination, the witness, among other things, said "I did not carry on a smiling conversation with Mr. Curtis. I tried to show him by my manner that his conversation was offensive. The head of the horse attached to the phaeton was turned up the street; Mrs. Bowles was driving, and on the side next to the store. In getting in I had to step across her feet, so as to sit on her left. Mrs. Bowles had thrown the reins down, so I got in without difficulty. He helped me into the phaeton. It was a very low phaeton. The peculiarity of what he did when he helped me in, consisted in the manner in which he squeezed my arm. I think Mr. John E. Poindexter and I rode together 24 or 25 miles. I said nothing about his squeezing my arm until just before tea."

The witness made other statements in her examination-in-chief and cross-examination, which however need not be repeated here.

Dr. J. S. D. Cullen, another witness for the defence, testified: "I saw John E. Poindexter about 2 hours after the killing. Summoned to see his arm, and went to the station house. He exposed his arm and showed the injury. On the left arm he had a bruise, and considerable swelling at the junction of the arm and wrist. I pushed up his sleeve, and found the lower flat surface of the arm quite red and bruised. The flat portion of the arm had been exposed entirely. I expressed the opinion at the time, that if the angle of the bone had received the blows, they would have fractured it. Prisoner has quite a small arm. The swelling at the wrist was, say an inch in diameter. Two days afterwards, when I examined the arm, there was an abrasion upon the
801 fleshy parts the size of the *end of your thumb, with the skin broken. No bones were broken."

Several witnesses on both sides were examined as to the size and weight of the prisoner and deceased respectively, from which it appears that their size and weight were about the same.

The following witnesses were sworn, and testified to the excellent and unexceptionable character of the prisoner for peaceableness and as a good citizen prior to the homicide, to-wit: Charles F. Taylor, Thomas H. Norward, Rev. J. G. Armstrong, John H. Tyler, William H. Powers, Thomas M. Alfriend, Rev. E. W. Warren, E. M. Alfriend, and James A. Richardson.

John Nagle, another witness for the Commonwealth, was present on the occasion of the last visit of Miss Cottrell to the store of Wingo, Ellett & Crump, and testified to what took place between her and Curtis on that occasion; but the testimony of that witness need not be set out here.

Then Mrs. Bowles was introduced for the defence, and testified as follows: "I went to the store of Wingo, Ellett & Crump on the 28th of February, 1879, with Miss Cottrell.

Am a sister of Mr. Crump of that firm. We rode in a phaeton. I did not go into the store. She made complaint of treatment received in that store. She said she was highly indignant; that the treatment had been received at the hands of Mr. Curtis. Her manner was that of a lady who felt herself greatly aggrieved by the treatment she had received. She made the statement immediately on entering the vehicle on coming out of the store. She told me all about it immediately on our starting out. I was not in the store at all.

And the court certified that the statements of the said witnesses, examined on the
802 said trial, as thereinbefore *set forth, contained all the material facts proved on the trial of the said cause.

The question now is, whether the verdict of the jury, finding the said John E. Poindexter guilty of voluntary manslaughter, and ascertaining the term of his confinement in the penitentiary at two years, is contrary to the law and the evidence?

The law which governs this case seems to be very plain, and to afford no room for controversy. We have not, thus far, found occasion to refer to any legal authority on the subject, and it is not probable that we will in the course of this opinion. Such is the protection which the law affords to human life, that it will not permit it to be taken for the purpose of self-defence, unless the person taking it have a well grounded apprehension that he is in danger of losing his own life or of suffering grievous bodily harm, and a well grounded belief that such danger may and can only be averted by taking the life of the person from whose act the danger is apprehended.

Now is this such a case as the one stated? The life of the deceased was taken by the accused; and taken by the use of a deadly weapon; by shooting him five times with a pistol; shooting him until he fell down dead by his side. The accused certainly intended to kill the deceased. Was it necessary for him to do so, to save his own life or avoid grievous bodily harm; or had he a well grounded belief of the existence of such a necessity? What are the facts of the case?

About two hours before the homicide was committed, and on the same day, to-wit: at 9¼ o'clock on the morning of the 3d day of March, 1879, the accused, who was a total stranger to the deceased, called at the shoe store of Wingo, Ellett & Crump, at the corner of Main and 10th streets, in the city of Richmond, in which store the de-

803 ceased was employed, and gave him *8 or 10 lashes with the horsewhip, because, as the prisoner alleged, the deceased had insulted a lady who had shortly before been dealing with him at the store in which he was employed. The deceased denied at the time that he had given such insult, and declared his willingness, if he had done so, or was supposed to have done so, to apologize to the lady, or to the accused in her behalf, for the insult or supposed insult. The deceased then did no violence to the accused in return for the violence

thus committed by the latter upon him; did not resist such violence; bore it patiently; and did not do one harsh act or speak one unkind word, to or of the prisoner or anybody else. The brother of the prisoner went with him to the said store, and was present when the said violence was committed. He went by the prisoner's request, to help to defend him, if necessary, against any return which might possibly be made of the intended violence. After the prisoner and his brother left the store of Wingo, Ellett & Crump, the deceased, who seems to have been greatly shocked and astounded by the treatment he had just received, was very much excited, and no doubt mortified on the subject, went out of the said store and into the streets to enquire who it was that had treated him so badly, and where he could be found. The deceased soon learned that the wrongdoer was the prisoner, who was then employed at Childrey's factory, corner of Main and Twenty-fourth streets, in the city of Richmond, just fourteen squares from the said store of Wingo, Ellett & Crump. The deceased then went down at once to see the prisoner on the subject of the violence just committed by the latter as aforesaid, and carried with him his friend McGuire; no doubt for the same purpose for which the prisoner had carried his brother with him to the store of Wingo, Ellett & Crump as aforesaid. On their way they procured **804** and carried *with them a stick of ordinary size and character, no doubt to be used in endeavoring to obtain redress and satisfaction only in the event of the refusal of the prisoner to make an apology for his violent treatment of the deceased as aforesaid. Neither the deceased, nor his friend McGuire, was armed with a firearm or dirk or knife, or any other weapon than the stick aforesaid. When they arrived at the said factory, which was about 11½ o'clock, just two hours after the commission of the violence at the store aforesaid, they found the prisoner in an inner room of the factory, at a window in the partition between that and the outer room. The deceased approached him there, and said he wanted an apology for the conduct of the prisoner towards him as aforesaid. The prisoner replied, "You can't get one." The deceased then went towards the door of the other room in which he prisoner was, apparently for the purpose of using the stick against him if he should persist in refusing to make an apology. There can be no doubt that if the prisoner had made an apology, as requested, the difficulty would, at once, have been finally and satisfactorily settled; and the deceased and his friend McGuire would have returned home, without ever going into the room where the prisoner was. The deceased, though he had just received very violent treatment from the prisoner without being permitted to make satisfaction by an explanation and an apology, which he would have done readily, and offered to do; was willing, and so declared to the prisoner, to receive an apology from him in satisfaction of the injury so received; but the prisoner was unwilling, and positively declined to give even an apology.

The deceased then, with his stick upraised, approached the prisoner, as if to strike him, and then stopped. The prisoner had his pistol in his hand, and said, "If you strike **805** me with that stick I *will shoot you."

The deceased remarked, "I am unarmed." The prisoner again said, "If you strike me with that stick I'll shoot you—I'll shoot you." McGuire then said, "Hit him, hit him; knock him in the head, knock him in the head." The deceased immediately advanced and struck him—the prisoner firing; the striking and firing continued until the deceased fell. He died, almost immediately, of the wounds he received on that occasion. There were three wounds on the left breast, one on the right, and one over the left eye. Four balls were found in his body.

Now all this might have been easily avoided by a mere apology; which, it seems, would have been reasonable, and even creditable to the prisoner. Ought it not to have been readily given, especially when by giving it the life of the deceased would have been saved? Can the taking of that life be regarded as an act of necessity when it could have been so easily avoided?

But it might easily have been avoided even without making an apology. The deceased and his friend McGuire were wholly unarmed, except with the stick aforesaid. They were alone in the factory; with nobody around or near them to render them any help in case of a personal conflict—while the prisoner was at his place of business, surrounded by his friends, who were ready and able to help him, if necessary; and would certainly have protected him, if necessary, from any injury in such a conflict. He was about an equal match, in size and strength, for the deceased; and might no doubt easily have obtained a chair or other thing in the room where he was, to use against the stick if necessary. Or, if he could not, his friends around him would not have tolerated the infliction of more than one or two blows upon him by the

806 deceased, *which would have done him little or no hurt. If he had closed with the deceased, as he might have done, and not used his deadly weapon, would he not thus have avoided any serious injury, either to his person or his reputation? And ought he not in that way, if necessary, to have avoided the occasion of putting a fellow mortal to death?

The court is therefore of opinion that the verdict of the jury is not contrary to the law and the evidence. And upon the whole the court is of opinion that there is no error in the judgment of the hustings court of the city of Richmond, and that it must be affirmed. Judgment affirmed.

807 *Baccigalupo v. The Commonwealth.

[36 Am. Rep. 795.]

January Term, 1880, Richmond.

1. Criminal Law—Venire Facias.—In a

*Criminal Law—Venire Facias—Summeleney.—See Poindexter v. Comm., 33 Gratt. 766 and note.

criminal prosecution for felonious stabbing with intent to kill, the first *venire facias* and return thereon having been exhausted, without getting a jury, it is not error to insert in the second *venire facias* a direction that persons be summoned who reside remote from the place where the felony was committed.

2. **Same—Indictment—Sufficiency.**—In such case the indictment which has been made by the grand jury of the hustings court of the city of Richmond charges the assault to have been made at the said city and within the jurisdiction of the said hustings court of the city of Richmond. **Held:** This is sufficient; and it is not necessary to state the place in the city where the assault was made.
3. **Same—Pleading Insanity.**—Under the plea of not guilty, it was competent for the prisoner to set up the defence of insanity at the time the assault was made for which he was on trial.
4. **Same—Same—Burden of Proof.**—When the defence of insanity is relied on by a prisoner, the burden of proof is on him; and it is not sufficient to raise a rational doubt on the subject; but he must satisfy the jury that he was insane at the time the act was committed for which he is prosecuted.
5. **Same—Cumulative Evidence as Ground for New Trial.**—Mere cumulative evidence is not sufficient to authorize the granting a new trial to the prisoner. And in this case the new evidence offered is merely cumulative.

At the April term, 1879, of the hustings court of the city of Richmond, the grand jury found an indictment against Angelo Baccigalupo, for that "on the 15th day of March, in the year eighteen hundred 808 and *seventy-nine, at the said city, and within the jurisdiction of the said hustings court of the city of Richmond, in and upon Mary Baccigalupo did make an assault,

***Description of Place—When a Material Ingredient.**—If the criminal character of an act depends upon the locality in which it is committed the allegation of place becomes material, and does not then merely determine the venue, but furnishes an essential feature in the description of the offence and must be accurately laid. Thus an indictment for an affray must charge that the fighting occurred in a public place. A charge that the affray took place in a certain town is not sufficient. 10 Enc. of Pl. & Pr. 529. As to Assault, see 2 *Id.*, 839.

†Pleading Insanity under the General Issue.—To the same effect as the principal case, see Gruber v. State, 3 W. Va. 699; 10 Enc. of Pl. & Pr. 1216.

‡Criminal Law—Insanity—Burden and Sufficiency of Proof.—In *Dejarnette v. Comm.*, 75 Va. 867, it was held that where insanity is relied on as a defence, it must be proved to the satisfaction of the jury, and it is not necessary that the jury shall be satisfied of the sanity of the prisoner, beyond all reasonable doubt. See *Boswell's* case, 20 Gratt. 860, citing principal case. Compare *Gruber v. State*, 3 W. Va. 699; 10 Enc. of Pl. & Pr. 1218; *Davis v. U. S.*, 16 Sup. Ct. Rep. 353; 1 Va. Law Reg. 932. Likewise as to the defence of intoxication, *Honesty v. Comm.*, 81 Va. 283, citing principal case.

Evidence—Appeal—Review.—See *Daingerfield v. Thompson*, 33 Gratt. 136 and *note*; *Terry v. Ragsdale*, 33 Gratt. 342 and *note*. See also *Taylor v. Comm.*, 77 Va. 697; *Moses v. Old Dominion Iron & Nail Works*, 81 Va. 22, 82 Va. 21; *Payne v. Grant*, 81 Va. 169, all citing the principal case.

and her, the said Mary Baccigalupo, feloniously and maliciously did stab, cut and wound, with intent, her, the said Mary Baccigalupo, then and there to maim, disfigure, disable and kill. Against the peace." &c.

The prisoner filed the plea of "not guilty." and on the trial the jury found him guilty, and fixed the term of his imprisonment in the penitentiary at eight years; and he was sentenced accordingly. He thereupon applied to a judge of this court for a writ of error and supersedeas; which was allowed.

In the progress of the trial the prisoner took exceptions to the rulings of the court which are set out in the opinion of Judge Christian.

John B. Young and John S. Wise, for the prisoner.

The Attorney-General, for the Commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Richmond. The plaintiff in error was convicted in said court of an assault with intent to kill his wife, Mary Baccigalupo, and that said assault was made feloniously and maliciously.

The murderous assault was distinctly proved. It was proved, that on the night of the 15th March, 1879, the prisoner, while walking with his wife on a narrow and unfrequented street on the bank of the canal basin, made a sudden assault upon her and inflicted upon her person nine wounds with a knife, and attempted to throw her in the canal.

809 *The jury found him guilty of this offense, and fixed the term of his imprisonment in the penitentiary at eight years; and thereupon the said court entered a judgment in accordance with said verdict. To this judgment a writ of error was awarded by one of the judges of this court.

In the petition three grounds of error are assigned, to-wit:

1. That the court erred in overruling the motion to quash the writ of *venire facias*.
2. That the court erred in overruling his motion in arrest of judgment.

3. That the court erred in overruling his motion for a new trial—first, upon the ground that the verdict was contrary to the law and the evidence; and second, upon the ground of newly discovered evidence.

As to the first assignment of error, it is sufficient to refer to the case of *Poindexter v. The Commonwealth*, supra 766, in which the president of this court has elaborately considered the same question raised by the first bill of exceptions in this case, in which I entirely concur. I will only add the single remark, that the policy of the law, as shown by repeated acts of the legislature, was plainly to declare that a jury should be obtained from a place remote from the scene of the act charged to have been committed. And certainly it is no error, after the panel

of jurors has been exhausted, and when it becomes necessary for the judge to obtain additional jurors, to direct the sheriff to summon the same in accordance with the requirements of the original venire facias, to-wit, jurors residing remote from the place where the offense is alleged to have been committed. Certainly, the prisoner cannot complain if the judge has furnished a list of jurors whose residence is that prescribed by law in the original venire facias.

810 *I am therefore of opinion that the said hustings court did not err in refusing to quash the said venire facias issued under the panel of jurors was exhausted after the original venire facias.

I am further of opinion, that the said hustings court did not err in overruling the motion in arrest of judgment. This motion is founded upon the ground that the indictment did not aver the place where the said offence was charged to have been committed. The indictment does in express terms aver that the offence was committed "at the said city of Richmond and within the jurisdiction of the said hustings court of the city of Richmond."

This is a sufficient averment and is in accordance with both the statute and common law. It is not necessary that the indictment should charge the particular locality in a county or city, but it is always sufficient if charged to have been committed within such county or corporation, or within the jurisdiction of the court having cognizance of the offence. This precise point was decided in a recent case, in which Judge Burks delivered the opinion of the court, and not yet reported. I am therefore of opinion that the court did not err in overruling the motion in arrest of judgment upon the ground set forth in the prisoner's second assignment of error.

The third assignment of error is based upon the prisoner's third bill of exceptions, to the judgment of the said hustings court overruling his motion for a new trial: First. Upon the ground that the verdict was contrary to the evidence; and second. Upon the ground of after-discovered evidence. Upon the first branch of this bill of exceptions, to-wit: that the verdict is contrary to the evidence, it is first to be observed that the facts are not certified, but we have before us a certificate of the evidence only.

811 *The defence intended to be raised by this evidence manifestly was that the prisoner was insane at the time of the offence committed.

It was undoubtedly competent under the plea of not guilty for the prisoner's counsel to show that at the time of the commission of the offence he was laboring under such aberration of mind, or insanity, as to make him morally irresponsible for the act with which he stood charged.

This could be done without the formal plea of insanity, and without calling a jury specially to pass upon the issue of insanity. It was sufficient if under the plea of not guilty it could be shown that the prisoner was not legally or morally guilty of the act charged against him. If it could be shown

that at the time of the commission of the offence charged, the prisoner was in that condition of mind which made him morally irresponsible for his acts, this fact could be as well shown under the plea of not guilty as upon a formal issue made before a special jury to try the question of insanity.

The rules governing an appellate court in passing upon the question of new trials upon the ground that the verdict is contrary to the evidence are now too well settled to admit of any doubt or discussion or to require any extended citation of authority.

In a case like the present where the evidence is certified, and not the facts proved, it is well established by repeated decisions of this court that the appellate court will not reverse the judgment, unless after rejecting all the parol evidence of the exceptor, and giving full faith and credit to the evidence of the Commonwealth, the decision of the court below shall appear to be wrong. See *Read v. The Commonwealth*, 22 Gratt. 924, and cases there cited. See also *Blosser v. Harshberger*, 21 Gratt. 214, where the rules on the subject of new trials are specifically stated.

812 *Indeed the learned counsel for the prisoner admit that the evidence upon the question of insanity was conflicting, and do not lay much stress either in their petition, or in the argument at the bar, upon this ground of error. But the stress of their argument is laid upon that part of the bill of exceptions aforesaid, which declares as ground of error, the refusal of the court to set aside the verdict because of after-discovered testimony. And this in fact, presents the most important question we have to consider in this case.

After the conviction of the prisoner an affidavit was filed by one of his counsel, John S. Wise, Esq., in the following words:

"That John B. Young, Henry W. Hobson, and he, were counsel for Angelo Baccigalupo, upon trial of Baccigalupo, for felony in the hustings court of the city of Richmond; that both he and other counsel had great difficulty in procuring testimony for the prisoner; that nothing could be gotten from the prisoner to enable to make an efficient defence; that he talked wildly and unintelligibly about his case; and that all testimony that they obtained, relative to his mental condition, was through accident and the kind offices of friends.

"That not until near the end of the trial did any of the counsel have any intimation of the testimony set forth in the Lynchburg affidavits filed herewith, and it was impossible to obtain such, prior to the prisoner's conviction.

"That the testimony of Coleman, as set forth in his affidavit, did not in any way come to the knowledge of counsel until after the conviction of the prisoner.

"That he and the other counsel have used all possible diligence and care in procuring all possible testimony in the defence of prisoner.

813 *"That they never had intimation, prior to the end of the trial, of the visit of Baccigalupo to Lynchburg.

That the evidence of the Lynchburg witnesses, Baccigalupo's visit to Lynchburg, and conduct there, was obtained by accident through C. C. Salamone, who learned it, pending the last trial, in a business letter, which is hereto attached; which letter was produced by the said C. C. Salamone, written in the Italian language, and which has been translated into the English language by John A. Pizzini, vice-consul for Italy; and is in the words and figures following, to-wit:

"Lynchburg, March 18th, 1879.

"Dear Friend Pasquini:

"In looking over the papers this morning, there appeared before my eyes the terrible tragedy which occurred in Richmond Saturday night, between Angelo Baccigalupo and his wife. The affair has filled me with horror, and I am anxious to know how he ever came to marry his cousin, inasmuch as it had seemed to me of late that he had lost his brain for, or become infatuated with another widow, which fact is perhaps known to you. I can now confess to you that Angelo was here about two months ago, and at that time his appearance seemed to be more adapted for the habitation of a maniac, while his conversation was anything but that of a rational person. In short I, as well as others, believed absolutely that he had lost his mind. Let me know all the particulars in regard to the above, and then I will write you again.

"I salute you, and am, most affectionately,

"Yours,

"Z. Triaca.

"P. S. My address is P. O. Box 161, Lynchburg.

814 *"That he further believes the prisoner to be in such mental condition as to have incapacitated him from aiding or assisting in his own defence, and that the labors of counsel have been earnest and unremitting, notwithstanding the entire want of co-operation on the part of the prisoner.

"Jno. S. Wise.

"Subscribed and sworn to before me, in open court, this 28th day of April, 1879.

"Andrew Jinkins,

"Cl'k Richmond hustings court."

This affidavit of the counsel was accompanied by affidavits of three parties (Italians) residing in the city of Lynchburg, and also of one witness residing in the city of Richmond, all of whom expressed their opinions very strongly as to the insanity of the prisoner, and give accounts of certain conduct and acts on the part of the prisoner upon which they base their opinions; and these acts and conduct are set forth with much detail in the affidavits filed. Without setting forth specifically the facts and opinions to which these witnesses would have testified if they had been called before the jury, it is sufficient to say that such evidence would have been merely cumulative and corroborative of that evidence which had been already heard by the jury upon the trial.

The rules governing new trials on the ground of after-discovered testimony have been repeatedly declared by this court, and may be briefly stated as follows:

To authorize the granting a new trial on the ground of after-discovered evidence, four things are necessary: 1st. The evidence must have been discovered since the former trial. 2d. It must be such, as reasonable diligence on the part of the

815 party asking it could not have secured at the former trial. 3d. It must be material in its object and not merely cumulative and corroborative or collateral. 4th. It must be such as ought to produce on another trial an opposite result on the merits. See Read's case, 22 Gratt. 924, and cases there cited. Also Tompson's case, 8 Gratt. 637; 3 Whart. Am. Cr. Law, § 3161; and St. John's ex'or v. Alderson, recently decided by this court, 32 Gratt. 140.

While the first two requisites laid down by these authorities have been fulfilled, the two latter are plainly wanting in this case. The evidence contained in the affidavits presented by the prisoner's counsel upon his motion aforesaid are merely cumulative and corroborative and are not such as would probably produce a different result.

It must be admitted that the record contains much evidence both as to the acts of the accused and the opinions of witnesses tending to prove the prisoner's insanity. The affidavits presented simply contain the opinions of other witnesses and facts of a similar character to those already testified to, tending to establish the prisoner's insanity. They are all simply cumulative and corroborative.

Nor do we think that such evidence, if it had been heard by the jury, would have produced a different result. A jury who had heard the decided opinions of distinguished physicians given upon the subject of the prisoner's insanity, could hardly have been influenced by the acts of the prisoner in a bar-room in the city of Lynchburg, when he might have been under the influence of strong drink, or by the opinions of such witnesses based upon his conduct upon a single occasion under the circumstances narrated by them in their affidavits.

We are therefore constrained to declare, upon the record before us, that the 816 evidence contained in the affidavits produced was merely cumulative and not calculated to produce a different result: if it had been heard on the trial. We are therefore of opinion that upon the well-established rules of law in such cases, the said hustings court did not err in overruling the prisoner's motion for a new trial upon the ground of after-discovered evidence.

It is proper to say that the court has not been entirely free from difficulty in coming to its conclusion in this case and have given it the most anxious consideration. While there has been much evidence tending to prove the prisoner's insanity, it is certainly not of so conclusive a character as to induce this court in violation of its established rules on the subject of new trials, to set aside the verdict of the jury, approved by the judge presiding at the trial. The question whether the prisoner was insane at the time of the

commission of the offence charged, was a question of fact for the jury who heard and saw the witnesses, who had before them, for days, the prisoner, and who concluded upon the whole evidence that he was not insane; and when that verdict is approved by the judge who presided at the trial, this court, whatever doubts it may have upon the evidence as presented in the record, would not be justified in setting aside such verdict.

We cannot say that this record presents such a case. Even the medical testimony is contradictory and conflicting as to the insanity of the prisoner. And in considering the evidence contained in the affidavits respecting the newly discovered testimony, relied upon, it is a pregnant and noteworthy fact to be considered that the evidence produced is that of witnesses living in a distant city, who saw the accused on a single occasion in a bar-room, while the record shows that the prisoner had been for many years a resident of the city of Richmond where he had
817 been engaged in a prosperous *business, in which he had accumulated a considerable amount of money, and yet up to the time of the commission of this offence, no one except one or two persons had ever advanced or expressed the opinion that he was insane. If such was really the fact, it would seem that it ought to have been established by persons living in the city of his residence, and not by strangers living in a distant city, who saw him but on a single occasion under the circumstances before referred to. The affidavit of only one person residing in the city of Richmond is produced as after-discovered evidence, and that does not materially supplement the evidence already heard by the jury.

In defence to a criminal prosecution upon the ground of insanity, it is not sufficient that the evidence should be of such a character only, as to produce a doubt on the minds of the jury, but the onus probandi is always on the accused to prove such insanity to their satisfaction.

In *Boswell's* case, 20 Gratt. 860, one of the grounds of error assigned, was that the court in that case gave to the jury the following instruction, to-wit: "That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury." In commenting upon this instruction, the president of this court said, "I think this instruction is unexceptionable. * * * * * He (the counsel for the accused) seems to think that all the proof required by law to repel the said presumption was only so much as would raise a rational doubt of his sanity at the time of committing the act charged against him. Now I think this is not law; and that the law is correctly expounded in the instruction given by the court. There are certainly several American cases which seem to
818 sustain the view of the prisoner's *counsel. But I think the decided weight of authority, English and American, is the other way. In 1 Whart. Am. Cr. Law, § 711,

the writer says: "At common law the preponderance of authority is that if the defence be insanity, it must be substantially proved as an independent fact." And for this proposition, a number of cases are cited. And after reference to many of them, he concludes as follows: "I think the fair result of them all is to show that insanity when it is relied on as a defence to a charge of crime must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground. * * * * The law presumes every person sane till the contrary is proved. The commonwealth having proved the corpus delicti, and that the act was done by the accused, has made out her case. If he relies on the defence of insanity, he must prove it to the satisfaction of the jury. If upon the whole evidence they believed he was insane when he committed the act they will acquit him on that ground; but not upon any fanciful ground that though they believe he was then sane, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence."

These principles so clearly declared by the unanimous voice of this court speaking through its president in *Boswell's* case, we think apply with full force and very aptly to the case at bar; and upon the whole we are of opinion that there is no error in the judgment of the said hustings court of the city of Richmond, and that the same must be affirmed.

Judgment affirmed.

819 *Price v. The Commonwealth.

[36 Am. Rep. 797.]

January Term, 1880, Richmond.

Criminal Law—Altering Verdict in Prisoner's Absence.—Upon the trial of P for murder, the jury found him not guilty of the murder, but guilty of involuntary manslaughter, and assessed upon him a fine of \$500. And the court thereupon entered a judgment discharging him. At the same term of the court, in the absence of P, the

***Amendment of Record.**—That imprisonment cannot be added to fine at subsequent term in prosecution for misdemeanor, see *Pifer v. Commonwealth*, 14 Gratt. 710. See also Code of 1887, ch. 198, § 4076.

A court has full control over its orders, judgments or decrees during the term at which they are made and until after adjournment may in its discretion revise, amend, supplement or vacate such judgments, etc. But after adjournment the court has no such power.

Thus in *Barnes' Case*, 92 Va. 796, it is said: "The common rule at law is that during the term wherein any judicial act is done the record remains in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during the term as the judges shall direct; but when the term is past, then the record is in the roll, and admits of no alteration, averment, or proof to the con-

court set aside the judgment, and entered a judgment against him, for the fine of \$500, and six months' imprisonment, and directed him to be arrested and committed to prison. *HOLD:*

1. The first judgment was erroneous.
2. During the same term of the court the matter was under the control of the court; and it was competent for the court to set aside the first and render the second judgment.
3. It was not necessary that P should be present in court when the second judgment was entered.

In September, 1879. Nathaniel L. Price was indicted in the county court of Pittsylvania for the murder of Dandridge Burnett. On his trial the jury found he was not guilty of murder as charged in the indictment, but guilty of involuntary manslaughter, as charged therein; and they fixed his fine at \$500. The court then made the following order:

"And thereupon proclamation being made as the matter is, and nothing further appearing, or being alleged against the said prisoner, it is considered by *the court that said Price be discharged of this prosecution and go thereof without day."

At the same term of the court, and only three days after the above order had been made, the court made the following order: "For reasons appearing to the court, it is ordered that so much of the order entered on the sixth day of this court, as discharged the

trary. 3 *Thos. Coke Lit.* 323, as quoted in 1 *Rob. Pr.* (old Ed.) 638; *Bunting v. Willis*, 27 *Gratt.* pp. 158-9; *Winston v. Giles*, *Id.* p. 534; *Cawood's Case*, 2 *Va. Cases* 527, 545." To the same effect see *Clendenning v. Conrad*, 91 *Va.* 410; *Sydnor v. Burke*, 4 *Rand.* 161; *Comm. v. Winstons*, 5 *Rand.* 546; *Mansion v. Fahy*, 11 *W. Va.* 496; *Smith v. Knight*, 14 *W. Va.* 759; *Bank v. Jarvis*, 26 *W. Va.* 785; *Green v. Pittsburg, etc., R. Co.*, 11 *W. Va.* 685, 692; *Kelty v. High*, 29 *W. Va.* 381; *Lingle v. Cook*, 32 *Gratt.* 262; *Vaugh v. Freeland*, 2 *Hen. & Munf.* 477; *Freeland v. Fields' Ex'ors*, 6 *Call* 12, 15; *Halley v. Baird*, 1 *Hen. & Munf.* 25; *Cogbill v. Cogbill*, 2 *Hen. & Munf.* 467; *Burch v. White*, 3 *Rand.* 104; 15 *Enc. of Pl. & Pr.* 205; *Richardson v. Jones*, 12 *Gratt.* 53; *Comm. v. McKinney*, 8 *Gratt.* 589; *Drake & Cochren's Case*, 6 *Gratt.* 667; *Powell's Case*, 11 *Gratt.* 822.

But mere clerical errors may be corrected at a subsequent term. *Marr v. Miller*, 1 *Hen. & Munf.* 204; *Snead v. Coleman*, 7 *Gratt.* 300; *Davis v. Comm.*, 16 *Gratt.* 134; *Shipman v. Fletcher*, 91 *Va.* 473; *Clarkson v. Booth*, 17 *Gratt.* 490; *Shelton v. Welsh*, 7 *Leigh* 175; *Richardson v. Jones*, 12 *Gratt.* 153; *Eubank v. Ralls*, 4 *Leigh* 308; *Garland v. Marx*, 4 *Leigh* 321; *Goolsby v. St. John*, 25 *Gratt.* 158; *Comm. v. Winstons*, 5 *Rand.* 546; *Dillard v. Dillard*, 77 *Va.* 820; *Bent v. Patten*, 1 *Rand.* 25; *Gordon v. Frazier*, 2 *Wash.* 130, 135; *Stringer v. Anderson*, 23 *W. Va.* 482; 15 *Enc. of Pl. & Pr.* 220. *Quære*: whether, in case of an order made by this court, but the entry omitted by inadvertence of the court or misprison of the clerk, such omission may be corrected at a subsequent term. And per *Tucker, P.*, it seems that it may. *Emory v. Erskine*, 7 *Leigh (Va.)* 267.

Quære: If the act, Code of 1849, ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony. *Powell v. Commonwealth*, 11 *Gratt. (Va.)* 822.

defendant Price from this prosecution, and directed that he go thereof without day, be set aside; and the court doth order that the said Price pay to the Commonwealth of Virginia \$500, the fine assessed by the jurors in their verdict, together with the costs of this prosecution; and in addition thereto, that said Price be imprisoned in the jail of this county for six months; and that he remain in jail after the expiration of said time, until the fine and costs are paid. And it is ordered that said Price be arrested and confined in jail pursuant to this order; and it is ordered that the clerk issue proper process, directed to the sheriff, commanding him to arrest said Price for the purposes aforesaid."

The process having been issued, and the sheriff having arrested Price, he applied to the judge of the hustings court of Danville for a writ of habeas corpus, complaining that he was illegally held in custody; and the sheriff having answered the rule, stating that he held Price under the aforesaid order of the county court of Pittsylvania, the case came on to be heard, and the court refused to discharge him. And he thereupon applied to this court for a writ of error; which was allowed.

John Gilmer, for the appellant.

The Attorney-General, for the Commonwealth.

831 *ANDERSON, J., delivered the opinion of the court.

The plaintiff in error was indicted in the county court of Pittsylvania county for murder. On the 25th of October, 1879, the jury rendered a verdict, as follows: "We, the jury, find the prisoner, Nathaniel L. Price, not guilty of murder, as charged in the within indictment, but guilty of involuntary manslaughter, as charged therein, and fine him \$500 dollars."

It appears from the entry made on the record, that "thereupon proclamation being made as the manner is, and nothing further appearing, or being alleged against the said prisoner," the court proceeded to enter judgment, and did enter judgment, in the following words, to-wit: "It is considered by the court that the said Price be discharged of this prosecution, and go thereof without day."

On a subsequent day of the same term, i. e., on the 28th of October, so much of the above order as discharged the said Price and directed that he go thereof without day, was set aside, and the following order was entered: "The court doth order that the said Price pay to the Commonwealth of Virginia, \$500, the fine ascertained by the jurors in their verdict, together with the costs of this prosecution, and, in addition thereto, that said Price be imprisoned in the jail of this county for six months, and that he remain in jail at the expiration of said time until the fine and costs are paid; and it is ordered, that said Price be arrested and confined in jail pursuant to this order; and it is ordered, that the clerk issue proper process, directed to the sheriff, commanding

him to arrest said Price for the purpose aforesaid."

On the same day the said Price was arrested upon a writ which issued from the clerk's office of the said county court, and confined in the jail of Pittsylvania *county.

822 And upon his petition to the judge of the hustings court of the city of Danville, a writ of habeas corpus was issued by the said judge to the sheriff of Pittsylvania county, commanding him to have the body of the said Price, together with the day and cause of his capture and detention, before him, on the day designated, at the court-house of the city of Danville. The return and answer of the sheriff shows that he held the said Price in jail under the aforesaid judgment of the county court of Pittsylvania; and he filed with his return a certified copy of the record in that prosecution.

The judge of the hustings court, upon maturely considering the case, was of opinion that the said Price was legally detained in custody, and remanded him to the jail of Pittsylvania county, to abide the aforesaid judgment of the county court of said county of the 28th of October, 1879, and gave judgment against him for the costs. To which judgment of the hustings court, Price prayed for a writ of error and supersedeas; which was allowed by one of the judges of this court.

The court is of opinion that the judgment of the county court of the 25th of October, discharging the prisoner from the prosecution, and directing him to go thereof without day, was erroneous. The verdict of the jury, whilst it acquitted him of the felony charged in the indictment, convicted him of involuntary manslaughter; which is declared by statute to be a misdemeanor, and is punishable with fine and imprisonment. This finding of the jury was authorized by the statute, which provides, that on an indictment for felonious homicide, the jury may find the accused not guilty of the felony, but guilty of involuntary manslaughter. New Criminal Procedure, ch. 17, § 27, p. 95. The judgment was not supported by the verdict.

It was clearly a conviction for a misdemeanor, 823 and it was the *province, and the duty of the court to ascertain the punishment, and to pass sentence on the accused therefor. But it took no notice of his conviction of a misdemeanor, and gave judgment for his discharge from the prosecution, as if he had been acquitted by the verdict of the jury, not only of the felony, but of all offence, and had not been found guilty of involuntary manslaughter, which is an offence against the law, and punishable by fine and imprisonment. Was it competent for the court to strike from the verdict of the jury so much of it as found the accused guilty of a misdemeanor, and by its judgment, contrary to the verdict, to acquit him of all offence? We think not.

But was it competent for the court to correct the error? Could it during the term set aside the erroneous judgment, and enter judgment for such punishment as the law annexed to the offence, of which the defendant had been convicted by the verdict of the jury, and which it was the province, and the

duty of the court, to ascertain and adjudge? It is an old and well established rule that all the proceedings, orders, judgments and decrees of the court are in the breast of the court until the end of the term, and in general subject to its rescission and alteration. This was conceded by Mr. Justice Miller in *ex parte Lange*, 18 Wall. U. S. R. 163, 167, though he insists that there must in the nature of the power, thus exercised by the court, be in criminal cases some limit to it. In that case it was held by the supreme court, that the circuit court exceeded its authority in setting aside its first judgment, and entering a different judgment, though the change was made during the same term. The law authorized in that case, imprisonment not exceeding one year, or a fine not exceeding \$200. The court through inadvertence imposed both punishments, when it could rightfully impose but one. After the

824 *fine was paid, and passed into the treasury, and the prisoner had suffered five days of his one year's imprisonment the court set aside its former judgment, and sentenced him to one year's imprisonment from that time. A majority of the court held with Mr. Justice Miller, that there was a limit to the above rule, and that it did not apply in this case, when the judgment had been partly executed. Mr. Justice Clifford, in an able opinion, and Mr. Justice Strong, dissented from the opinion of the court, upon the ground that the matter was in the breast of the court during the term, and upon the further ground that the supreme court had not jurisdiction to revise the decision of the circuit court, in a criminal case, upon the writs of habeas corpus and certiorari.

No man can be twice lawfully punished for the same offence. In civil cases the maxim is, *nemo debet bis venari pro uno et eadem causa*. In the criminal law the same principle is expressed in the Latin phrase, *nemo debet bis puniri pro uno delicto*. And *ex parte Lange*, supra, was decided mainly upon this principle—that is, that no one ought to be punished twice for the same offence. The common law goes further, and forbids a second trial for the same offence, whether the accused had suffered punishment or not, if in the first trial he had been acquitted or convicted. And hence the plea of *autrefois acquit*, or *autrefois convict*, is a good defence to a criminal prosecution.

The case under judgment does not fall within the inhibition of either of the foregoing principles. The defendant was not subjected to punishment twice for the same offence. Nor was he subjected to a second trial for the same offence, for which he had been before tried, and acquitted, or convicted. He was certainly not subjected to punishment twice for the one offence; but by the first judgment was discharged from

825 prosecution *and permitted to go at large, before sentence had been pronounced against him for the misdemeanor of which he had been convicted by the verdict of the jury; and the court afterwards pronounced against him the sentence of the law annexed to the commission of the offence of which he had been found guilty; but before

proceeding to pronounce such sentence, set aside the erroneous judgment of acquittal, which was still under its control, it being during the same term of the court, and no injury or injustice resulting thereby to the defendant, in consequence of the first judgment having been executed.

In Piper's case, 14 Gratt. 710, it was held, Allen, J., delivering the opinion, in which the other judges concurred, that the judgment is entire, and when a verdict is passed, is the sentence of the law upon the result of the proceedings. The court say: "It becomes when rendered an entire judgment upon the facts as found, and in the language of the books finishes the proceedings; and it would seem to follow that as the judgment is the determination of law upon the verdict, or particular state of facts, it cannot be divided, and a part of the final sentence be pronounced at one term, and after having to that extent passed entirely from the control of the court, that it should at a subsequent period, take up the same finding, and pronounce another sentence in addition to the one already entered upon the same state of facts."

But in this case after the first judgment was entered it had not entirely passed from the control of the court, but remained in the breast of the court until the end of the term, subject to revision, alteration, or rescission, no injustice or injury being done thereby to the defendant. It was therefore proper that the judgment which had been entered probably through inadvertence, and without
826 due consideration, whilst during *the term the whole subject-matter was under the control of the court, should be set aside, and an entire judgment rendered in conformity to the requirements of the law, upon the facts as found by the jury.

And it was not necessary, that the defendant should be personally present, when said judgment was rendered. In the above case it was held that in misdemeanors the personal presence of the defendant is not necessary at the trial; a verdict and judgment for the fine may be found and rendered in his absence. A capias to hear judgment is not now necessary—"And if such judgment requires an infamous or corporeal punishment, the court may make such order as may be necessary for the arrest of the person against whom the judgment is, and for the execution of the judgment." Code of 1873, ch. 203, § 21, p. 1253.

It was not error therefore to render judgment against the defendant in his absence.

Upon the whole the court is of opinion that there is no error in the judgment of the hustings court of the city of Danville, and that the same be affirmed.

Judgment affirmed.

827 *Glass v. The Commonwealth.

March Term, 1880, Richmond.

Moffett Law—Indictment—Sufficiency.—In a prosecution under sections 5 and 10 of the "Mof-

*Criminal Law—Indictment.—As to what is

fett Liquor Law," the indictment alleges that the principal was a "bar-room keeper," and a "bar-room liquor dealer," but does not allege that he was "licensed" as such. On motion in arrest of judgment—**Held:** The indictment is fatally defective.

This was an indictment in the county court of Hanover against Thomas Glass, for failing to turn the crank of the Moffett register at the time and in the presence of the person to whom he sold a drink. There was a verdict and judgment against the defendant, and he thereupon obtained a writ of error and supersedeas. The case is stated in the opinion of Moncure, P.

George A. Jones, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the county court of Hanover, to which a writ of error was denied by the judge of the circuit court of said county. On the 16th day of July, 1879, the grand jury of said county in said county court, upon their oaths presented an indictment against
828 Thomas Glass, agent for John W. *Pate, for a misdemeanor, a "true bill;" in which indictment it was charged, that the said "Thomas Glass, servant, agent and employee of John W. Pate, on the 10th day of July, 1879, at the said county of Hanover, and within the jurisdiction of the said county court of Hanover county, did sell to Benjamin Bowles one drink of ardent spirits, to be drunk at the place where sold; and did then and there deliver the same to the said Benjamin Bowles; and that the said Thomas Glass, agent, servant and employee of the said John W. Pate, unlawfully did then and there wilfully fail, immediately on the sale of the said one drink of ardent spirits, in the presence of the said Benjamin Bowles, to turn the crank of the proper register until the bell thereof had struck one, and the indicator on the dial of said register had moved one point for the said one drink of ardent spirits so sold and delivered by him, the said Thomas Glass, agent, servant and employee of the said John W. Pate, as aforesaid, the said John W. Pate being then and there a bar-room keeper and a bar-room liquor dealer—against the peace and dignity of the Commonwealth of Virginia."

On the 21st day of August, 1879, the said defendant pleaded "not guilty," to the said indictment against him, and for his trial put himself upon the country, and the attorney-

requisite in indictment, see *Terry v. Comm.*, 87 Va. 672, citing principal case.

See also on this question *Boyd v. Comm.*, 77 Va. 52; *Boyle v. Comm.*, 14 Gratt. 674; *Comm. v. Young*, 15 Gratt. 664; 11 Enc. Pl. & Pr. 523.

Same—Proof at Trial.—In *State v. Whitter*, 18 W. Va. 308, it was held that proof on trial that the defendant "kept a hotel and public bar-room" is not in itself sufficient evidence that he had a State license to sell spirituous liquors, the court citing the principal case with approval.

for the Commonwealth did the like; whereupon came a jury, which were sworn, the truth of and upon the premises to speak, and having heard the evidence and arguments of counsel, were sent out of court to consider of their verdict, and returned the following verdict, to-wit: "We, the jury, find the defendant, Thomas Glass, agent, guilty of the offence charged in the indictment against him, in manner and form as therein charged." Thereupon the accused moved the court to set aside the said verdict, and grant him a new trial, which

829 motion the court overruled. *And thereupon the said defendant moved the court in arrest of judgment; which motion being argued, the court took time until the next day to consider of its judgment; on which day, to-wit:

On the 22d day of August, 1879, the court having maturely considered the said motion in arrest of judgment and heard the argument of counsel on the said motion, overruled the same; whereupon it was considered by the court that the said defendant, for his said offence, be fined fifty dollars, to the use of the Commonwealth, and that he pay the costs of the said prosecution.

To which opinion and judgments of the court, as well as other opinions rendered upon said trial, the defendant excepted, and tendered his several bills of exceptions, which were signed, sealed and enrolled and made a part of the record in the case.

The said bills of exception are three in number, and are to the following effect:

No. 1. On the trial of the case, the attorney for the Commonwealth moved the court to give the following instruction to the jury: "The jury are instructed that if they believe from the evidence, that the defendant did sell and deliver the one drink of ardent spirits, as charged in the indictment, and failed to register the same, provided for by section 5 of the law known and called the Moffett liquor law, in the presence of the purchaser, they must find the defendant guilty; although they may further believe from the evidence, that after the purchaser had left the store he did then turn the register once for the drink so sold and delivered out of his presence. The defendant, by—, on the indictment, the agent, servant or bar-keeper for John W. Pate, a license bar-room keeper and bar-room liquor dealer." But the accused, by counsel, objected to the in-

830 struction, and the court overruled *the objection and permitted the said instruction to go to the jury, to which action of the court the accused excepted. &c.

No. 2. On the said trial, after the jury had brought in their verdict and before judgment had been entered thereon, the accused moved to set aside said verdict as contrary to the law and to the evidence. But the court overruled said motion, and the court certified that the facts proved are as follows: "That on or about the 10th day of July, 1879, Thos. Glass, agent, servant, employee of John W. Pate, and at the store known as Johnson's store, in the lower part of Hanover county, did sell and deliver to Ben Bowles one drink of ardent

spirits, and did not immediately, in the presence of the said Ben Bowles, turn the crank of the proper register until the bell (of the Moffett register) had struck once and the indicator on the dial had marked one point, as required by law. But that said Thomas Glass did, after the said Ben Bowles had left the store, turn the crank of the proper register, until the bell (of said Moffett register) had struck once and the indicator on the dial had moved one point for the drink so sold as aforesaid, and that there was no one present at the time. And that at the time of said sale and delivery the said Thomas Glass, agent, did sell and deliver drinks to sundry other purchasers, and did sell and deliver sundry groceries to persons then present; and that the said Glass, agent, &c., gave on oath as his excuse for not turning the crank in the presence of Ben Bowles, as aforesaid, that he forgot it in the pressure of confusion, and did turn the crank as aforesaid, as soon as he remembered his failure, and that no one was present at the time that he did turn one crank, &c., as aforesaid; and that John W. Pate had at the time a bar-room license to sell ardent spirits, &c., at said store.

831 *No. 3. And thereupon the accused by counsel moved in arrest of judgment for errors appearing on the face of the record. But the court overruled said motion.

There are various assignments of error in this case; but one of them is conclusive of the case, and is therefore the only one which it will be necessary to notice. That one is, that the indictment contains no averment, and does not show that any offence was committed by the accused. It contains no charge that he sold by retail, ardent spirits, to be drunk at the place where sold, without having a license therefor; nor that, being a licensed retail or bar-room liquor dealer, he failed to comply with the requirements of the law in regard to a sale of ardent spirits by retail by such a dealer, to be drunk at the place where sold. These requirements are made only of licensed retail or bar-room liquor dealers, and an accused can only be subjected to them, or to the consequence of not complying with them, by charging and proving that he failed to comply with them, though he was a licensed retail or bar-room liquor dealer.

The act of assembly on which this prosecution is founded, to-wit, chapter 59, Acts of 1878-9, pages 310-317, inclusive, requires a retail or bar-room liquor dealer to obtain a license to authorize him to carry on his said business; and in section five of the said act, requires him to perform certain duties therein mentioned; and in the tenth section of the said act, it is enacted that "any licensed retail or bar-room liquor dealer, as well as his agent, servant, or bar-keeper, for every failure to perform any of the duties required of such dealer under the provisions of the fifth section of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than fifty nor more than one hundred dollars, one-third to go to the informer, for which fine such

832 dealer and his sureties *shall be liable on his bond, which may be collected by

summary process, by motion, on ten days' notice, in the name of the Commonwealth; and where the offence is committed by the dealer himself, or by his connivance, he shall forfeit his license, which shall not be renewed during the term for which it was granted. Any person prosecuted for a violation of the provisions of this act, shall be allowed to testify in his own behalf."

No doubt the offence intended to be charged against the accused in this case was the misdemeanor defined by the tenth section of the said act. But by the express terms of the act, such offence could only be committed by a "licensed retail or bar-room liquor dealer," or "his agent, servant, or bar-keeper." To bring the cases, therefore, within the said terms, it ought to have been averred in the indictment, that the accused, when he committed the act with which he is charged, was a "licensed retail or bar-room liquor dealer." He may have committed that act without being guilty of any legal offence. To authorize a valid conviction of an offence, it must be sufficiently charged in the indictment or information. Every material ingredient of the offence must be so charged; otherwise, there can be no legal conviction in the case, for, admitting the charge to be literally true, it does not follow that the accused was guilty of any offence.

The principals of law on which the foregoing observations depend, are so well settled that it seems to be unnecessary to cite any authorities to sustain them.

The following references will, however, be here made, viz: 3 Wharton on Criminal Law, chapter X, "Motion in Arrest of Judgment"; Davis' Criminal Law, 469-70; 3 Rob. Prac. (old ed.) 275-8; 2 Va. Ca. 122. Boshers' case; 4 Leigh 692, Pea's case; 29 Gratt. 844, Helfrick's case.

833 *It follows, therefore, that the court below erred in overruling the motion of the accused in arrest of judgment, for errors appearing on the face of the record, and that, for that cause alone, without any necessity for noticing any of the other questions presented in the case, the said judgment ought to be reversed and annulled, and the accused discharged from further prosecution in the case.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the indictment in this case contains no averment and does show that any offence was committed by the accused; and that the county court erred in overruling the motion of the accused in arrest of judgment. Therefore, without deciding any other question arising in the case, it is considered by the court that the judgment of the said county court to which the writ of error was awarded in this case is erroneous, and that it be reversed and annulled on the ground of the error aforesaid. And this court proceeding to render such judgment as the said county court ought to have rendered, instead of that which it did render as aforesaid, it is further considered by the court, that the said judg-

ment of the county court be arrested, and that the accused be discharged from the further prosecution, and from custody in the said case; which is ordered to be certified to the said county court.

Judgment reversed.

834 *Lee Reynolds v. The Commonwealth.

March Term, 1880, Richmond.

Criminal Law—Murder—Case at Bar.*—B and L, are jointly indicted for the murder of S. On the trial of L the jury find him guilty of murder in the second degree, and the court refuses to grant L a new trial, and enters a judgment on the verdict. Upon the evidence—**Held:** That L had no part in the killing, either as acting or advising, or countenancing it, and therefore though present at the time he is not guilty of any offence.

This was an indictment in the circuit court of Patrick county against Burwell Reynolds and Lee Reynolds, for the murder of Aaron C. Shelton. The prisoners elected to be tried separately, and Lee Reynolds being put upon his trial, and the jury having found him guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at eighteen years; and the court having overruled a motion for a new trial, and sentenced him in accordance with the verdict, the prisoner obtained a writ of error and supersedeas from this court. The case is fully stated in the opinion of the court delivered by Moncure, P.

There was no counsel for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

835 *This a writ of error to a judgment of the circuit court of Patrick county, convicting the plaintiff in error, Lee Reynolds, of murder in the second degree, and ascertaining the term of his imprisonment in the penitentiary therefor to be eighteen years.

On the 29th day of January, 1878, Burwell Reynolds and the said Lee Reynolds were jointly indicted in the county court of said county for the murder of Aaron C. Shelton. On the 31st day of January, 1878, the accused were arraigned for the said offence and plead not guilty to the indictment therefor. Whereupon, electing to be tried separately, and demanding to be so tried in the circuit court of said county, they were remanded to jail for separate trials before the said

*Cited with approval in Kemp v. Comm., 80 Va. 443. See 14 Cent. Dig. 698.

Aiders and Abettors—What Constitutes.—To constitute one an aider or abettor it is essential that there should be: first, presence actual or constructive; second, participation in the crime. 2 Am. & Eng. Enc. of Law (2nd Ed.) 32. But one who watches while others commit a murder is principal in the second degree. Mitchell's Case, 33 Gratt. 845.

circuit court on the said indictment, at the next term thereof.

At which term, to-wit: in April, 1878, the said Lee Reynolds was accordingly tried separately for the said offence on the said indictment, and the jury sworn to try him, found a verdict against him in these words: "We the jury find the prisoner Lee Reynolds guilty of murder in the second degree, in manner and form as charged in the indictment, and ascertain the term of his confinement in the penitentiary to be the period of fifteen years." Thereupon the said prisoner moved the court to set aside the verdict and grant him a new trial, on the ground that the said verdict was against the law and the evidence. But the court overruled the said motion and rendered judgment according to the said verdict. The said prisoner excepted to the said action of the court, and all the facts proved on the trial were certified in the bill of exceptions.

To the said judgment of the circuit court rendered in April, 1878, a writ of error was awarded by this court, upon which the **836** said judgment was reversed, and *the cause was remanded to the said circuit court for a new trial to be had therein.

Accordingly such new trial was thereafter had, to-wit: in October, 1878, when a verdict was found in the case by a jury, in these words: "We the jury find the prisoner Lee Reynolds guilty of murder in the second degree, and ascertain the term of his confinement in the penitentiary to be eighteen years." Whereupon the prisoner moved the court to set aside the verdict and grant him a new trial; which motion the court overruled; to which action of the court the prisoner excepted. In his bill of exceptions, all the facts proved on the trial were certified.

The said verdict having been rendered, and the said motion to set it aside having been overruled, judgment was thereupon rendered by the court; to which judgment the writ of error in this case was awarded by this court. Whether the said judgment be erroneous or not, depends upon the question whether the said verdict of the jury was warranted by the facts certified to have been proved on the last mentioned trial? To decide that question, it will therefore be necessary to state and consider the facts so certified. They are as follows:

"That A. C. Shelton had become provoked some time preceding the homicide because a younger brother had been ducked by the children of a negro school, for hallooing 'school-butter,' of which school Lee Reynolds was a member. His brother, Burwell Reynolds, who was jointly indicted with him, took an active part in the ducking. This took place about three weeks before the homicide. On the morning before the homicide, Aaron C. Shelton passed the school-house in which the school was then in session, hallooed 'school-butter,' and passed to **837** his work without *any disturbance, about four hundred yards, to where he was going to load his wagon with saw logs, in which business he was at that time engaged. At recess of the school on the same

day the teacher having left his school in charge of one of the grown and advanced scholars, another brother of Aaron C. Shelton, about thirteen years of age, approached the school-house at a distance of 150 yards, and hallooed 'school-butter.' The members of the school then pursued him until they got to where Aaron C. Shelton was standing in the road with a stick in his hand, his uncle, Asa Tuggle, being present; this place was about 400 yards from the place where his saw logs were, and in the direction of the school-house. Aaron C. Shelton having understood some one to call him a rogue, and was told by one of the school children that it was Puss Reynolds, the sister of Lee and Burwell Reynolds, whereupon an altercation took place between Shelton and the school children in which he abused Puss Reynolds. The school children then turned back to the school-house, Aaron C. Shelton following then with a rock and stick, stating to them that his brother had been ducked a short time before, and he might pass there when he damned pleased and halloo 'school-butter,' and if he was ducked again, he would shoot their heart-strings out, and if the teacher interfered, he would shoot him if he had to follow him into the school-room.

"Neither Lee nor Burwell Reynolds were present on this occasion, but Aaron C. Shelton shook a stick over the head of Puss Reynolds, a sister of Lee and Burwell Reynolds, and asked her who it was that called him a rogue; she said, 'No one,' and asked Shelton what all this meant; he replied, 'One of your brothers ducked my little brother sometime ago.' She said her brother did not duck his brother, but only patted a little water on his head. Shelton then said he

838 would *pat for him, and used abusive language to her, which the witness declined to repeat in court.

"Marv Burwell, one of the witnesses for the defence, informed Burwell and Lee Reynolds, that evening, of the manner in which Aaron C. Shelton had abused their sister. Late in the evening of the same day, Shelton returning home from his work, found Burwell and Lee Reynolds trying to roll one of the saw logs that had been cut by his uncle, which he intended carrying to the saw-mill, out of the road down a hill. A road had been cut by the uncle of Shelton by which any one could pass around the log without any inconvenience. Shelton asked Lee Reynolds what he was doing. He said they were going to roll that log out of the road. Shelton cursed them, and told them if they did he would thrash them. Lee and Burwell then passed on around the log in the direction of the school-house, and Shelton stopped at the log about a quarter of an hour, and then went on in the same direction, on his way home. When he got to the school-house he found Lee and Burwell standing on the side of the road from which they had turned to let Shelton pass, with an axe which they used at the school-house. Lee addressed Shelton and told him he and Burwell were going back to the log, at which he had just found them, the next morning, and were going

to roll that log out, and if he interfered with them they would shoot him, and if he ran they would make their dogs catch him. This threat was denied by Burwell Reynolds, who was introduced as a witness, and stated that Shelton stopped in the road and said he had not forgotten him for ducking 'my brother.' Green Shelton, the brother of Aaron C. Shelton, was the witness to this threat. Aaron C. Shelton passed the school-house on Wednesday morning and on Thursday morning, hauling his logs without interfering

839 with the *school. On Wednesday Shelton received a message, purporting to come from Lee Reynolds, saying that he intended to move that log, and that he had his gun with him, and if he, Shelton, interfered with him he would shoot him. On Wednesday morning following the past difficulty on Tuesday before, the prisoner, with his brother Burwell, went back to their farm. On their way they were informed by Asa Tuggle, the uncle of the deceased, that Aaron C. Shelton told him to tell them that if he caught them on that road he would beat them. They received the same warning on Thursday morning from the same source. They went on to their farm, finished their work, and about 3 o'clock P. M. were returning the same road; Burwell driving the slide with some little loading on it. The prisoner was walking in front with a gun and stick. They came to a tree across the road which had been cut by Tuggle since they went down in the morning. It was cut into saw logs. The second cut had been hauled away. There was one across the road. They moved the log out of the way to pass with the slide, and while in the act of moving, Asa Tuggle, who had cut the log, and who was engaged for that purpose by Shelton, said, 'Now, boys, you have moved that log and you must take the result.' Burwell drove on up the road, which was a single track about 15 paces, and turned short around a tree into the brush out of the road. The deceased drove his wagon up opposite the rear of the slide, in the only track a wagon could have passed, and stopped at least 5 or 10 paces before it was necessary to have stopped in order to load his log, but had stopped further from the log the day before. And the slide could have passed out behind the wagon after it stopped.

"There was a conflict of testimony at this point, as to how the difficulty occurred—
840 whether Lee Reynolds *drew the stick upon the deceased, or whether the deceased ordered him to drop it—but that the deceased did get the stick into his possession, and that Lee Reynolds backed, and the deceased followed him, in a scuffle over the gun, for fifteen paces, until the prisoner got to the log; then Shelton struck him with the stick, and knocked him over the log. At this moment Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco knife. It was proved that it was eighty yards from the slide to where Shelton was first seen with his wagon by the prisoner, and that the slide could have passed the wagon

at other and better places in that distance. Which is accordingly certified.

"Wm. M. Tredway. [Seal]"

The court is of opinion that the circuit court erred in overruling the motion of the prisoner, Lee Reynolds, to set aside the verdict and grant him a new trial. The facts certified by the court below to have been the facts proved on the trial before that court, did not at all warrant the verdict of the jury nor the judgment of the court thereon, to which the writ of error in this case was awarded. The facts certified to have been proved at the last were the same in substance with the facts certified to have been proved on the former trial in the same case. This court was unanimously of opinion that those facts were wholly insufficient to sustain the verdict rendered upon them against the prisoner, and therefore reversed the judgment rendered upon that verdict, and remanded the cause to the court below for a new trial to be had therein. Such new trial has accordingly been had, on which the same facts substantially which were proved on the former trial are certified to have been again proved, and no other, on the latter trial; and yet the jury, on that

841 *trial, convicted the prisoner of the same offence as on the former trial, and ascertained the term of his confinement in the penitentiary therefor to be eighteen years—three years more than the term ascertained by the jury on the former trial. And the court which presided at the said trials overruled the motion of the prisoner to set aside the verdict and grant him a new trial, and rendered judgment according to the verdict on the latter occasion, as had been done on the former, notwithstanding the judgment of this court reversing the former judgment of the court below, upon the ground that the facts certified by that court to have been the facts proved on the former trial were, according to the unanimous opinion of this court, wholly insufficient to warrant the verdict rendered by the jury on that trial.

The prisoner certainly did not kill the deceased; nor do the facts certified show, or even tend to show, that he assented in any way, or to any extent, to the said killing, nor to the act by which it was done, nor to its being done by any other act or any other person. The prisoner never struck the deceased, nor offered to strike him, nor assented to his being struck by any other person. He was a youth going to school at the time the homicide was committed, and near the place of its commission. He and his brother Burwell Reynolds were living with their father and working for him on his farm, near the place where they were going to school. On the day on which the homicide was committed they went in the morning from the place where the school was kept to their father's farm and returned in the evening to the place of the school. When they got near to the latter place, in driving along the road, there was a saw log lying in the road, which had been cut and put there by the deceased or his direction; he being engaged in hauling
842 logs to a saw-mill. At that *point they

were overhauled by the deceased who was driving a wagon and seems to have been about to haul the log in question. He was not prevented by them from so doing, nor did they say anything to him on the subject. When they were approaching the log in the road it seems that Burwell Reynolds was driving the slide, and Lee Reynolds was walking with a stick and a gun in his hand, which latter it seems he was in the habit of carrying about with him. It is stated, in the certificate of facts, that "there was a conflict of testimony at this point as to how the difficulty occurred; whether Lee Reynolds drew the stick upon the deceased, or whether the deceased ordered him to drop it; but that the deceased did get the stick into his possession, and that Lee Reynolds backed and the deceased followed him in a scuffle over the gun for fifteen paces until the prisoner got to the log, then Shelton struck him with the stick and knocked him over the log. At this moment Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco knife."

Now it does not appear that Lee Reynolds had any thing to do with the stabbing of the deceased, or any knowledge of any intention on the part of Burwell Reynolds to stab or kill him, or that the said Burwell at that time had in his possession the knife by which the stabbing was done, or any other weapon; nor that any effort was made to use the gun which Lee Reynolds then happened to have in his hand; nor that the said gun was then loaded, even with bird-shot. The deceased pursued Lee Reynolds, took away his stick, attempted to take away his gun, and knocked him over the log. During all this time, and notwithstanding this violence on the part of the deceased towards the prisoner it does not appear that the latter gave to the former a single blow, or that such a blow was
843 ever *given. In this state of things "Burwell Reynolds, who was with the slide, came up from the rear and stabbed Shelton in the back with a large tobacco knife."

Now how can Lee Reynolds be made liable for this act which he did not commit, to which he did not consent, and of which he had no knowledge nor information until it was done.

There is much evidence in regard to disputes between the deceased and scholars at the school to which Lee Reynolds was going at the time of the homicide, but it is not material to this case nor necessary to notice it here.

The facts certified are so insufficient to sustain the verdict that upon a demurrer to evidence judgment ought to have been given in favor of the demurrant.

When this case was placed in the hands of this court the learned attorney-general was so well satisfied that the judgment ought to be reversed that he said so to the court; which was very proper under the circumstances.

The court is therefore of opinion that the said judgment is erroneous and must be

reversed, and the cause be remanded to the court below for a new trial to be had therein.

The judgment was as follows:

This day came again as well the plaintiff in error by his counsel as the attorney-general on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is unanimously of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in overruling the mo-
844 tion of the prisoner, Lee Reynolds, *the plaintiff in error, to set aside the verdict and grant him a new trial; this court being decidedly of opinion that the facts, certified by the court below to have been all the facts proved upon the trial, were wholly insufficient to warrant the said verdict, and that even if the said prisoner had demurred to the evidence on the said trial, the judgment of the court below upon the facts certified, ought to have been in favor of the demurrant.

Therefore it is considered that the said judgment of the said circuit court to which the writ of error was awarded in this case, be reversed and annulled; and that the cause be remanded to the said circuit court for a new trial to be had therein.

Judgment reversed.

845 *Albert Mitchell v. The Commonwealth.

March Term, 1880, Richmond.

1. **Criminal Law—Jury.***—M and two others are indicted for murder in the county court of L., and on their arraignment they elect to be tried in the circuit court. A writ of *venire* is issued by the county court for the summoning of a jury, returnable to the circuit court, and the 24 men selected by the county court are summoned to the circuit court. On the motion of the prisoner this *venire* is quashed by the circuit court, and the court directs another *venire* of 24 to be summoned, and names the 24 summoned on the first *venire*. HELD: The directing the same 24 men to be summoned is not error.
2. **Same—Confessions—Evidence.**†—Upon the trial of a prisoner for murder, he twice makes a confession, both of which are admitted in evidence. There is very little doubt that the first confession

***Criminal Law—Venire Facias.**—The rule stated in the first headnote was cited with approval in Waller & Boggs v. Comm., 84 Va. 492. See also Poindexter v. Comm., 33 Gratt. 766 and note; Bacigalupo v. Comm., 33 Gratt. 807; Drier v. Comm., 89 Va. 531; Snodgrass v. Comm., 89 Va. 683.

†**Same—Admission of Confessions in Evidence.**—In State v. Morgan, 35 W. Va. 267, the court said: "It is so well settled that, to exclude confessions, they must be made, not only under inducements, but under inducements held out by persons in authority, that I shall not discuss the subject, but simply refer to Smith's Case, 10 Gratt. 734; Shifflet's Case, 14 Gratt. 659; Thompson's Case, 20 Gratt. 724; Venable's Case, 24 Gratt. 643; Page's Case, 27 Gratt. 980; Mitchell's Case, 33 Gratt. 845." See also State v. Morgan, 35 W. Va. 262.

was made without any promise or threat to induce it; and there is no doubt the last was so made.

HELD: The evidence was admissible.

3. Same—Principal in First Degree.—Upon the evidence in this case, three persons go together to rob a store. One, M, is posted some distance from the house to watch; and the other two obtain admittance into the storehouse, kill the owner and rob the store, and M shares the booty. HELD: M is principal in the first degree of the crime of murder, and may be punished with death.

4. Same—Mixed Jury for Negro.—Upon an indictment of M, a man of color, for murder, he is not entitled to have a mixed jury.

At the October term, 1879, of the county court of Louisa, Albert Mitchell, William Talley and Ann Eliza Jackson were indicted jointly for the murder of Charles K. Walton. They elected to be tried in the circuit court; and in that court the prisoners elected *to be tried separately.

846 Albert Mitchell was thereupon put upon his trial; and the jury found him guilty of murder in the first degree; and the court sentenced him to be hanged.

The prisoner took three exceptions to rulings of the court; and obtained a writ of error and supersedeas from this court. The case is very fully stated in the opinion of the court delivered by Moncure, P.

Tutwiler, for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Louisa county, rendered on the 1st day of October, 1879, convicting the plaintiff in error, Albert Mitchell, of murder in the first degree, and sentencing him therefor to be hanged by the neck until he be dead. He was convicted on an indictment found in the county court of said county, at its April term, 1879, against William Talley, Ann Eliza Jackson and the said Albert Mitchell, which indictment contains ten counts, in which the accused is charged with having, on the 9th day of March, 1879, murdered Charles K. Walton, in the manner and by the means set out in the said counts respectively. On the 15th day of April, 1879, the accused were arraigned on the said indictment in the said county court, and thereupon demanded to be tried in the circuit court of said county, pursuant to the act of assembly in such case made and provided; whereupon they were remanded for trial in the said circuit court. And the clerk of the said county court was ordered to certify and transmit to the clerk of the said circuit court a record of the proceedings in the

847 * said county court in relation to the said prosecution, and copies of the indictment and all other papers connected

with the case; which was accordingly done. Thereafter, to-wit, on the 24th day of September, 1879, the accused were set to the bar of the said circuit court, and demurred generally to the whole indictment and to each count thereof; and the prisoner's counsel being called on to state the ground of the demurrer, said they were not prepared to state any in support thereof. The court overruled the same. And thereupon they plead not guilty to the indictment, and for their trial put themselves upon the country, and elected to be tried separately. And thereupon Albert Mitchell was set to the bar for trial. Various proceedings were had in the case on the last-mentioned and future days of the said circuit court, which need not be here mentioned, at least for the present, until the 26th day of September, 1879, when the jury sworn to try the case, having fully heard the evidence and arguments of counsel and retired to their room and considered the case, returned into court and rendered the following verdict:

"We, the jury, find the prisoner, Albert Mitchell, guilty of murder in the first degree, this the 26th day of September, 1879.

"Thos. J. Plea'ants, Foreman."

On the 1st day of October, 1879, it being demanded of the said Albert Mitchell if anything for himself he had or knew to say why the court to judgment and execution against him of and upon the premises should not then proceed, and nothing being alleged in delay of judgment, it was therefore considered by the court that he be hanged by the neck until he be dead, &c.

848 *Upon the trial of the said cause, the prisoner tendered three bills of exceptions, which were received, signed and sealed by the court, and ordered to be made a part of the record in the said cause. As all, or nearly all, of the questions arising in the cause are presented by these bills of exceptions, they will be here fully or substantially stated and considered in the order in which they are numbered:

"1st bill of exceptions.

"Commonwealth v. Albert Mitchell, for murder.

"Be it remembered that when the venire summoned in this case was called, the prisoner by his counsel moved the court to quash the venire facias upon the ground that the list from which the venire had been summoned had been furnished by the judge of the county court of Louisa; whereupon the court quashed the said writ of venire facias, which is as follows:"

Here follows the said writ, after which is inserted the "list of jurors referred to above;" that is, in the said writ. In which list twenty-four names are included.

The said bill then proceeds as follows:

"Endorsement by sheriff.

"Executed by summoning all of the parties on the list appended hereto.

"R. F. Moss, S. L. C."

*Same—Mixed Juries.—Principal case cited with approval in Lawrence v. Comm., 81 Va. 845. See also Coleman v. Comm., 84 Va. 1; Virginia v. Rives, 100 U. S. 338.

And the court then furnished the sheriff of Louisa a list containing the names of twenty-four persons, who were the same persons named in the venire facias issued by the judge of the county court of Louisa, and

which had been quashed, from which **849** list, &c., the officer was *directed to summon the said twenty-four persons, whose names were mentioned in the list appended to the first writ of venire facias, to attend the court forthwith for the trial of the prisoner; which is as follows: Then follows the "2d writ," which is the same in form and substance with the first writ referred to, except that in the first writ the twenty-four persons therein mentioned, are required "to be summoned from a list to be furnished by the judge of the county court of said county, to appear before the judge of the circuit court of said county, at the courthouse, on the 22d day of September, 1879;" whereas in the second writ, they are required "to be summoned from a list to be furnished by the judge of the circuit court of said county, at the courthouse, on the 24th day of September, 1879." Then follows the "list of jurors referred to" in said "2d writ;" being the same with those named in the list referred to in the said first writ.

The said bill then proceeds as follows:

"Whereupon the prisoner by his counsel moved the court to quash this last writ of venire facias, upon the ground that the list from which the venire was directed to be summoned contained only the names of 24 persons. 2d. Upon the ground that the said list and the said writ contained the names of the same persons who had been summoned from a list furnished by the judge of the county court of Louisa, to attend the court on the 1st day of its term, and who had been in attendance on the court from its commencement, during which time a large number of the citizens of Louisa had been present, among whom were a large number of witnesses, some 40 or 50, summoned on behalf of the Commonwealth, to testify against the prisoner and those jointly indicted with him,

for the murder of Charles K. Walton; **850** and also the friends *and relatives of said Walton and others interested in the prosecution of the prisoner and those indicted with him, it being known to the court that these prosecutions had attracted much attention and excited great interest in the county of Louisa and the adjoining county of Goochland, where the dec'd had many relations; that apprehensions were felt, lest because of the necessary delay in the trials, thoughtless and inconsiderate persons might be tempted if any effort should be made by designing and wicked parties to arouse their natural indignation at such a crime against the prisoners to organize and subject the prisoners to the violence of a mob. This apprehension was only in regard to the other prisoners indicted jointly with the prisoner, Albert Mitchell; and the court had deemed it prudent to avoid the possibility of such a movement to remove them to the city of Richmond in the latter part of April last, whence, at the instance of the counsel for those

prisoners, they were returned to the jail of Louisa county in August last. But the court overruled the prisoner's motion to quash said writ of venire facias, and called the panel; to which opinion of the court, overruling said motion, the prisoner by his counsel excepts, and prays that this his bill of exception, may be signed, sealed and enrolled, and made a part of the record in this case, which is accordingly done.

"W. S. Barton. [Seal.]"

The court is of opinion that the circuit court did not err in overruling the prisoner's motion to quash said writ of venire facias.

It was not necessary that the list from which the venire was directed to be summoned, should have contained the names of more than twenty-four persons, although it might have contained more. If the list **851** *contain the names of twenty-four persons, then of course those twenty-four can be summoned under the writ of venire facias mentioned in chapter 17, section 4, page 340, Acts of Assembly, 1877-8. This question is well settled by authority. See Sand's case, 21 Gratt. 871; Poindexter's case and Baccigalupo's case, supra, 766, 807; all of which cases are cited by the attorney-general in this case.

Nor is it error that the said list and the said writ contained the names of the same persons who had been summoned from a list furnished by the judge of the county court of Louisa to attend the court on the first day of its term. &c. Those persons might be competent and suitable jurors, and if so there could be no valid nor reasonable objection to their serving as such. But if not, it was not necessary that they should so serve, and doubtless they would not have so served.

"2d bill of exceptions.

"Be it remembered that on the trial of this cause, the Commonwealth, to sustain the issue on her part, offered in evidence the confession said to have been made by the prisoner soon after his arrest, to the introduction of which the prisoner by his counsel objected, unless the Commonwealth first showed by clear and indisputable affirmative evidence, that the said confession was free and voluntary and had not been induced by any promises held out to, or threats made against the prisoner, by those engaged in his arrest.

"The Commonwealth, to prove the said confession had been free and voluntary, introduced Capt. John Tyler of Hanover, who testified that on the 27th of March, 1879, in company with John A. Waddy, he arrested the prisoner in the low grounds on the farm of Henry Gardner, where the prisoner **852** lived and was *employed by the year; the arrest was made about 12 o'clock; that on his arrest, the prisoner said he had done nothing; he seemed to want to talk, but I told him I did not want to hear him; I sent John A. Waddy ahead to the place where we had left the horse and jersey, and told him to tell the crowd there assembled not to say anything to the prisoner; I searched him

and found on him some small money in coin, a copper speil mark, and a small pistol marked 'Prairie King'; put him in the jersey and sent him to Yanceyville; several persons went with him in the jersey; something was said to him about Talley, who was jointly indicted with him; there was a considerable crowd assembled at Yanceyville, and along the road from Gardner's, who were a good deal excited; I heard some say he ought to be hung.

"On cross-examination, witness said that R. P. Cammack and Ned Kinney went along with the prisoner in the jersey to Yanceyville; I offered the prisoner no inducements to confess, and made no threats against him to make him confess. I left to arrest Talley, living about $\frac{1}{2}$ a mile off, leaving 10 or 15 men in charge of the prisoner and three others.

"W. S. Hunter, another witness, being introduced said, that when Capt. Tyler went to arrest Talley, he left me, a constable of Louisa county, in charge of the prisoner and three others; J. E. Bibb and R. P. Cammack also had charge of him; Capt. Jack Wren and W. S. Knox, two Richmond detectives, engaged in the arrest, and in working up the case, after Tyler left to arrest Talley, took the prisoner out of the wagon and started with him; Knox soon stopped, and Wren went on with the prisoner some 15 or 20 steps from the crowd, and just out of the road, and talked with him from 3 to 5 minutes, then called to us, and I think his expression was, 'this boy wants to tell about
853 *it'; the whole transaction did not exceed 10 minutes. When we came up, Wren said to the prisoner, now, before you make any statement, I want you to understand I don't hold out any inducement to you to tell anything; if you tell it must be voluntary, or you can tell or not as you please. I can't undertake to give the exact words that he used; that was the amount of it.

"W. S. Knox, one of the Richmond detectives, was then introduced, and testified that he was sitting on a log with Longden, who said to him the man is coming, and when the jersey got there Wren and the prisoner walked off some distance to one side, and in a little while Wren beckoned to him and he went to meet Wren and the prisoner, and some others were there; that he said to prisoner, you can't say anything to me, you must tell it to these gentlemen; that the prisoner asked him, if he would confess would it do him any good; and witness replied that he would make him no promises; that he would have to see Mr. Winston (then acting Commonwealth's attorney), and he could make his agreement with him, and offered to go with him to see Mr. Winston. This last conversation was had either as they got back into the wagon, or while they were on their way to the courthouse afterwards—it could not be distinctly understood which. (The witness was a good deal under the influence of liquor, and his statements were very confused, and to some extent unintelligible.)

"Ned Kinney was then introduced, and testified that he drove the jersey down near Gardner's, where the prisoner was arrested. Capt. Tyler brought the prisoner, Dawson Price and Nelson Smith, whom he had arrested; told me to hitch up, he would bring the jersey along; I must go on when we got to Yanceyville; I had the horse in
854 charge. No inducements *were held out to the prisoner in my presence. I saw him all the time Capt. Tyler was gone. The prisoner seemed anxious to talk about the matter.

"After the foregoing witnesses were examined, in the absence of the jury, upon the admissibility of the confession, the court decided that it appeared to it that the confession was free and voluntary, and admitted it to go to the jury.

"And the jury being recalled, said James M. Tyler stated to the jury that after bringing the prisoner to near the old store, near the place where the store of Walton, at Yanceyville, had been burned, where a halt was made, he went off on horseback to arrest Wm. Talley, who lived $\frac{1}{2}$ mile off, and was gone about 20 minutes, after which he returned and took all the prisoners in charge and started off with them, but had not gone far when he called the prisoner back and took him to the mill in the presence of Mr. J. E. Smith, and told him he could make any statement he desired. This was after he had made a confession in the presence of Waddy and Hunter, immediately after his interview with Knox and Wren in the woods, spoken of in the testimony of W. S. Hunter, above detailed, and in the testimony of John A. Waddy, hereinafter mentioned, and was late in the evening. Capt. Tyler then detailed the confession then made to him in the presence of J. E. Smith, late on the evening of the arrest, and just as they were starting to bring the prisoner to jail, which is detailed in the certificate of facts certified by the court in this cause contained in the 3d bill of exceptions.

"J. E. Smith being introduced detailed the same confession.

"Another witness, John A. Waddy, was then introduced before the jury on the part of the Commonwealth, who testified that
855 he was present at the first *confession, which took place near the old storehouse, near Yanceyville. Wren and Knox, the detectives, took the prisoner out in the woods, about 30 steps from the crowd, and talked to him about 10 minutes. Knox left him, and from 2 to 3 minutes after, Wren called out to him and said, the prisoner has, or wants to, or has confessed, and then the prisoner and Wren came up, and the first confession was made in the presence of Hunter, myself, Wren and Knox.

"And thereupon the prisoner, by his counsel, moved the court to exclude the confession which had gone to the jury, on the ground that the Commonwealth had not shown by clear proof that the first confession, made in the presence of Waddy, Hunter, Knox and Wren, under the circumstances above detailed, was free and voluntary; that

it was incumbent on the Commonwealth to show by affirmative testimony, that the first confession was not obtained by promise, or threats; that, to say the least, it was left in doubt whether the said confession was free and voluntary or not.

"The counsel for the prisoner insisting that the Commonwealth should have introduced Wren as a witness (he having been summoned by the Commonwealth) to show what had passed between himself and the prisoner when he was aside with him, as testified to by Hunter and Waddy, before the court passed upon the admissibility of the confession, commenting with great earnestness upon the failure of the Commonwealth to introduce the detective Wren; but the court declined to entertain the motion at that time, being unwilling to have the time of the court consumed by that and similar motions which might be made when any evidence might be introduced touching the subject; and suggested that as the confession had gone to the jury, the motion to exclude be postponed until all the evidence had been heard, when it could be considered

856 *upon all the evidence together. The examination of witnesses was resumed, and after the conclusion of the testimony and just before the adjournment of the court for the balance of the night, the prisoner, by his counsel, renewed his motion to exclude the confession; the court took time to consider of the motion until the next morning. After resuming the case the next morning, the court overruled the motion to exclude; and the prisoner by his counsel noted his exception thereto; and the attorney for the Commonwealth commenced his argument to the jury, and after speaking a few minutes it was announced by the Commonwealth's attorney, that Wren had arrived on the morning train, having been telegraphed for; and thereupon the court stopped the argument and examined Captain Jack Wren, who testified that after the prisoner had arrived at the old store near Yanceyville, he went with him aside, at his request, for him to urinate; that the prisoner mumbled out something; he was absent from the crowd not more than half a minute, that he made no promises to, or threats against the prisoner; that the prisoner then returned to the crowd and made the first confession in the presence of himself, Knox, Hunter and Waddy. It appeared that upon the offer of the prisoner, by his counsel, to show that the witness Wren was unworthy of credit, it was admitted by Capt. George D. Wise, who had been employed to assist the Commonwealth's attorney in the prosecution, that said witness was unworthy of credit and not to be believed. Said Wren then stated on cross-examination that he had been hired to work up the case against the prisoner, and that his pay depended on his conviction. Whereupon the prisoner, by his counsel, excepted to the opinion of the court admitting the confession of the prisoner made to Capt. Tyler in the presence of J. E. Smith, set out in the certificates of facts

857 *contained in the 3d bill of exceptions, and asked that this his bill of excep-

tions might be signed, sealed and enrolled and made a part of the record in this case; which is accordingly done.

"W. S. Barton. [Seal.]"

The court is of opinion that the circuit court did not err (as suggested in the second bill of exceptions) in admitting the confession of the prisoner made to Captain Tyler in the presence of J. E. Smith, set out in the certificate of facts contained in the third bill of exceptions. There is nothing in the record to show that the said confession was not free and voluntary, or that it had been induced by any promises held out to, or threats made against, the prisoner, by those engaged in his arrest or any other person, but the contrary. There is not a particle of evidence in the case to show that any such promise was held out to, or threat made against the prisoner. Captain Tyler, by whom the prisoner was arrested and to whom the confession was made as aforesaid, positively testified "that on his arrest the prisoner said he had done nothing; he seemed to want to talk, but I told him I did not want to hear him. I offered the prisoner no inducements to confess, and made no threats against him to make him confess."

W. S. Hunter, another witness, testified that when Captain Tyler went to arrest Talley (one of the accused), he left the witness, a constable of Louisa county, in charge of the prisoner; "Capt. Jack Wren and W. S. Knox, two Richmond detectives, engaged in the arrest and in working up the case, after Tyler left to arrest Talley, took the prisoner out of the wagon and started with him; Knox soon stopped, and Wren went on with the prisoner some 15 or 20 steps from the crowd,

and just out of the road, and talked 858 *with him from 3 to 5 minutes, then called to us, and I think his expression was 'this boy wants to tell about it; the whole transaction did not exceed 10 minutes. When we came up, Wren said to the prisoner, now, before you make any statement, I want you to understand, I don't hold out any inducement to you to tell anything; if you tell, it must be voluntary, or you can tell or not as you please."

W. S. Knox testified that "Wren and the prisoner walked off some distance to one side, and in a little while Wren beckoned to him, and he went to meet Wren and the prisoner, and some others were there; that he said to prisoner, you can't say anything to me—you must tell it to these gentlemen; that the prisoner asked him if he would confess would it do him any good, and witness replied he would make him no promises; that he would have to see Mr. Winston, then acting Commonwealth's attorney, and he could make his agreement with him, and offered to go with him to see Mr. Winston."

Ned Kinney, another witness, testified, that "no inducements were held out to the prisoner in my presence. I saw him all the time Capt. Tyler was gone. The prisoner seemed anxious to talk about the matter."

After the foregoing witnesses were examined, in the absence of the jury, upon the

admissibility of the confession, the court decided that it appeared to it that the confession was free and voluntary, and admitted it to go to the jury.

And the jury being recalled, testimony of the said confession, made at different times, including the first confession, made in the presence of Waddy, Hunter, Knox and Wren, under circumstances set forth in the record, was introduced.

And thereupon the prisoner, by his counsel, moved the court to exclude the confession which had gone to the jury, on the ground that the Commonwealth had not shown by clear proof that the first confession, made in the presence of Waddy, Hunter, Knox and Wren, under the circumstances above detailed, was free and voluntary; that it was incumbent on the Commonwealth to show by affirmative testimony that the first confession was not obtained by promises or threats; that, to say the least, it was left in doubt whether the said confession was free and voluntary or not.

The counsel for the prisoner insisting that the Commonwealth should have introduced Wren as a witness to show what had passed between himself and the prisoner when he was aside with him, as testified to by Hunter and Waddy, before the court passed upon the admissibility of the confession, the said Wren was accordingly introduced as a witness for that purpose, and "testified that after the prisoner had arrived at the old store near Yanceyville, he went with him aside, at his request, for him to urinate; that the prisoner mumbled out something; he was absent from the crowd not more than half a minute; that he made no promises to, or threats against, the prisoner; that the prisoner then returned to the crowd and made the first confession in the presence of himself, Knox, Hunter and Waddy."

Now it plainly appears from what has been hereinbefore said, that the confession of the prisoner made to Captain Tyler, in the presence of J. E. Smith, set out in the certificate of facts contained in the third bill of exceptions, was admissible evidence in this case, and therefore the circuit court did not err in admitting the said confession as evidence in the said case as stated in the second bill of exceptions in the case. The following authorities referred to by the attorney-general on this branch of the case seem to sustain his views on the subject, viz: Wolfe's case, 30 Gratt. 833; 860 Smith's case, 10 Id. 734; Shiftet's case, 14 Id. 652; Page's case, 27 Id. 954; Venable's case, 24 Id. 639; 1 Greenleaf on Ev., § 229.

"3d bill of exceptions.

"Be it remembered that after the jury in the case had returned a verdict against the prisoner of guilty of murder in the 1st degree, the prisoner by his counsel, moved the court to set the same aside on the ground that it was contrary to the law and the evidence; which motion the court overruled; to which ruling of the court the prisoner, by his counsel, excepted, and asked the court

to certify the facts proved, which is accordingly done, and thereupon the court certified the following as the facts proved:

"That the store-house of C. K. Walton, in which he also slept at Yanceyville, in the county of Louisa, was burned on the night of Saturday, the 8th of March, 1879; that the fire was first seen by James E. Smith, between 1 and 2 o'clock of the morning of that night; that the said house was two stories high, built entirely of wood; that it was old and very dry and burnt up quickly; that when first seen the whole western side on which the bed in which Walton slept was situated, was covered with fire, which quickly reached the shingles; that persons did not go very near it at first, for fear of the explosion of a keg of powder which was known to be in it; that in a short time the powder did explode, scattering the weatherboarding some distance; that said store-house was about 40 feet square, with four rooms below; the one next the road was the store-room, in which dry goods, groceries and liquors were kept; adjoining this to the west was the one in which Walton slept, and in which he kept some goods, notions, &c.; another room was used as a dining-room; another as a kitchen;

that there was a cellar below the
861 *room in which Walton slept, 18 by 19; there were two doors on the front, two on the west side, and one on the north side of the house, and doors leading from one room to another on the inside; said store was situated on the main road leading from Louisa courthouse to the 3-chopped road, which was much traveled; that Mr. Nuckolls lived about 250 y'ds, J. E. Smith about 350 y'ds, and Jack Hunter, a colored man, about 250 y'ds, from said storehouse.

"It was further proved that Mr. Smith, who lived near the store, was awakened that morning by some sort of noise, saw the light of the fire and went near it; the whole house was in flames. That morning about 8 o'clock, part of the body of a white person was discovered in the cellar immediately under the place where the bed in which Walton slept sat; said body was at the foot of where the bed sat, in an inclined position, lying on the breast, the back up; the legs, arms and head were gone; small pieces of bones were found amongst the ashes; the bowels were burnt to a crisp; the back was not blistered, but was discolored; that a piece of dark cloth was taken from the back, about two inches square, and another piece, which was taken by the witness to be part of the bed-clothing or something of the sort, a good deal of something like bed-clothing was raked off of the back; no signs of blood or marks of violence were seen about the body or the cloth found; that the sex to which the body belonged could not be told. It was further proved, that Walton was a man of very peculiar structure, broad shoulders, tapering down to a small waist, the part of the body found answered this description: that Walton was a bachelor living by himself, and no one usually slept with him at the store. It was further proved, that Walton was at his store on Saturday night about

862 ½ after 7 o'clock; that Zeno. Jones and *his brother E. A. Bowis, George

Anderson, a colored man, William Talley, also a colored man, and Wm. Bolling, were at the store that eveninig; that when Wm. Bolling left about 7½ o'clock, he left William Talley there, and that Eliza Jackson, who came there three times a day to cook for Walton, had left. It was further proved, that Walton read sometimes at night, that his goods were insured for \$1,000; that he had more than enough owing to him in good hands to pay all his debts, although he owed some money, and that he was not embarrassed. It was further proved that the prisoner, on the evening of his arrest, about 5 o'clock, and just at the time Capt. Tyler was starting with him to the courthouse, he was called back by Capt. Tyler, and told that he could make any statement he desired, and the prisoner, then in the presence of Capt. Tyler and Mr. Smith, and perhaps others, made the following statement or confession, no inducements being then held out to him by anyone. He stated that on Friday night, before the store was burnt, Bill Talley came to his house and said he wanted him to go some where with him the next night; that the next night he went over to Bill Talley's house, and Bill Talley, Eliza Jackson and himself went to Walton's store; that he was told by Bill Talley to stand in the road and watch; that Eliza Jackson and Bill Talley went over to the store; that Eliza Jackson knocked at the door; that the door was opened by Walton, and Bill Talley and Eliza Jackson went in and the door was closed; that he heard something like a scuffle, and in a few minutes they came out at a different door; Bill Talley bro't out the cash drawer and gave him some money, amongst which was a torn five dollar note; that Talley said they had killed Walton and told him to keep quiet or they would kill him; Talley then threw the cash drawer away; they then separated, *Bill Talley and Eliza Jackson

863 going one way and he another; that he heard something like a groan in the store; that the money he had, came out of the money drawer, and also the spiel mark, and that the pistol he had came out of the store; that they were going down the road, and that Talley did not tell him what he wanted him to come to his house on Saturday night for, and said he did not see the fire or hear the report of the explosion of the keg of powder.

"It was proved, that when the prisoner was arrested, while at work in the field of Mr. Gardner, his employer, he said he had done nothing; and after being arrested, there was found on his person, a spiel-mark coin, a small silver-plated pistol, revolver, and some small sum in silver coin. It was further proved, that the prisoner said to Mr. Gardner, with whom he lived, on Wednesday after the fire, he had lost ten dollars, in two five-dollar notes, one of which had been torn in two by him, and he had tried to mend it by pasting some paper over it; said he had gotten \$5 from his sister, and \$4.75 from

George Anderson; when told that those two sums did not make \$10, he said he had some other money before, and that was all the money he had except 75 cts.

"It was proved by the sister of prisoner, called by him as a witness, that she had lent to the prisoner, about Christmas last, \$2, and he had paid her only 75 cts. of it.

"It was further proved, that the prisoner had lived with and worked for Mr. Gardner for three years; that he gave him \$65 a year for his services, paying him at Christmas and along as he wanted it; that in February last, he had paid him \$15 in Richmond, prisoner saying that he was going to get married, and wanted to get something to go to house-keeping with; that he brought home a bedstead and safe; and that **864** he had *paid him \$3.60 in specie after the fire—six half dollars, two quarters and one ten-cent piece.

"It was further proved, that the prisoner was industrious and steady at his work; that he was provident, and did not squander his money, as negroes usually do.

"It was further proved, that the prisoner was at home, at Mr. Gardner's, three miles from Yanceyville, on the night of the fire; that he was seen there about 8 o'clock that night, and again about day-break the next morning.

"It was further proved, that the deceased had taken in on Saturday, the day of the fire, a \$5 note which had been torn in two, and which had been attempted to be mended by pasting a piece of paper on the back.

"It was further proved, that the pistol found in possession of the prisoner on the day of his arrest, 18 days after the fire, was like a pistol which was in the possession of Walton on the Friday evening previous to the fire, which was purchased in Richmond in the fall of 1878, and was the only one of that kind purchased; that the pistol in possession of Walton was a small silver-plated revolver (7 shooter); that the catch which held the cylinder in place was out of order, and that it was hard on trigger; the one found in possession of the prisoner had the same peculiarity, and was marked on the barrel 'Prairie King.'

"It was further proved, that a pair of boots at the time of his arrest, was found in possession of the prisoner's brother, who, being called upon by the prisoner, said he bought them of the prisoner after the fire, new, and had only worn them once.

"It was further proved, that deceased bought his shoes and boots for his store, of Gardner, Carlton & Baldwin, wholesale boot and shoe merchants, of the city of Richmond, and that the boots sold by this firm had on them the initials of their firm, G., C. B.

865 *It was further proved that deceased had only two pairs left of his last purchases, a pair of No. 6's and a pair of No. 8's; that the boots found in possession of the prisoner's brother were No. 8's, and had on them the letters G., C. & B. It was admitted that Gardner, Carlton & Baldwin sold boots and shoes all over the State, to every merchant they could.

"It was further proved that a peculiar copper coin, commonly known as a spiel mark, was found in possession of the prisoner on his arrest in his pocket, which was identified as like one which the deceased had taken in during the fall of 1878, which he kept as a pocket piece for some time, and it was then left in his cash drawer, and was there on the Saturday previous to the fire. None of the witnesses who spoke of it had ever seen one like it. It was further proved that the prisoner spent at Louisa courthouse, amongst the merchants there, a few days before his arrest, \$2.95 in small change, and had in his possession the same day \$5 or \$6 in specie, and that he had spent his money, and exhibited it without any secrecy or concealment. It was further proved that there was in Walton's cash drawer, on the day before the fire, \$60 or \$70 in notes, and \$20 or \$25 in specie, including 400 to 500 coppers. Only 46 cents were found in the ashes of the burnt store. It was further proved that on Tuesday after the fire, a cash drawer like the one Walton had, was found in 10 or 12 yards from an old shop, which was 41 yards from the store on the main road, near the place where the prisoner in his confession said he was standing watching; that a 3-cent piece was found at the same time near the place where the prisoner in his confession said he parted with Bill Talley and Eliza Jackson the night of the fire. It was further proved that on Friday night before the fire, William Talley was at Adeline Jackson's, half mile 366 from the store, ¼ *mile from his house and three miles from Gardner's, where the prisoner lived; that he got there about dark, and staid there until what the witness supposed late bedtime, and supposed to be 10 or 11 o'clock.

"It was further proved that Bill Talley and George Anderson were at the house of Fanny Jackson on the night of the fire; that they got there in the early part of the night. Bill Talley staid there a short time and George Anderson did not stop, but went on. It was further proved that the prisoner was a young colored man, about 21 or 22 years old, and not very intelligent.

"The jury having found the prisoner guilty of murder in the first degree, and these being all the facts proved in the case, the prisoner, by his counsel, moved the court to set the verdict aside, on the ground that it was contrary to the law and the evidence; which motion the court overruled, and to the opinion of the court overruling said motion, the prisoner, by his counsel, excepts, and prays that this, his bill of exceptions, with the certificate of facts, may be signed, sealed and enrolled, and made a part of the record in this case, which is accordingly done.

"W. S. Barton. [Seal.]"

The court is of opinion that the circuit court did not err in overruling the motion of the prisoner to set aside the verdict on the ground that it was contrary to the law and the evidence, as stated in the third and last bill of exceptions; the court being of opinion that it was not contrary either to the law or

the evidence. There can be no controversy about the law which applies to the case, and the facts proved on the trial being certified by the circuit court, there can be no controversy about the evidence, in deciding the question we are now considering. The 367 facts certified *being hereinbefore set out, and the law which applies to the case being plain and well settled, it cannot be necessary to say much if anything upon that question. According to those facts and that law the deceased was murdered, and the prisoner was present, aiding and abetting in the commission of the murder with which he was charged, and of which he has been convicted in this case. The conclusion is irresistible, that the circuit court did not err in overruling the motion to set aside the verdict as aforesaid.

That the prisoner was present aiding and abetting in the commission of the murder is conclusively shown by the confession proved on the trial of the prisoner to have been made by him, and to have been free and voluntary. He states in that confession, "that on Friday night, before the store was burnt, Bill Talley came to his home and said he wanted him to go some where with him the next night; that the next night he went over to Bill Talley's house, and Bill Talley, Eliza Jackson and himself went to Walton's store; that he was told by Bill Talley to stand in the road and watch; that Eliza Jackson and Bill Talley went over to the store; that Eliza Jackson knocked at the door; that the door was opened by Walton, and Bill Talley and Eliza Jackson went in and the door was closed; that he heard something like a scuffle, and in a few minutes they came out at a different door; Bill Talley brought out the cash drawer, and gave him some money, amongst which was a torn five dollar note; that Talley said they had killed Walton, and told him to keep quiet or they would kill him; Talley then threw the cash drawer away, they then separated, Bill Talley and Eliza Jackson going one way and he another; that he heard something like a groan in the store; that the money he had, came out of the money drawer, and also the spiel mark, and that the 368 pistol he *had came out of the store; that they were going down the road, and that Talley did not tell him what he wanted him to come to his house on Saturday night for, and said he did not see the fire or hear the report of the explosion of the keg of powder."

That according to the facts just stated, the prisoner was a principal in the second degree in the commission of the said murder, and just as liable to conviction of the said murder, on an indictment charging the murder generally, as he would have been if he had been a principal in the first degree, in the commission of the said offence, is conclusively shown by all the authorities on the subject. For example, see 1 Russell on Crimes 26-30; 3 Greenleaf on Evidence. (Redfield's edition), Part V. §§ 40 and 41; and Davis' Criminal Law 35, 36.

In 3 Greenleaf, supra, it is, among other

things, said in section forty that "persons participating in a crime are either principals or accessories. If the crime is a felony, they are alike felons. Principals are such either in the first or second degree. Principals in the first degree are those who are the immediate perpetrators of the act. Principals in the second degree are those who did not, with their own hands, commit the act, but were present, aiding and abetting it. It is not necessary, however, that this presence be strict, actual and immediate, so as to make the person an eye or ear witness of what passes; it may be a constructive presence. Thus if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act, and others to watch at proper distances to prevent a surprise, or to favor the escape of the immediate actors; here, if the act be committed, all are in the eye of the law present and principals; the immediate perpetrators in the first degree, and the others in the second." And in section forty-one, that "the presence alone of the party is not sufficient to constitute him a principal in the second degree, unless he was aiding and abetting the perpetrator." This implies assent to the crime; and mere bodily presence, without any attempt to prevent the crime, though it will not of itself constitute guilty participation, is evidence from which a jury may infer his consent and concurrence."

To the same effect is the law laid down in 1 Russell on Crimes, and Davis' Criminal Law, cited supra. But it is unnecessary to repeat here what is said there, as those books are easily accessible to us all.

It cannot be necessary to say anything more to show that the court below did not err in any of the rulings mentioned in either of the three bills or exceptions taken in this case, all of which have been fully considered by us.

But some objections are taken by the counsel for the plaintiff in error, to some of the proceedings in the court below in the case, anterior to the taking of any of the said bills of exceptions, which objections, or some of them, ought perhaps to be noticed in this opinion.

The demurrer to the whole indictment and each count thereof was overruled by the circuit court. This is not assigned as error in the petition for a writ of error in this case, and it may therefore be regarded as no error in the judgment of the circuit court, as it certainly is not.

It is stated in the record that the prisoner moved the court to allow him a mixed jury, which the court overruled. To this action of the court, no exception was taken therein, and the objection thereto is now made, for the first time, in this court. The court is of opinion, that the circuit court did not err in overruling the said motion, even if it be not now too late to raise the question, for the first time in this court.

The remaining assignments of error, made by the counsel for the prisoner in his petition and written argument before this court, seem to be founded, alone, on the three bills of exceptions made a part of the record in the case, which have already been fully considered in the foregoing opinion and need not be further noticed.

At the conclusion of the said written argument, signed by the attorney for the plaintiff in error, is the following statement: "For the information of the court, I will state that William Talley and Ann Eliza Jackson, jointly indicted with the prisoner, have been tried and acquitted." The case of the prisoner before this court, cannot be affected by the result which has taken place in regard to the case of the said Talley and Jackson. They, probably, made no confession, and the confession of the prisoner was not legal evidence against them. While there was, doubtless, insufficient evidence to convict them, there was sufficient to convict the prisoner, who was therefore convicted; and his conviction can only be affected (if such affection be proper) by the action of the executive in the exercise of its power of pardon, absolutely or conditionally.

Upon the whole, the court is of opinion that there is no error in the said judgment of the circuit court, and that the same ought to be affirmed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment of the circuit court; and therefore it is considered that the same be affirmed. At the conclusion of the written argument signed by the attorney for the plaintiff in error in this case, it is stated "that William Talley and Ann Eliza Jackson, jointly indicted with the prisoner, have been tried and acquitted." The case of the prisoner before this court, cannot be affected by the result which has taken place in regard to the case of the said Talley and Jackson. They, probably, made no confession, and the confession of the prisoner was not legal evidence against them. While there was, doubtless, insufficient evidence to convict them, there was sufficient to convict the prisoner, who was therefore convicted; and his conviction can only be affected (if such affection be proper) by the action of the executive in the exercise of its power of pardon, absolutely or conditionally; which is ordered to be certified to the circuit court of Louisa county.

Judgment affirmed.

872 *Nelson Mitchell v. The Commonwealth.

March Term, 1880. Richmond.

1. Criminal Law—Case at Bar—Evidence—Sufficiency.—Upon the evidence in this case the prisoner was guilty of murder in the first degree.

2. **Same—Same—Same—Same.**—There was no doubt that the prisoner intended to kill the deceased, and that he struck the fatal blow when the deceased was endeavoring to escape from him, and the blow was in the back of the deceased; and the only questions were whether the striking the prisoner with a heavy stick to resent an insult offered to him was a sufficient provocation to justify the killing of the deceased in the manner in which it was done, and whether the prisoner did not provoke the attack upon himself that he might have an excuse for killing the deceased. And the jury having found the prisoner guilty of murder in the first degree, and the county judge who presided at the trial, and the judge of the circuit court of the county, having refused to grant a new trial, this court seeing there is evidence to warrant the verdict, will not set it aside.

At the December term, 1879, of the county court of Amherst, Nelson Mitchell was indicted for the murder of John C. Gillespie. He was tried at the February term, 1880, of the court, and the jury found him guilty of murder in the first degree. He thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and sentenced the prisoner to be hanged. The prisoner excepted to the opinion of the court; and applied to the judge of the circuit court for a writ of error; which was refused; and he then obtained a writ of error and super-sedeas, from a judge of this court.

873 *The case is fully stated in the opinion of the court delivered by Moncure, P.

N. M. Williams, for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the county court of Amherst county, ren-

dered on the 20th day of February, 1880, whereby the plaintiff in error, Nelson Mitchell, was convicted of murder in the first degree and sentenced to be hung therefor. The following is a statement of the case, or so much of it, as seems to be proper to be stated, in order to its correct understanding and decision.

On the 15th day of December, 1879, he was indicted by a grand jury in the said county court, for having, on the 14th day of November, 1879, in the said county, murdered John C. Gillespie. On the 17th day of February, 1880, being arraigned in the said court on the said indictment, he pleaded not guilty thereto, and was put upon his trial: in the progress of which, to-wit: on the next day, on his motion, the court gave to the jury to following instruction, to-wit:

"If the jury believe from the evidence that the deceased made an assault upon the prisoner with a stick, and struck him one or more severe blows, and that the prisoner, immediately thereafter, and in sudden passion produced by the blows aforesaid, struck and cut the deceased, causing his death without necessity, this is not murder, either in the first or second degree, but is voluntary manslaughter."

On the 19th day of February, 1880, the jury brought in a verdict in the case in the following words:

874 *"We, the jury, find the prisoner, Nelson Mitchell, guilty of murder in the first degree."

Whereupon the accused moved the court to set aside the verdict and grant him a new trial, which motion the court overruled; to which opinion of the court he filed a bill of exceptions, which was signed, sealed and enrolled by the court, and made a part of the record. And the court certified therein, that the following are the facts and all the facts proved on the trial of the said Nelson Mitchell:

"That on the 14th day of November, in the year 1879, the deceased, John C. Gillespie, went to the house occupied by the said Nelson Mitchell, in Amherst county, for the purpose of employing Editha Brown, a sister-in-law of the prisoner, to plow in some wheat. The prisoner was engaged in drawing timber for baskets; the deceased, after having talked to the woman at the house, went to the place where the prisoner was at work, near said house and in said county, when the prisoner asked the deceased about paying Editha Brown for some work which she had done for the deceased, and remarked that he did not think one-half bushel of corn was enough for four days' work; the deceased replied to him that he had already heard him tell Editha Brown that he would pay her until she was satisfied; the prisoner then asked him again, 'Do you think one-half bushel of corn is enough for four days' work? I think it is damned little pay'; to which the deceased replied, 'you must not talk to me in that way'; the prisoner said, 'I will talk as I damn please'; the deceased immediately stooped down and picked up a white-oak stick between four and five feet long, an inch wide, and an inch thick, and

***Criminal Law—Murder.**—"It was held by this court, in *Whiteford v. Commonwealth*, 6 Rand. 721, which case has been followed ever since as correctly laying down the law of murder, that the pre-meditated design to kill need not have existed any particular length of time, but if the design at the time of killing was then formed, and the killing was done without provocation then or recently received, it is murder in the first degree. This decision has been followed in many cases. See *Jones' case*, 1 Leigh 598; *Howell's Case*, 26 Gratt. 995; *Mitchell's case*, 33 Gratt. 872, and cases referred to in these cases." *Wright v. Comm.*, 75 Va. 914; *Price v. Comm.*, 77 Va. 393; *McDaniel v. Comm.*, 77 Va. 281.

Same—Use of a Deadly Weapon.—"The use of a deadly weapon has always been treated by courts as a material circumstance or factor in passing on the degree of murder" said the court in *State v. Welch*, 36 W. Va. 700, citing the principal case. *Cain's case*, 20 W. Va. 681; *Hill's case*, 2 Gratt. 595; *Wright's case*, 33 Gratt. 895; *Wright's case*, 75 Va. 920; *Jones' case*, 1 Leigh 598.

Same—Same—Provocation.—See *Honesty v. Comm.*, 81 Va. 283, citing the principal case.

Same—Instructions.—See *Whitehurst v. Comm.*, 79 Va. 556, citing the principal case.

struck the prisoner, who was sitting down on a horse used for drawing timber for baskets, making one severe blow on the back, and one severe blow near the back of the neck, when the prisoner immediately reached down and picked up a pole-axe, which was lying in reach of where he was sitting, and raising up struck with the axe in his right hand, cutting the left hand of the deceased, in which he was holding the white-oak stick before mentioned, when the said stick dropped out of the hand of the deceased, who had turned as if to get out of the way of the prisoner, who, with the axe in both hands, after the deceased had retreated 8 or 10 feet, with his back to the accused, struck the deceased just above the hips, in the back, somewhat to the left side, cutting the spinal column in two, passing into the hip bone, and penetrating to the hollow; the wound was eight inches long and five inches deep; the blows given by the deceased, and those given by the prisoner, were all in rapid succession, occupying but a moment of time; and the prisoner struck the second and fatal blow with the axe as quickly after the first as it was possible, after the above change of position, to do—but it was given while the deceased was retreating with his back to the prisoner. The deceased survived from the middle of the day, on Friday, when the wound was given, until the following Monday evening, about four o'clock, when he died from the effect of the wounds given by the prisoner. It was proven that prisoner and deceased had been friendly prior to the difficulty, but that in the spring preceding the homicide, the prisoner said, in talking about some railroad ties which he and deceased were getting out, he would bust deceased open if he fooled with him."

On the 20th day of February, 1880, the prisoner was sentenced to be hung for the murder aforesaid on the 23d day of April next ensuing.

A petition for a writ of error and superseas to the said judgment was there-
876 after presented by the counsel *of the prisoner to the judge of the circuit court of the said county of Amherst, who refused the same by an endorsement on the said petition in these words:

"The writ of error prayed for in the petition is denied. The prayer which led to the fatal rencountre was provoked and brought on by the prisoner, and the jury might well be satisfied that the object of the prisoner in doing it was, to provoke the deceased to strike him, in order to have a pretext to take his life, considered in reference to the character of the weapon used, and the circumstances under which the fatal blow was given, and that he was therefore guilty of murder in the first degree.

"G. A. Wingfield.

"March 3d, 1880."

The prisoner then applied to a judge of this court for a writ of error and superseas to the said judgment, which were accordingly awarded; and this is the case which this court has now to dispose of.

It presents for our decision the question, whether there be any error in the judgment, for which it ought to be reversed? And that depends alone upon the question, whether it appears from the facts certified by the court below that the prisoner was not guilty of the murder of which he has been convicted.

The jury and the court below, who saw the witnesses and heard them testify, were of opinion, that the prisoner was guilty, and the former so found and the latter refused to set aside the verdict and grant a new trial. And the learned and distinguished judge of the circuit court of the county, the Hon. G. A. Wingfield, who was applied to for a writ of error to the judgment of the county court, on full consideration of the facts certified in the record, was of opinion, and so ad-
877 judged, *that there is no error in the judgment, and refused to award a writ of error thereto. "The writ of error prayed for in the petition," he said in his refusal, "is denied." See his refusal and the grounds of it endorsed on the record, and already inserted in the foregoing statement of the case. "The quarrel," he said in that refusal, "which led to the fatal rencountre, was provoked and brought on by the prisoner, and the jury might well be satisfied that the object of the prisoner in doing it, was to provoke the deceased to strike him, in order to have a pretext to take his life, considered in reference to the character of the weapon used and the circumstances under which the fatal blow was given, and that he was therefore guilty of murder in the first degree."

How can we, sitting as we now are, at a distance from the scene of this criminal transaction, disregard and reverse the opinion and the judgment of the court and jury who saw and heard the witnesses testify, in the presence of the prisoner, and upon the evidence before them, and from what they saw and heard, convicted the prisoner of murder in the first degree; and disregard and reverse the opinion of the learned circuit judge of the county in which the offence was committed, and the prisoner was tried—an opinion formed upon the full deliberation and examination of the record and the facts therein certified, in the exercise of his duty as judge of the circuit, to whom an application was made by the prisoner for a writ of error, but who denied the same for the reasons fully and strongly stated by him in his refusal.

If we look to the certificate of facts in the record, we find that it contains amply enough to warrant the judgment of the jury and of the court of trial, all of whom saw and heard the witnesses testify, and of the circuit judge, who is very learned and has had long
878 *experience and practice in such matters. On the occasion of the homicide the language of the deceased was mild and peaceful. He said not an objectionable word. On the other hand, the language of the prisoner to the deceased was harsh in the extreme. Speaking about what he, the deceased, intended to pay to a sister-in-law of the prisoner for some work done by her

for the deceased, the prisoner said: "I think it is damned little pay;" to which the deceased replied, "you must not talk to me in that way;" the prisoner said, "I will talk as I damned please;" the deceased immediately stooped down and picked up a white-oak stick between 4 and 5 feet long, an inch wide and an inch thick and struck the prisoner who was sitting down on a horse used for drawing timber for baskets, making one severe blow on the back, and one severe blow near the back of the neck, when the prisoner immediately reached down and picked up a poleaxe which was lying in reach of where he was sitting, and raising up, struck with the axe in his right hand, cutting the left hand of the deceased, in which he was holding the white-oak stick before mentioned, when the said stick dropped out of the hand of the deceased, who had turned as if to get out of the way of the prisoner, who with the axe in both hands, after deceased had retreated 8 or 10 feet, with his back to the accused, struck the deceased just above the hips, in the back, somewhat to the left side, cutting the spinal column in two, passing into the hipbone and penetrating to the hollow; the wound was eight inches long and five inches deep.

See how terribly severe was this assault and battery committed by the prisoner upon the deceased, with a deadly weapon, while the deceased was retreating with his back to the prisoner. The latter must have intended to kill the deceased. He must

879 have known that the *violent blows inflicted by him with such a deadly weapon upon the deceased would produce his death. The provocation for inflicting them was wantonly brought on by the conduct of the prisoner which was wholly unwarranted. He provoked the blows which were given him by the deceased, but which did him no harm so far as the record shows; and he may have provoked them for the purpose of obtaining a pretext for the deadly violence he afterwards used to the deceased while the latter was running away from him. In the spring preceding the homicide, the prisoner said, in talking about some railroad ties which he and deceased were getting out, "he would bust deceased open if he fooled with him." He seemed to have been carrying out this threat when he cut the deceased with a poleaxe as aforesaid.

All the facts aforesaid were before the court and jury by whom the prisoner was tried, and they thereon found him guilty of murder in the first degree; and were thereby well warranted in so doing. At all events, this court cannot reverse the judgment of the court below on the ground of any supposed error therein.

A case was referred to by the attorney-general in the argument of this case which has an important bearing thereon, and is the only one that need be referred to; that is Howell's case, 26 Gratt. 995.

There is no error in the judgment of the county court, which is therefore affirmed. Judgment affirmed.

880 *Wright v. The Commonwealth.

July Term, 1880, Wytheville.

Absent Burks, J.

I. Change of Venue—Refusal to Grant.*—

Upon an application by the prisoner to change the venue, upon the ground that an impartial jury cannot be had in the county, the application is refused; and a jury is obtained in the county. **Held:**

1. If the prisoner feared he could not get an impartial jury in the county, he should first have asked that jurors should be sent for from another county. And not having done this, and an impartial jury having been in fact obtained, the appellate court will not set aside the verdict for the refusal of the court to change the venue.

II. Murder in First Degree—Essential Elements.*—

To constitute a willful, deliberate and premeditated killing, constituting murder in the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into existence for the first time, at the time of such killing, or any time previously.

This was an indictment in the county court of Bedford, of Peter Wright for the murder of Robert Maupin. The case was once before in this court, when the judgment was reversed, on the ground that an incompetent juror had been admitted to serve on the jury. On the second trial of the prisoner there was a verdict of murder in the first degree, and the court sentenced him to be hung.

881 And thereupon the prisoner applied *to this court for a writ of error; which was allowed. The case is fully stated by Judge Moncure in his opinion.

Jordan and Claytor, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the county court of Bedford county, rendered on the 27th day of March, 1880, condemning the plaintiff in error, Peter Wright, for murder in the first degree, of which he had just been convicted in the said court, and sentencing him to be hung therefor. A petition was presented by the said plaintiff in error to the judge of the circuit court of said county for a writ of error to the said judgment of the said county court, which was denied by the said judge. And thereafter a petition was presented by the said plaintiff in error to the judges of this court for a writ of error to said judgment, which writ of error was thereupon awarded. The question presented to this court by the said petition to the judges

***Criminal Law—Change of Venue.**—The ruling of the court set out in the first headnote was approved in *Joyce v. Comm.*, 78 Va. 287; *Waller & Boggs v. Comm.*, 84 Va. 492 and *R. R. Co. v. Reiger*, 95 Va. 422.

The principal case is cited with approval in *Wright's Case*, 33 Gratt. 895.

†**Same—Murder.**—See *Mitchell v. Comm.*, 33 Gratt. 872 and *note*.

thereof, and the record of the proceedings in the case of which a copy accompanies the said petition, is whether there be error in the said judgment or not, for which the same ought to be reversed.

There are two, and only two, assignments of error in the said petitions, which will be considered and disposed of in the order of the said assignments.

The first is, in refusing to grant said petitioner a change of venue.

The following appears from the record to be the state of the case in regard to this assignment of error:

"At the county court continued by adjournment and held for Bedford county at the courthouse on Wednesday *the 25th day of February, A. D. 1880, Peter Wright, who stands indicted for murder, was again led to the bar in custody of the sheriff of this county, and the prisoner by his counsel moved the court for a change of venue to the county court of some adjacent county; which motion was defended by the attorney for the Commonwealth, and being argued, the court doth overrule said motion; and on the motion of the prisoner, and for reasons appearing to the court, it is ordered that his trial be postponed until the next term of the court.

"And at another day, to-wit: at a county court continued by adjournment and held for Bedford county at the courthouse, on Tuesday the 23d day of March, A. D., 1880, Peter Wright who stands indicted for murder, was again led to the bar in custody of the sheriff of this county, and the prisoner by his counsel moved the court for a change of venue to the county court of some adjacent county; which motion was defended by the attorney for the Commonwealth, and being argued, the court doth overrule said motion; and the writ of venire facias awarded for the trial of the prisoner being returned according to law, the court proceeded to impanel a jury for his trial, and a panel of sixteen jurors, free from exception, being formed according to law, the prisoner struck therefrom the names of four persons, leaving the remaining twelve persons to compose the jury for his trial, to-wit: (here follow the names of the jurors) who were duly sworn to well and truly try and true deliverance make between the Commonwealth and the prisoner, and a true verdict render according to the evidence. And having heard the evidence in part, the said jury were, with the consent of the prisoner, committed to the custody of the sheriff of this county, who is directed to keep

them together without communication with any other *person, and to cause them to appear in court to-morrow morning at nine o'clock; and thereupon an oath was administered to two deputies of the sheriff of said county, to the following effect: 'You shall well and truly, to the best of your ability, keep this jury, and neither speak to them yourself nor suffer any other person to speak to them touching any matter relative to this trial until they return into court to-morrow morning;' and the prisoner is remanded to jail. And

"At another day, to-wit: at a county court continued by adjournment and held for Bedford county at the courthouse on Wednesday, the 24th day of March, A. D., 1880, Peter Wright, who stands indicted for murder, was again led to the bar in custody of the sheriff in this county, and the jury adjourned on yesterday were brought into court in charge of the sheriff of this county, pursuant to their adjournment; and the said jury having fully heard the evidence and arguments of counsel, retired to their room to consult of a verdict, and after sometime returned into court and upon their oath do say: 'We the jury, find the prisoner, Peter Wright, guilty of murder in the first degree,' and the prisoner is remanded to jail."

To the said opinion of the said county court, overruling the motion of the prisoner for a change of venue as aforesaid, he filed a bill of exceptions, which was signed, sealed and ordered to be made a part of the record, and is in the words following to-wit:

"Be it remembered that upon the trial of this case, and before the jury were impaneled, the prisoner, by his counsel, moved the court for a change of venue from this to some other county court of this Commonwealth; but the court overruled said motion; to which opinion of the court the prisoner excepts, and prays that this, his bill of exceptions may be signed, sealed *and made a part of the record; which is accordingly done. And to save the prisoner the benefit of his exception, certifies that the prisoner, in support of his said motion, offered the following affidavits, which are in the words and figures following, to-wit:

"Affidavit No. 1.

"This day personally appeared before me, J. Morton Speece, a deputy clerk of the county court of Bedford, Peter Wright, who stands indicted in said court for murder, and made oath that he has reasons to believe and does believe that there exists throughout this entire community and in the county of Bedford great prejudice against him; that so great is this prejudice that he believes it would be utterly impossible, were he again put upon trial here, to obtain a fair and an impartial verdict at the hands of a jury of this county; that at the trial heretofore had this court was unable to obtain such a jury as the law requires, on account of this very prejudice; that at the time said trial was had, various rumors and newspaper reports of his case were circulated throughout the county, to such an extent as to be known, as this affiant is informed and believes, to nearly every citizen in the county; that several months having elapsed since said trial, these reports and rumors have become more widely circulated, and at this time he believes that there cannot be found a single citizen in this county who has not either expressed a decided opinion or fully made up his mind as to the guilt or innocence of this affiant, and in nearly every case to his prejudice.

"Your affiant states that he does not file, as he would wish to do, affidavits from citizens of this county in support of the facts herein

stated, for the reason he is a poor colored man that has been unable, on account
 885 *of extreme prejudice, to obtain such affidavits; that his counsel have made oft and repeated efforts to obtain from citizens of this county their affidavits to the truth of these statements; that in nearly every case these citizens have openly expressed the opinion that a fair and impartial trial cannot be had within the county by a jury of the county, but on account of public opinion they decline to allow their affidavits to be used in this case, so great is their prejudice against this affiant.

This affiant further states that, in view of these facts, he does not think that he could go safely into trial here; that he will be again put upon trial for his life, and for this reason he believes that he should be granted every privilege the law in its mercy allows, and he believes that this court being cognizant of these facts ought not and will not permit this affiant to be tried by a jury of this county.

"Given under my hand this the 27th day of January, 1880.

"J. Morton Speece, D. Clerk."

"Affidavit No. 2.

"Virginia—city of Lynchburg, to-wit:

"This day Peter Wright made oath before me that he has been credibly informed and believes that there is great prejudice against him in the county of Bedford; that it has been publicly manifested in the newspapers by a publication by one of the jury that tried him; that there have been moves in the county to lynch him, and that this prejudice was exhibited by the vast crowd of citizens of Bedford that attended his trial; that two venuries of 48 men and some twenty bystanders were required to be summoned to procure the jury that tried him, and that each and all of the panel were challenged for cause, and he is advised
 886 *that the court of appeals decided that he did not then get an impartial and fair jury. He verily believes that not only can he not get a fair trial in the county of Bedford, but that his life is not safe if kept and tried in said county.

"Given under my hand this 7th Feb'y, 1880.

"Andrew J. DeWitt, Notary Public."

"Affidavit No. 3.

"This day personally appeared before me, J. Morton Speece, deputy clerk of Bedford county court, Graham Claytor, that he is of counsel for the prisoner, Peter Wright, who stands charged with murder in said court, and made oath that as such counsel he has made repeated efforts to obtain from the citizens of this county affidavits to the effect that the prisoner cannot get a fair trial in this county on account of prejudice existing against him; that the parties to whom he applied in nearly every case expressed the opinion that the prisoner could not obtain a fair trial in said county, but they declined to give their affidavit to the facts on account of the odium attached to the case and on account

of public opinion—so great is the prejudice against the prisoner.

"Given under my hand this the 22d of March, 1880.

"J. Morton Speece, D. Clerk."

This court is of opinion that the said county court did not err in overruling the motion of the prisoner for a change of venue as aforesaid. It does not appear from the record, nor from anything therein contained, that he did not have a perfectly fair and impartial trial on the occasion when the verdict and judgment
 887 were *rendered against him as

aforesaid, to which judgment the writ of error was awarded in this case as aforesaid, to-wit: the judgment rendered on the 27th day of March, 1880. There had been a former trial in the case, in which a verdict and a judgment in the same words or to the same effect had been rendered in the same county against the same prisoner for the same offense; and that judgment had been reversed by this court upon the ground, and only upon the ground, that one of the veniremen on the said former trial, to-wit: Charles W. Hardy, was not a competent juror for the trial of the plaintiff in error, and that therefore the county court erred in overruling his objections to said Hardy, based upon said incompetency. It was therefore considered by the court that the said judgment of the county court for the error aforesaid be reversed and annulled, the verdict of the jury set aside, and a new trial awarded the plaintiff in error; on which new trial in the same case and in the same court, another verdict and judgment were rendered in the same words or to the same effect; the said judgment being the same to which the writ of error in this case was awarded as aforesaid. That there was one incompetent juror on the first trial of the case, was no good ground, in itself, for considering that a competent jury could not be obtained in the case in the said county of Bedford. If it had been, the difficulty might no doubt have been removed, by summoning from another county so many duly qualified jurors as could not be found in the county in which the trial occurred. There was no such attempt made thus to remove such a supposed difficulty, but instead of that, there was a motion for a change of the venue. The facts of the case as they appear in the record, show that a perfectly competent jury could be, as one such was in fact, summoned in the county and empaneled
 888 for the final trial *of the case. To not one of the twelve jurors who finally tried it, was the slightest objection assigned, either in this court or in the court below. The conclusive presumption therefore is, that there was no ground for any such objection, and that the ground now taken by the plaintiff in error, that his motion to change the venue ought to have been sustained, is wholly unfounded.

The only evidence introduced by the prisoner in support of his motion for a change of venue as aforesaid, consisted of three affidavits, two of which were those of the prisoner himself, and the third that of the pris-

oner's counsel. It is not stated in the said affidavit of the said counsel, that he believed the prisoner could not obtain a fair trial in the said county. Even if it had been so stated, there is nothing in the record to show that any difficulty which might have existed in obtaining a fair and impartial jury in the county might not have been removed by causing so many jurors as might have been necessary to be summoned from any other county or corporation. If such difficulty could have been so removed, there was, of course, no necessity for a change of venue. But no motion was made by the prisoner for a venire facias to summon jurors from another county or corporation; and indeed there was no occasion, so far as the record shows, for any such venire facias. On the contrary it appears that a fair and impartial jury was actually obtained in the said county.

The court below therefore clearly did not err in refusing to grant the plaintiff in error a change of venue.

The second and only remaining assignment of error is, that "the verdict of the jury should have been set aside and a new trial granted, because the verdict was contrary to the law and the evidence.

889 *Another bill of exceptions was made a part of the record in this case, which states "that upon the trial of this cause and after the jury had rendered their verdict, the prisoner by his counsel, moved the court to set aside the verdict of the jury and grant the prisoner a new trial upon the ground that the verdict was contrary to the law and the evidence; but the court overruled the said motion and refused to set aside the verdict and grant the prisoner a new trial. To which opinion of the court so overruling said motion, the prisoner by counsel excepts, and prays that his bill of exceptions may be signed and sealed by the court and made a part of the record; which is accordingly done. And to save the prisoner the benefit of the exception, the court certifies that the following is the evidence and the whole of the evidence which was produced upon said trial by witnesses introduced by the Commonwealth:

The first witness, Carr Maupin, said: "I am the father of the deceased. I live in Bedford county, about 3½ miles south of Liberty. Peter Wright, the prisoner, who was a tenant of mine, under our contract he was to have one-half of the crop of oats, corn and tobacco. I was to furnish one mule and he one—he to haul and sell the wood from the new ground and to pay me one-half of the proceeds every night. Peter Wright had been hauling wood out of my new ground and pocketing all the money. I went over to the new ground in the afternoon. I told him he must stop; that he was neglecting his crop and keeping the money; if he didn't I would get some one to work his crop for him. He replied, 'I will haul the last stick away.' I observed to him that he would have to haul it without my mule. I started home and the prisoner said, 'God

d—n your old soul, I intend to kill you anyhow.' He then *knocked me

down with his fist and beat me as long as he saw proper. The prisoner's son, a boy about 13 years old, hollowed to prisoner 'not to beat me any longer, he had beat me enough'—he stamped me just below the stomach. I went to the wagon to unhitch the breast chain of my mule and saw my son, (the deceased), coming through the tobacco, and as he came up said, 'Peter what in the world are you beating my father this way for?' Prisoner then turned round and snatched the standard from the wagon and struck me and knocked me down, and then whirled and knocked my son down. When he struck me I caught the lick with my hand, but the lick struck me on the head and knocked me down. I lay on the ground, I do not know how long, and when I got up I said, 'Peter you have killed my son,' and prisoner replied, I am glad of it, (or damn glad of it, I don't know which). Peter then unhitched his mule and gave the harness to his daughter and went down the branch towards Liberty, Va., and gave himself up. This is the standard with which he struck me and with which he killed my son. (Here the standard was produced, which is a dogwood standard, 2½ or 3 feet long, 1½ inches in diameter.) This was the last of June or 1st July, 1879, in the county of Bedford. Neither of us struck him or offered to strike him. I was not able to do so. We made no resistance or offered to make any. I know of no personal ill-feelings up to that time between me and prisoner or between the prisoner and deceased. I was unarmed when the difficulty occurred. The prisoner was also unarmed, but if I had had a pistol I would have killed him, if I had been able to do him justice."

The second witness, Lydia Early (a woman of color), said: "I live about 100 yards from the place where the difficulty occurred. I

891 I had two little children over there *where difficulty occurred. My little girl who was in the yard came into the house and said that Mr. Carr Maupin and Peter were quarreling at the wood-stack. I went out doors and sat down by the table, and heard Carr Maupin say, you pocket all my money and pay me none. Peter says, 'I am going to haul that stack of wood.' Carr Maupin says, 'I am going to take out my mule.' Peter said, 'Let that mule alone.' Carr Maupin went to unhitch his mule. Peter knocked him down and stamped him, and says, 'Damn your old soul, I'll kill you.' By this time Robert Maupin (the deceased) came running up with open hands, and says: 'Hey there; don't you hit my father any more.' Peter's little boy says, 'Father, don't fight; you can do without all that fighting.' As Robert Maupin ran up Peter snatched the wagon standard and knocked old Mr. Maupin down, and turned and knocked Robert Maupin down. Mr. Carr Maupin lay there from 4 to 5 minutes before he got up. Robert Maupin did not get up at all. Peter Wright stayed long enough to divide his gear from Mr. Carr Maupin's; he gave his harness and his horse to his girls who had come up at that time. Peter then went down the creek towards town. Neither of the Maupins as far as I

saw had any rock or stick. I did not see the beginning of the difficulty. I was in my house when the difficulty commenced. They were talking very loud. Maupin generally talks loud. The whole fight from the beginning to end was in less time than ten minutes. Robert Maupin, the deceased, was a grown man, and about as stout as the prisoner. I have never heard of any ill-feeling between Peter and Robert Maupin. They all thought a great deal of Robert Maupin."

The third witness, Dr. Walter Izard, said: "I was the physician called to see the deceased; arrived on the *ground about an hour or two after the difficulty, and found him insensible and speechless; had bled freely from the wound on his head, and might have—produced by the stick here produced. I had him removed to his father's house, and did not see him again until the next morning when I found him dead (about 9 A. M.). Upon making a post mortem examination I found the skull badly fractured, the fracture extending some three inches. The wound inflicted was the cause of his death. I regard the standard used a deadly weapon in the hands of a man like the prisoner."

This court is of opinion that the said county court did not err in overruling the motion of the prisoner to set aside the verdict of the jury and grant the prisoner a new trial upon the ground that the verdict was contrary to the law and the evidence. There is no doubt but that the killing in this case was murder; and the only question is, was it murder in the first degree, as it was found by the jury upon the evidence?

"Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery or burglary. is murder of the first degree. All other murder is murder of the second degree." Code of 1873, p. 1188, ch. 187, § 1. The killing in this case was not "by poison, lying in wait, imprisonment, starving," "or in the commission of, or attempt to commit arson, rape, robbery or burglary"; and the only question therefore is, whether it was a "willful, deliberate and premeditated killing?" If it was, it was murder in the first degree.

The court is of opinion that it was a willful, deliberate and premeditated killing, and therefore it was murder in the first degree.

At all events, the jury were warranted *by the evidence in so finding, whatever the judge of the county court or of the circuit court or the judges of this court might have found if they had been on the jury. To constitute a willful, deliberate and premeditated killing, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should come into existence for the first time at the time of such killing or any time previously.

Now in this case, we must regard the evidence as facts, as the jury might have regarded it. The parties when the altercation commenced were all unarmed; and Carr and

Robert Maupin remained unarmed to the end of the transaction. No attempt or threat was made by either of them to do violence to the prisoner. No harsh word was spoken by either of them to him. Carr Maupin testified: "I started home, and the prisoner said, 'God damn you old soul, I intend to kill you anyhow.' He then knocked me down with his fist and beat me as long as he saw proper. The prisoner's son, a boy of about 13 years old, hollowed to prisoner 'not to beat me any longer, he had beat me enough;' he stamped me just below the stomach. I went to the wagon to unhitch the breast chain of my mule, and saw my son, the deceased, coming through the tobacco, and as he came up said, 'Peter, what in the world are you beating my father this way for? Prisoner then turned round and snatched the standard from the wagon and struck me and knocked me down, and then whirled and knocked my son down. When he struck me, I caught the lick with my hand, but the lick struck me on the head and knocked me down. I lay on the ground. I do not know how long, and when I got up I said, 'Peter you have killed my son,' and prisoner replied, 'I am glad of it (or

894 damn glad of it, *I don't know which).' This is the standard with which he struck me, and with which he killed my son. (Here the standard was produced which is a dogwood standard, 2½ or three feet long, 1½ inches in diameter). Neither of us struck him or offered to strike him. I was not able to do so. We made no resistance or offered to make any. I know of no personal ill-feelings up to that time between me and the prisoner, or between the prisoner and deceased. I was unarmed when the difficulty occurred. The prisoner was also unarmed, but if I had had a pistol I would have killed him, if I had been able to do him justice."

Lydia Early's testimony was strongly confirmatory of that of Carr Maupin and need not be repeated.

Dr. Walter Izard testified: "I was the physician called to see the deceased; arrived on the ground about an hour or two after the difficulty, and found him insensible and speechless; had bled freely from the wound on his head, and might have been produced by the stick here produced. I had him removed to his father's house, and did not see him again till the next morning, when I found him dead (about 9 A. M.). Upon making a post mortem examination, I found the skull badly fractured, the fracture extending some three inches. The wound inflicted was the cause of his death. I regard the standard used a deadly weapon in the hands of a man like the prisoner."

It seems plain enough, without any further comment, that the evidence warranted the jury in finding the verdict they did.

The court is therefore of opinion that there is no error in the judgment and that the same ought to be affirmed.

It is unnecessary to review the cases and the authorities referred to by the court. 895 sel for the plaintiff in error. *There is nothing in them in conflict with the conclusion at which the court has arrived in

this case. There is one very recent decision of this court in which the five judges thereof were unanimous, in a case very similar to the present in most of its facts, which is conclusive upon the question that the court below did not err in overruling the motion of the prisoner to set aside the verdict of the jury and grant the prisoner a new trial upon the ground that the verdict was contrary to the law and the evidence. That case was *Nelson Mitchell v. The Commonwealth*, supra 872.

There is an important difference between that case and this in the fact that in that case the killing was preceded by an assault and battery committed by the deceased upon the accused just before the former was killed by the latter. Whereas in this case, the deceased made no assault on the accused at or about the time of the killing or any other; made no threat against him; had no weapon in his hand; and merely enquired, "Peter, what in the world are you beating my father this way for?" It appears that there never had been any ill-feeling between Peter and Robert Maupin, and that all thought a great deal of Robert Maupin. The killing then was an act of wanton cruelty; in effect without any provocation at all.

There is no doubt but that the prisoner intended to kill the deceased; and that he had not the least ground of justification or excuse for doing so. The act of killing was done with a deadly weapon, which is fully described in the evidence. With it he badly fractured the skull of the deceased, giving to it a fracture extending some three inches, which was certainly the cause of the death of the deceased; and it must have been known to the prisoner that the blow thus

given by him would be the cause of the death of the deceased. There *was no personal ill-feeling up to that time between Carr Maupin, the father of the deceased, and the prisoner, or between the prisoner and deceased. Both Carr Maupin and his son, the deceased, were then unarmed, and neither of them made an assault upon, or attempted or made any threat to assault the prisoner. Carr Maupin started home and the prisoner said, "God damn your old soul, I intend to kill you anyhow." The prisoner then knocked the father down with his fist and beat him as long as he saw proper; he stamped the father just below the stomach. The latter went to the wagon to unhitch the breast chain of his mule, and saw his son (the deceased) coming through the tobacco, who, as he came up, said, "Peter, what in the world are you beating my father this way for?" Prisoner then turned round and snatched the standard from the wagon and knocked the father down; and then whirled and knocked the son (the deceased) down. The father lay on the ground some time. He would, no doubt, have been killed if he had not caught the lick with his hand. When he got up he said, "Peter, you have killed my son"; and prisoner replied, "I am glad of it (or damn glad of it, the witness did not know which)." It appears that there

never had been any ill-feeling between the prisoner and the deceased, and that all who knew the deceased thought a great deal of him. It was certainly the duty of the deceased to interpose and save his father from death or great bodily harm. He indicated no purpose to do anything else, but the contrary. He had no weapon, made no assault upon or threat against the prisoner, but only enquired as he came up, "Peter, what in the world are you beating my father this way for?" and then without any further provocation the prisoner killed the

deceased with a deadly weapon! *We say that the jury were warranted by the evidence in finding this to be murder in the first degree, as they did; and that the judgment of the court below ought not to be reversed, but ought to be affirmed, which is adjudged accordingly. Judgment affirmed.

898 *Webber v. The Commonwealth.

July Term, 1880, Wytheville.

Absent *Moncure, P.*, and *Anderson, J.*

1. **Foreign Corporations—Sales by Agent—Taxation.**—The Singer manufacturing company, a foreign corporation, has a place of business in Richmond, where it sells its machines, made out of the State, and has paid a tax to the State of \$322. The company is a resident merchant in the sense of the revenue laws of Virginia, and may appoint an agent to conduct its business. But this does not authorize the agent to take its machines to another county and there sell and deliver them to the purchasers, without paying in that county the tax prescribed by the statute.
2. **Merchants—Sales in Other Counties—Taxation.**—Whilst the statute, section 35 of the revenue law of 1877, allows a resident merchant or manufacturer, who has paid a tax on his business of \$100, to sell his goods by sample, card, &c., in any other county, without paying an additional tax, he is not authorized to take his goods or wares to another county and there sell them, without paying the tax prescribed by the said revenue laws.
3. **Foreign Corporations—Compliance with State Revenue Laws.**—The fact that the Singer manufacturing company is making its machines under a patent of which it is the assignee, does not entitle the company to bring her machines into the State, and sell them here without complying with the requirements of the State revenue laws.
4. **Revenue Laws—Constitutionality.**—There is nothing in these provisions of the State revenue laws in conflict with the Constitution of the United States.

This case was transferred from the docket of the court at Richmond to Wytheville, and there heard and decided. It was an indictment in the county court *of Henrico against J. T. Webber, for selling

in said county, certain machines known as the "Singer sewing machine"; the said machines not having been manufactured in Virginia, but in another State, viz: the State of New York, without having obtained a license from the proper authorities of the

county authorizing him to sell, or offer to sell the said machines therein, and without having paid the tax imposed by law for the privilege of so doing. He the said J. T. Webber not being a merchant, or an agent selling on commission for any person, &c., authorized by law to sell or offer for sale the machines aforesaid, in the county aforesaid, he the said J. T. Webber not being the owner of the machines offered by him.

There was a verdict against the defendant, and judgment for a fine of \$50. From this judgment he obtained a writ of error to the circuit court of Henrico, where it was affirmed; and thereupon he applied to a judge of this court for a writ of error and supersedeas; which was awarded.

On the trial in the county court the defendant Webber took three bills of exceptions to rulings of the court. It is only necessary to give the second:

"Be it remembered, that after the evidence mentioned in the first bill of exceptions, which is hereby made a part of this bill, had been given to the jury, the accused asked the court to instruct the jury as follows:

"The court instructs the jury that if they believe, from the evidence, that the Singer manufacturing company paid to the proper officer of the State the sum of three hundred and twenty-two dollars for a general merchant's license for year beginning May 1, 1880, and ending the 1st May, 1881, and received from said officer such license; and further that when the defendant offered to sell the machines known as the
900 Singer *sewing machines, he was only acting as the employee of the said Singer manufacturing company, then they must find the defendant not guilty.

"The court further instructs the jury that if they believe, from the evidence, that the Singer manufacturing company are the patentees in the patent offered in evidence; that the sewing machines offered for sale by the defendant were machines made by said Singer manufacturing company in accordance with specifications in said patent, that at the time they were so offered for sale they were the property of the said Singer manufacturing company, and that the said defendant when so offering them for sale was acting only as the employee of said company, then they must find the defendant not guilty.

"But the court, after considering the same, refused to grant said instructions; to which ruling of the court so refusing, the accused excepted and tendered this, his bill of exceptions, to the said refusal of the court; which he prays may be signed, sealed, and made a part of the record; which is accordingly done."

John A. Meredith and W. Crump, for the appellant.

The Attorney-General, for the Commonwealth.

STAPLES, J., delivered the opinion of the court.

The defendant was convicted in the county

court of Henrico of selling and offering to sell in said county certain machines known as the "Singer sewing machine," without having first obtained a license according to law, and was sentenced to pay a fine of \$50. To that judgment he applied for and obtained a writ of error from the circuit court; which affirmed the judgment of the
901 county court. A writ of error *was awarded by this court to the judgment of the circuit court.

On the trial in the county court it was proved that the Singer manufacturing company is a corporation incorporated by the laws of New Jersey; that it has a place of business in the city of Richmond where it keeps a stock of sewing machines; that the company is duly licensed by the State of Virginia, having paid a license tax of \$322; and is therefore a resident merchant of this State, and taxed as such; and the defendant is its authorized agent, and as such has sold and delivered at the time of sale, since May 1, 1880, machines to divers citizens of Henrico county. The question before us, is whether the defendant upon this state of facts was properly convicted of the offence for which he was indicted?

In determining this question it will be necessary to examine the provisions of various statutes relating to the assessment and collection of the public revenues. In one or more of these statutes it is expressly declared that every license granting authority to any person to engage in any business, employment, or profession shall designate the place of such business, employment, or profession, unless otherwise expressly provided. And engaging in or exercising any such licensed business elsewhere than at such designated place is declared to be without license. And no person is allowed the privilege of selling throughout the State under one license, except by special provision of law. §§ 88-94, pp. 30-31, Va. Revenue Laws, 1877. These provisions, it will be observed, are very broad in their operation, and apply as well to merchants as to the owners of articles or machines manufactured in this State, or in other States and Territories. A careful examination of the revenue laws fails to show any enactment allowing either

902 of these classes of persons *the privilege of selling elsewhere than at their designated places of business, unless, it be the statutes relating to sample merchants, found in the thirty-fourth and thirty-fifth sections, pp. 61-62 of the Revenue Laws. These sections declare that any person who shall sell or offer to sell any description of goods, wares or merchandise by sample, card, description or other representation, verbal or otherwise, shall be deemed a sample merchant. Any person engaging in such business must obtain a license which confers upon him the privilege of selling anywhere in the State. He may under his license appoint one agent or salesman to sell in his place. But for any additional agent or salesman employed to sell, he must pay an additional tax of \$50. It is also provided that nothing in either of the sections shall be so

construed as to prevent any resident merchant or manufacturer from exhibiting a specimen of his goods, wares or merchandise anywhere in the State, or the exhibition of a sample of any property which the person exhibiting is authorized to sell without a sample merchant's license. And at the conclusion of the thirty-fifth section is the following provision: "Nothing in this or the preceding section (34th) shall be construed to require any licensed merchant or manufacturer who has paid a license tax of not less than one hundred dollars to pay an additional tax for selling or offering to sell by sample, either by himself or his agents.

Under this provision the licensed merchant or manufacturer who pays a tax of one hundred dollars may sell by sample himself, or he may sell by agents. It is very true the language quoted does not of itself confer express authority so to sell, but is rather in the form of an exception or proviso. It must be remembered, however, that any person is privileged to sell goods, wares and merchandise until prohibited by **903** some statutory enactment, and but for the thirty-fourth and thirty-fifth sections any person may sell by sample to any extent. When therefore the licensed merchant or manufacturer is excepted out of the operation of these sections he stands precisely as though they had never been adopted. If these sections do not apply to him there is no law that does, and he may sell by sample himself in any part of the State, or he may appoint any number of agents to sell for him, without the payment of any additional tax. In this respect he stands upon much higher ground than the mere sample merchant, who for every additional agent is required to pay a tax of fifty dollars.

This discrimination if it may be so termed, is founded upon sound considerations of public policy. The sample merchant is generally a non-resident, and beyond the small tax he pays into the treasury, contributes nothing to the wealth and resources of the State, whilst he is constantly withdrawing a large amount of capital from our midst as well as injuriously affecting domestic trade and enterprise. On the other hand the resident merchant pays not only the tax upon his business but generally he pays upon other subjects of taxation necessarily employed in that business, and at the same time he is a substantial contributor to the wealth of the State in time of peace, and her strength in time of war. We repeat therefore the statutes already cited have made a distinction between a licensed merchant or manufacturer who pays a tax of one hundred dollars and the mere sample merchant. It was conceded by the attorney-general, that this distinction has been recognized and acted upon by the several departments of the government since 1874, until very recently; and although the legislature has been repeatedly in session in the meantime, it has never **904** interfered to change the rule of construction so adopted. We think the courts ought not to do so, but leave

the whole matter to the legislature where it properly and rightfully belongs.

We are now to enquire what are the rights and privileges of a sample merchant; for whatever they are, they may be exercised by the licensed merchant or manufacturer who has paid a tax of one hundred dollars. The thirty-fourth section defines a sample merchant. He is one "who sells or offers to sell any description of goods, wares or merchandise by sample, card, description, or other representation, verbal or otherwise, or any agent for the sale or collection of orders by sample or description list, such as is prescribed by the C. O. D. supply company of America, or any similar company." The word "sample, both in its legal and popular acceptation, means that which is taken out of a large quantity as a fair representation of the whole—a part shown as a specimen." Indeed upon the well-known maxim of *noscitur a sociis*, the word "sample" in its connection with "card" or "representation," shows what was intended by the legislature. The history and the reasons of the legislation contained in the thirty-fourth and thirty-fifth sections are perfectly well known.

The object was to provide a remedy for a constantly increasing evil growing out of the influx of multitudes of agents and salesmen from the commercial cities of the north traversing the State with sample cards and descriptive lists, and receiving orders to be filled by their respective employers. This traffic yielded no revenue to the State, and was deeply injurious as well as unjust to the licensed merchant and manufacturer. It is hardly to be supposed that the legislature in providing a remedy for this abuse intended to confer new privileges upon the licensed merchant, and to allow him to sell as a merchant or pedlar his goods by retail

905 *in any part of the State. If the right to sell by sample carries with it the right to sell and deliver as a retail merchant or as a pedlar, every licensed merchant or manufacturer who pays a tax of \$100 may establish a place of business in each county in the State, and there retail his goods; or he may appoint any number of agents to peddle his goods from place to place, and sell them without restraint or limitation. The result would be that a license to sell at one place in effect confers authority to sell at any other place according to the inclination or interest of the grantee of the license. A person licensed as a merchant to sell goods at a particular place may of course receive orders from his customers and others in any and every part of the State, may fill these orders and forward the goods accordingly. It is the constant practice, and no one presumes to question its legality. And so a merchant or manufacturer paying a tax of \$100 may send his agents into any county supplied with samples, cards or descriptive lists, and may receive and fill orders for furnishing and delivering goods so sold by sample, card or description.

And while it is conceded to be no easy task precisely to define when the privilege of the

sample merchant begins, or when it terminates, it is very clear, that a person, whether he be owner or agent, who has a place of business in a county or town, and there sells and delivers the articles at the time of sale, or a person who carries his goods from place to place, and sells and delivers the article at the time of sale, is not selling by sample, card or description. Such a person may be a retail merchant or a pedlar; but he is not a sample merchant. And this is precisely what was done by the defendant. Either he had a place of business in Henrico county, where he kept the machines for sale and delivery

at the time of sale, or he carried
 906 *them from place to place and sold and delivered whenever he would find a purchaser. In either case he was not selling by sample. This proposition seems to be so free from difficulty it would have been passed by without discussion but for the earnest and elaborate argument of the learned counsel for the defence.

It is claimed, however, that although the defendant may be guilty of violating the statutes relating to sample merchants, or the statute relating to pedlars, he cannot be convicted in this case, because he is not indicted under those statutes but under what is known as the forty-fifth section of the Revenue Laws 1878, page sixty-five. That section provides that any person who shall sell, or offer to sell the manufactured articles or machines of other States or Territories unless he be the owner thereof and taxed as a merchant, or who shall take orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States and Territories. The ground taken by defendant's counsel, "that this section contains an express exception in favor of the owner who has paid a license tax—that this exception creates an inevitable implication that such owner may sell; and if he may sell, his agent may do so, under the decision in Myerdock's case, 26 Gratt. 988." The argument is plausible but it is not sound. In the first place the forty-fifth section was not designed to confer rights and privileges upon any class of persons, either the owner or vendors of goods, wares and merchandise. Those rights are defined by other statutes. The sole object of the forty-fifth section was to restrain—to provide some remedy for an evil growing out of the sale in this State of articles manufactured in other States brought here by persons who were the agents of others; or if they were the owners, paid no tax for the privilege.

All such persons are denominated
 907 *agents by the statute, and are required to take out license in each county in which they sell. But if the construction of defendant's counsel be correct—if the forty-fifth section is to be read as of itself conferring upon the owner who has paid a merchant's tax authority to sell, we have this anomalous condition of things. Under the thirty-fourth and thirty-fifth sections a resident merchant who pays a \$100 tax may sell by sample; but the payment of the tax is a condition precedent to the exercise of

the privilege. According to the interpretation now sought to be put upon the forty-fifth section, any licensed merchant who is the owner, whether he has paid \$20 or \$100, may sell not merely by sample, but he may sell by retail as a merchant or as a pedlar, in every county and town in the State, without limit or restraint. The result is that whilst the payment of \$100 tax is necessary in order to sell by sample under the forty-fifth section according to the present pretension, any resident merchant who is the owner of the goods he offers for sale, may sell without limit as to time or place. It is impossible that a construction which leads to such consequences can be correct.

It is very true, as was held by this court in Myerdock's case, whenever the merchant is authorized to sell at a particular place he may appoint an agent to sell there for him. But it is equally true, that the merchant cannot confer upon an agent authority to sell where he himself cannot lawfully sell. If therefore the Singer manufacturing company cannot, under its Richmond license, sell in Henrico except by sample, it cannot of course appoint an agent to sell there in its place. So that at last we are brought back to the enquiry. "What are the privileges of a resident merchant who has paid a tax of one hundred dollars? These privileges, whatever

908 they may be, are defined, *not by the forty-fifth section, but by other provisions already cited. But although the owner is not punishable under the forty-fifth section, because he is expressly excepted from its operation, there is no such exception in favor of any other person; not even an agent of the owner. For whilst the law protects the agent in selling where the principal may lawfully sell, it does not so protect him in selling where the principal himself is prohibited from selling. It is very true also that the forty-fifth section is silent as to the mode and manner of selling. It is a matter however of no importance. All manner of selling is prohibited, unless the party can show that the privilege is conferred upon him under other statutes—as for example that he is a merchant licensed to sell at the place of sale, or that he is a resident manufacturer, or that he is authorized to sell by sample and is merely exercising that privilege. It seems to us this is the only construction that can be given to these revenue laws, unless we mean by a sort of judicial legislation to change the whole policy of the legislature for the last thirty years, with respect to the licensed business of the State. We are therefore of opinion the defendant was properly convicted under the forty-fifth section; and the county court did not err in so holding.

It has been further insisted, that the machines sold by the defendant as agent of the Singer manufacturing company, were manufactured by the company as assignees under a patent of the United States; and that no State can consistently with the Federal Constitution and the laws of the United States, impose burdens by taxation or otherwise upon the privilege of selling such ma-

chines within its limits. When we consider the number and variety of patented articles sold throughout the country by the patentees or their assigns, it is obvious that 906 if the proposition contended *for be correct the States will be deprived of an immense amount of revenue for the support of their governments and the conduct and management of their domestic economy and administration. The learned counsel produced no authority in support of this doctrine. The only decision cited having any bearing on the subject is that of the supreme court of the United States in *Patterson v. State of Kentucky*, reported in *Albany Law Journal* February 22, 1879, p. 156. The only question in that case was whether a State may provide for the inspection of illuminating oil patented by the government, and may prohibit the sale of any that will not stand the prescribed test. It was held that the prohibition was a police regulation within the power of the State. That case therefore did not call for any decision of the precise point involved here. But Mr. Justice Harlan, who delivered the opinion of the court, drew a very just distinction between the right of property in the physical substance which is the fruit of a discovery or invention, and a right in the discovery or invention itself. The right to sell the oil itself is not derived from the patent, but exists independent of it. The right which the patent primarily secures is the exclusive right in the discovery or invention, which is an incorporeal right. The enjoyment of that right may be secured and protected by the Federal government against all hostile State legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation simply because the inventor acquires a monopoly in the discovery.

Applying these principles to the present case, the patentee has the exclusive right to use or sell the "Singer sewing machines." No one has the right to use the product of his labors except with his consent. He has a monopoly in the invention and this is 910 the sole *operation and effect of the patent. But this does not prevent the States in the exercise of their just powers of taxation from taxing the business of selling the machine which is the subject of the invention. If the State attempts by a system of hostile and discriminating legislation to destroy the entire value or use of the discovery or invention, a very different question would then be presented. But so long as the taxation imposed is just and reasonable, and accords with the general burdens imposed upon like subjects of taxation, there will be no just ground of complaint. As was said by Chancellor Kent in *Livingston v. Van Ingen*, 9 Johnston R. 582, "That species of property must likewise be subject to taxation and to the payment of debts as other personal property. The national power will be fully satisfied if the property created by patent be for the given term enjoyed and used exclusively, so far as under the policy of the several States the property shall be deemed fit for toleration

and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted; which was to reward the beneficent efforts of genius and to encourage the useful arts."

Under the Virginia statutes it is not pretended there is any discrimination against patentees residing in this or other States, or against their assignees. The tax is imposed equally upon the sale of all articles or machines manufactured in this or other States and Territories whether patented or not; and no complaint is made that the tax is burdensome or oppressive. It was said by the attorney-general in the argument here that the patent granted to the inventor of the "Singer sewing machine" had expired, and had not been renewed by Congress. If this be so, as no doubt it is, there can be no pretence or claim of right in the present company to the exclusive use or sale of 911 the *machines, or to an exemption from taxation by the State.

And lastly, it is claimed that the statute under which the defendant was convicted is in conflict with the power vested in Congress to regulate commerce among the several States; and is therefore unconstitutional and void. The learned counsel for the defendant laid no particular stress upon this point, and clearly attached no great importance to it. The Singer manufacturing company, as far as appears, paid the tax imposed on resident merchants without objection or protest, and was only licensed as such. Under this license it claims the right to sell its machines in any part of the State; and this whole controversy grows out of the assertion of that right. Upon the trial in the county court its claim for exemption was based upon two grounds: First, that the company having taken out a merchant's license had the right under it to sell by its agents in the county of Henrico or elsewhere; and secondly, that as assignee of the patentee it could sell independently of any restriction of limitation imposed by the laws of the State. It does not appear that any question was raised as to the constitutionality of the tax in other respects, or that the pleadings or evidence were framed with reference to the point now presented in the argument. That point seems to have been an after thought, first raised in the circuit court, and now renewed in this court. Without entering into any detailed argument on the subject, we think there is no just ground for saying that any discrimination is made by the statutes of this State against the products or citizens of other States. As was said by the supreme court of the United States in *Woodruff v. Parham*, 8 Wall. U. S. R. 123, "there is no attempt to discriminate injuriously against the products of other

States or the rights of their citizens, 912 *and the law is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by resident citizens. For whether the goods be manufactured here or manufactured abroad, their sale without a license is

equally prohibited, and the same tax is to be paid in each case for the privilege of selling. It is very true that the forty-sixth section contains an exception in favor of resident manufactures. But this exception is not founded upon any idea of discriminating against non-resident manufacturers, but upon the policy of holding out inducements to the investment of capital and the employment of labor in that branch of business. When we consider the practice, energy and skill so necessary in all the various processes required for the production of manufactured articles, the great outlay of capital and labor necessary; the accessions they bring to the wealth and power of a community, and the taxes imposed upon the property employed in that branch of business, it is not at all surprising that many of the States have allowed exemptions from taxation upon the article whilst it is the hands of the manufacturer. It might with as much propriety be contended that exemptions in favor of literary and benevolent associations constitute un-

just discriminations against non-residents. If the resident manufacturer pays no tax upon the sale of his fabric, he pays more than an equivalent in the burdens imposed upon the property real and personal often employed in the business. This exception is nothing new in Virginia. It has prevailed here for nearly forty years, without being called in question. No decision of the supreme court of the United States, or of any court has been cited, which holds that such an exemption is an unconstitutional discrimination against non-residents. Most

913 *of the cases are cited in *Howe Machine Company v. Gage* recently decided by the supreme court of the United States and not yet reported. But none of them involve the precise question arising here. This court has therefore no sort of difficulty in sustaining a system of legislation sanctioned by time, the usage of States and the principles of equity and justice.

Judgment affirmed.

INDEX.

ACTIONS.

1. In an action of trespass on the case, the declaration charged the defendant with an assault in various forms, one of which was, by a wounding from a pistol shot, so as to cause the amputation of the leg of the plaintiff; and also set out an ordinance of the city in which the wound was inflicted, prohibiting the discharge of firearms therein; also alleging the continued sickness, disorder and suffering in consequence of said wound; the expense, medical attendance and other costs, consequent on said wound, which, plaintiff claimed, amounted to a large sum, and for which he claimed damages amounting to \$10,000. On demurrer—**Held**: The declaration alleges a case of trespass at common law, and under our statute (C. V., 1873, ch. 145, § 6) trespass on the case will lie, wherever trespass will, and is sufficient.

Daingerfield v. Thompson, 136

2. If a municipal corporation in improving its streets, fills up a street and does it in such way that the water which before had been carried off by gutters, is thrown back upon an adjoining lot, the corporation will be liable for the damage to the lot, if by proper care and means it might have been prevented.

Smith v. City Council of Alexandria, 208

3. In an action of trespass on the case for assault and battery, the defendant, under the general issue, may give in evidence matters which merely go to the quantum of damages, by way of palliating the offence.

Davis & als. v. Franke, 413

4. While it is true, that where the defendant in such action relies upon provocation as a defence, he is limited to such recent acts as will raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff; yet where the plaintiff makes the offensive acts or declarations committed or said by him, long anterior to the assault, a part of the *res gestæ*, by repeating or alluding to them at the time, in a manner which indicates a repetition, renewal of, or persistence in them, they are admissible in evidence on behalf of the defendant; and this is so, even where one of the acts of the plaintiff was a libel against the defendant, for the publication of which the defendant had already recovered damages. *Idem*, 413

5. In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them.

Idem, 413

6. In an action by a father for the seduction of his daughter, a count which avers she is under twenty-one years of age, and unmarried, and was so at the time of the seduction, and the plaintiff then was and still

is entitled to her attentions and services. **Held**: This is a sufficient averment of the relation of master and servant, between the father and daughter.

Clem v. Holmes, 722

916 *7. In an action by a father for the seduction of his daughter, evidence offered by the father of the pecuniary condition of the defendant is competent.

Idem, 722

8. The statute, Code of 1873, ch. 145, § 1, which in an action for seduction dispenses with any allegation or proof of the loss of service of the female, by reason of the defendant's wrongful act, does not alter the rule as to the commencement of an action on the case by the father; and when the daughter lived away from her father's house at the time of the seduction, but returned and was confined there and nursed, the statute of limitation will only begin to run from that time. *Idem*, 722

ADVANCEMENTS.

Interest on advancements to children. **Held**: In this case only to be charged from the date when the estate was in a condition to be divided.

Barrett & Wife v. Morris' ex'ors & als., 273

APPELLATE COURT.

1. The terms "matter in controversy" as used in reference to the jurisdiction of the court of appeals in § 2, art. VI. of the Virginia Constitution, means the "subject of litigation, the matter for which suit is brought, and upon which issue is joined."

Harman v. City of Lynchburg, 37

2. When the plaintiff seeks a revision of the judgment below, if he claims in his declaration money or property of the value of not less than five hundred dollars, the court of appeals has jurisdiction, although the judgment may be for less, or for the defendant. But where the revision is sought by the defendant, the amount or value of the judgment at its date, determines the jurisdiction. This is the general rule. For exceptions to it, see 32 Gratt. 285; and the onus is upon the party seeking the revision, to establish the jurisdiction of the appellate court. *Idem*, 37

3. The judgment of a court of competent jurisdiction is always presumed to be right; and a party in the appellate court, alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail. *Idem*, 37

4. When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed to any

other ruling of the court below at the trial, the bill should be so framed, by the insertion of proper matter as to make the error, if any, apparent; otherwise the exception will generally be unavailing. *Idem*, 37

5. Where the record contains only a certificate of the evidence, and not of the facts proved, the appellate court will only consider the evidence introduced by the party prevailing, and will not reverse the judgment unless, after rejecting all the parol evidence of the acceptor, and giving full faith and credit to that of the adverse party, the judgment of the court below still appears to be wrong.

Daingerfield v. Thompson, 136

6. There is a verdict in favor of the defendant in a cause, which, upon motion of the plaintiff, is set aside by the court; and upon a second trial there is a verdict and judgment for the defendant. Upon writ of error by the plaintiff, if it was error in the court below to set aside the first verdict and grant a new trial, the appellate court will affirm the judgment, without inquiring into the proceedings on the second trial.

Terry v. Ragsdale, 342

7. See Judgments No. 2, and
Gray & al. v. Stuart & Palmer, 351

917 *8. On the proceedings on a writ of quo warranto the defendant having waived the filing of an information in the court below, cannot be heard to complain of any irregularity on this ground in the appellate court.

Bland and Giles County Judge case, 443

9. A motion for a continuance, is one addressed to the sound discretion of the trying court, under all the circumstances of the case, and its action will not be reversed by the appellate court unless it appears plainly erroneous. *Idem*, 443

10. See Practice in Chancery, Nos. 1 and 2, and

Simmons v. Simmons' Adm'r, 451

11. See Settlements No. 4 and
Triplett & al. v. Romine's adm'r & al., 651

12. See Murder, No. 7, and
Nelson Mitchell's case, 872

ASSIGNOR AND ASSIGNEE.

See Negotiable Instruments, No. 1, and
Broun v. Hull, survivor, 23

ATTORNEYS-AT-LAW.

Attorneys-at-law are not officers.
Bland and Giles County Judge case, 443

BOARD OF PUBLIC WORKS.

See Contracts, No. 1, and
Commonwealth v. Johnson & al., 294

BUILDING FUND ASSOCIATIONS.

The act of May 29, 1852, which authorizes the organization of building fund associations, has not been repealed by any of the subsequent statutes; and a building fund

association organized under that statute on the 8th day of September, 1872, is a legally organized association.

Davies & Co. v. Creighton, 696

CASE.

See Actions, Nos. 1, 3, 5, 6, 7, 8.

CHARGES.

R by his will, after giving to a trustee certain stocks, the interest of which was to be applied to the support of his sister J, and at her death to two of her daughters by name; and a like trust for the support of R a daughter of J, gave to D a son of J, land and stocks; "subject, however, to the full and comfortable maintenance and support of his mother and sister R during their natural lives." The mother died and the stocks left for the support of R became worthless. HELD: The land left to D is liable for the support of R in preference to any debt of D
Cockerille v. Dale's adm'r & al., 45

COMMISSIONS OF FIDUCIARIES.

See Lunatics, No. 2, and
Crigler's committee v. Alexander's ex'or, 674

CONFESSIONS.

On a trial for murder what confessions of the accused are evidence against him.

See Murder No. 3, and
Albert Mitchell's case, 845

CONSTITUTIONALITY OF STATUTES.

1. The act of March 28, 1879, in relation to the settlement of the State debt, which provides that all obligations created under this act shall be forever exempt from all taxation, direct or indirect, by the state, is not in violation of article 10, § 1, of the Constitution of Virginia.

Williamson v. Massey, auditor, 257

2. The overdue coupons upon bonds issued under said act of March 28, 1879, are receivable for all taxes levied by the State, including the capitation tax; and the auditor is bound to receive them, when offered in payment of taxes returned delinquent to his office.

Idem, 327

3. See Taxes and Taxation, Nos. 5, 6, 7, and
Webber's case, 898

CONSTRUCTION OF STATUTES.

1. For the principles on which a statute will be construed as prospective or retrospective, see the opinion of Staples, J., in
Crigler's committee v. Alexander's ex'or, 674

2. For the principles governing the question of the repeal of the statute by implication, see the opinion of Burks, J., in
Davies & Co. v. Creighton, 696

CONTRACTS.

The contract made on the 27th of February, 1867, by the board of public works with B. T. Johnson, N. Poe and J. P. Poe, for prosec-

ing the claims of the State of Virginia against the Chesapeake and Ohio canal company, was authorized by the resolution of the general assembly of February 26, 1867; and a full and final and honest settlement of all the matters involved in the contract having been made by the board and Johnson, &c., the same is conclusive upon the State.

Commonwealth v. Johnson & als., 294

CONVEYANCES.

The effect of a wife uniting with her husband in a deed, is not to vest in the grantee any estate, separate and distinct, from that of the husband, but simply to relinquish a contingent right, in the nature of an incumbrance, upon the land conveyed, which, if not so relinquished, would attach, and be consummate on the death of the husband.

Corr v. Porter & als., 278

CORPORATIONS.

1. A city is not responsible for property destroyed by its police force, without any authority from the city, or its governing power.

Harman v. City of Lynchburg, 37

2. If a municipal corporation in improving its streets, fills up a street and does it in such way that the water which before had been carried off by gutters, is thrown back upon an adjoining lot, the corporation will be liable for the damage to the lot, if by proper care and means it might have been prevented.

Smith v. City Council of Alexandria, 208

3. See Equity Jurisdiction and Relief, No. 1, and

Webb v. City Council of Alexandria, 168

4. See Building Fund Associations, No. 1, and

Davies & Co. v. Creighton, 696

COUNTY COURT JUDGES.

1. A judge of the county court who has been elected to fill a vacancy occasioned by the death of a former judge, is elected for a full term of six years, and not for the unexpired term of the former judge. And this is equally true of judges of the court of appeals and the circuit courts.

Meredith ex parte, 119

Harrison ex parte, 119

2. Manchester was incorporated as a city in 1874, and having more than five thousand inhabitants was entitled to have a judge of its hustings court. In March, 1874, C was elected and qualified as judge of said court. HELD: That this being the first judge of this court, under the Constitution C's term of office commenced on the 1st of January, 1875, and would continue until the 31st of December, 1880; and he was under the Constitution authorized to act as judge from the time of his qualification to the commencement of his term.

Fisher ex parte, 232

Fitzgerald ex parte, 232

3. See Judicial Tenure of Office, No. 3, and

Bland and Giles County Judge case, 443

4. B was elected in January, 1874, judge of the county court of Halifax and commissioned by the governor, and proceeded to act as such. HELD: His term of six years did not commence until the first of January, 1875, and continued until the 31st of December, 1880.

Estes v. Edmondson, sheriff, 510

5. A was elected in January, 1880, judge of the county court of Halifax, and commissioned by the governor; and believing that his term commenced immediately he proceeded to hold the court and transact business. HELD: He was a judge de facto; and his judgments are valid and binding, as if he had been a judge de jure. Idem, 510

McCraw v. Williams, Supt. Pen., 510

6. B is entitled to the office until the end of his term, and the fact that he did not immediately proceed to oust A, but practiced as an attorney in his court, did not operate either as a surrender or forfeiture of his office. Idem, 510

CREDITOR AND DEBTOR.

1. R by his will, after giving to a trustee certain stocks, the interest of which was to be applied to the support of his sister J, and at her death to two of her daughters by name; and a like trust for the support of R a daughter of J, gave to D a son of J, land and stocks; "subject, however, to the full and comfortable maintenance and support of his mother and sister R during their natural lives." The mother died and the stocks left for the support of R became worthless. HELD: The land left to D is liable for the support of R in preference to any debt of D. Cockerille v. Dale's adm'r & als., 45

2. A receiver appointed to sell real estate and collect proceeds, though he takes a bond for the purchase money in his own name, is not a creditor to whom the surety can give notice to sue upon the bond under the statute, Code of 1873, ch. 143, §§ 4, 5.

Davis' adm'r for, &c., v. Snead & al., 705

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Upon an indictment of P for the murder of C, before the jury is called the prisoner moves the court to quash the venire facias, and return thereon, for errors and irregularities appearing thereon; the only ground of error is that the act requires the jurors to be summoned, &c., "remote from the place where the offence is charged to have been committed;" and the language of the venire facias is—"where the felony was committed." HELD: This was no error. Poindexter's case, 766

2. A jury not having been obtained from the twenty-four persons summoned under the first venire facias, a tales is issued directing the persons named by the judge to be sum-

moned—"who reside remote from the place where the felony was committed." **HOLD:** The introduction of these words into the tales, if not required by the statute, is in accordance with the policy of the law, and does not invalidate the venire. And in a venire facias sent to a distant city, the insertion of these words is immaterial.

Idem, 766

Baccigalupo's case, 807

920 *3. After the Commonwealth had introduced evidence of the affray at the factory of Childrey, which occurred between 11 and 12 o'clock, where C had come to see P, the Commonwealth asked the witness whether he had any conversation on that morning with P concerning any difficulty between himself and deceased, occurring that morning, and if so, what was it? To which question and answer thereto, the prisoner objected. And the Attorney for the Commonwealth announced that he intended to follow the question up by evidence that the prisoner had conspired with another on the morning of the homicide to whip the deceased. The court overruled the objection, and the witness stated what the prisoner told him of a difficulty he had had with C, and that he had whipped him. **HOLD:** It was competent evidence. *Poindexter's case*, 766

4. It having been proved that C had come to the factory of Childrey between 11 and 12 o'clock, and demanded an apology from P, which P refused to give, and thereupon C had attacked P with a cane, and P had shot him, the Commonwealth offered evidence to prove the particulars of an assault made by the prisoner on the deceased at the store of Wingo & Co., where C was employed, between 9 and 10 o'clock of the same day of the homicide at Childrey's, in which the accused beat the deceased. **HOLD:** The occurrences were so connected that the evidence of what occurred at the store of Wingo & Co. was competent. *Idem*, 766

5. The objection to a juror that he was not a competent juror, because he had not paid his capitation tax of the previous year, comes too late after a verdict of conviction in a criminal trial; and is not good ground for setting aside the verdict, and granting a new trial to the prisoner. *Idem*, 766

6. Upon the facts in this case the prisoner was properly convicted of voluntary manslaughter. *Idem*, 766

7. In a criminal prosecution for felonious stabbing with intent to kill, the indictment which has been made by the grand jury of the hustings court of the city of Richmond charges the assault to have been made at the said city and within the jurisdiction of the said hustings court of the city of Richmond. **HOLD:** This is sufficient; and it is not necessary to state the place in the city where the assault was made.

Baccigalupo's case, 807

8. Under the plea of not guilty, it was competent for the prisoner to set up the defence of insanity at the time the assault was made for which he was on trial.

Idem, 807

9. When the defence of insanity is relied on by a prisoner, the burden of proof is on him; and it is not sufficient to raise a rational doubt on the subject; but he must satisfy the jury that he was insane at the time the act was committed for which he is prosecuted.

Idem, 807

10. Mere cumulative evidence is not sufficient to authorize the granting a new trial to the prisoner. And in this case the new evidence offered is merely cumulative.

Idem, 807

11. Upon the trial of P for murder, the jury found him not guilty of the murder, but guilty of involuntary manslaughter, and assessed upon him a fine of \$500. And the court thereupon entered a judgment discharging him. At the same term of the court, in the absence of P, the court set aside the judgment, and entered a judgment against him, for the fine of \$500, and six months' imprisonment, and directed him to be arrested and committed to prison. **HOLD:**

1. The first judgment was erroneous.

Price's case, 819

921 *2. During the same term of the court the matter was under the control of the court; and it was competent for the court to set aside the first and render the second judgment. *Idem*, 819

3. It was not necessary that P should be present in court when the second judgment was entered. *Idem*, 819

12. In a prosecution under sections 5 and 10 of the "Moffett Liquor Law," the indictment alleges that the principal was a "bar-room keeper," and a "bar-room liquor dealer," but does not allege that he was "licensed" as such. On motion in arrest of judgment—**HOLD:** The indictment is fatally defective.

Glass' case, 827

13. M and two others are indicted for murder in the county court of L, and on their arraignment they elect to be tried in the circuit court. A writ of venire is issued by the county court for the summoning of a jury, returnable to the circuit court, and the 24 men selected by the county court are summoned to the circuit court. On the motion of the prisoner this venire is quashed by the circuit court, and the court directs another venire of 24 to be summoned, and names the 24 summoned on the first venire. **HOLD:** The directing the same 24 men to be summoned is not error.

Albert Mitchell's case, 845

14. Upon the trial of a prisoner for murder, he twice makes a confession, both of which are admitted in evidence. There is very little doubt that the first confession was made without any promise or threat to induce it; and there is no doubt the last was so made. **HOLD:** The evidence was admissible.

Idem, 845

15. Upon the evidence in this case, three persons go together to rob a store. One, M, is posted some distance from the house to watch; and the other two obtain admittance

into the store-house, kill the owner and rob the store, and M shares the booty. **Held:** M is principal in the first degree of the crime of murder, and may be punished with death.

Idem, 845

16. Upon an indictment of M, a man of color, for murder, he is not entitled to have a mixed jury.

Idem, 845

17. Upon an application by the prisoner to change the venue, upon the ground that an impartial jury cannot be had in the county, the application is refused; and a jury is obtained in the county. **Held:** If the prisoner feared he could not get an impartial jury in the county, he should first have asked that jurors should be sent for from another county. And not having done this, and an impartial jury having been in fact obtained, the appellate court will not set aside the verdict for the refusal of the court to change the venue.

Wright's case, 880

CURATORS.

H is appointed curator of the estate pending a contest over C's will; and whilst curator collects an ante-war debt well secured, in Confederate money C's will having been established, H qualifies as executor, but is afterwards removed; and the administrator de bonis non with the will annexed, files a bill against H, as curator and his sureties seeking to subject them to the payment of said debt; and the defendants demur to the bill. **Held:** The administrator de bonis non with the will annexed, may maintain the suit against the curator and his sureties, under the statute. Code of 1873, ch. 118, § 24.

Helsley & als. v. Craig's adm'r & als. 716

922

*DAMAGES.

1. T was the keeper of a restaurant in Alexandria city, which has an ordinance prohibiting the discharging of firearms in its streets. He had shut his front door for the night, but his light was burning, when D, H, and S came there and demanded admittance about midnight. S went around at a side door, went in, and told T that D wanted to come in. D and H were at the front door. D said to H, "fire a salute," or something of the sort. H fired, and the ball went through the door into the leg of T, wounding him so severely as to cause amputation of the leg, and seriously to impair his health. In a suit brought by T against D and H, which was, at the instance of D, tried separately against him first, and a verdict rendered against him for \$3,000 damages and the costs, on a motion to set aside the verdict as being contrary to the law and evidence, and because the damages were excessive, it was refused by the circuit court, and on a writ of error affirmed by this court.

Daingerfield v. Thompson, 136

2. In estimating the damages, the jury should take into consideration "the bodily

injury sustained by the plaintiff, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent, the expenses incidental to attempts to effect a cure, or to lessen the amount of injury, and the pecuniary loss sustained by the plaintiff through inability to attend to his business." *Idem*, 136

DECREES.

1. J's devisees and W are tenants in common of a hotel property, and J's executor and W agree to sell the property at public auction; the deferred payments to be secured by separate bonds to each for his half of the purchase money, with a lien retained on the real property. The sale is made and W becomes the purchaser, but refuses to execute the contract. J's executor sues W for specific execution of the contract, and there is a decree in 1868 in his favor for specific execution, a personal decree against W for the amount due, and for a sale of the whole property. Before the decree W sells and conveys his moiety of the property to M who pays the purchase money. Upon a bill by the judgment creditors of M to subject his moiety of the property to the payment of their debts—**Held:** W bought at the sale but J's moiety of the property, and the lien of J's executor's decree only extends to that moiety, though the whole property was sold under the decree.

Johnson's ex'or v. Nat. Exchange Bank Richmond, 473

2. The decree of J's executor was left with the clerk of the county court to be docketed on the 4th of February, 1870, but was not then put upon the docket. In July, 1870, the decree was found in the office and was then docketed, but was dated February the 4th. In May of the same year W conveyed a tract of land to T and C in trust to secure a debt to G, which was recorded. **Held:** The decree was not duly recorded until July, and the deed to T and C had preference of satisfaction out of the land. *Idem*, 473

3. Though T, the trustee, had been the judge who made the decree against W, yet he stated in his answer, and also in his deposition, that he had no recollection of the decree when the deed was made and recorded. **Held:** In order to affect the creditor by the previous notice or knowledge of his agent or trustee, of the existence of a prior unrecorded lien on the real estate *which is conveyed for his security, it is necessary that the notice or knowledge should have been given or imparted to the agent in the same transaction, unless one transaction is closely followed by and connected with the other. In this case the evidence does not establish notice. *Idem*, 473

4. See Practice in Chancery, No. 18, and Wood's ex'or & als. v. Krebbs, &c., 685

DEEDS.

1. If a deed not properly authenticated is

admitted to record, a copy of the deed from the record is not competent evidence.

Carter & als. v. Robinett & als., 429

2. In 1792 a power of attorney authorizing the attorney to convey land, was admitted to record on the certificate of a notary public of its execution. At that time there was no statute of Virginia authorizing the admission to record of a power of attorney on such a certificate; and a copy of the power from the record is not competent evidence.

Idem, 429

3. A deed takes effect from its delivery; and such delivery, like any other fact, may be established, either by direct proof, or by circumstances.

Harman & als. v. Oberdorfer & als., 497

4. Without evidence of any preceding executory agreements between the parties, or any evidence of the time of the delivery of the deeds, except what may be inferred from their dates, P, a judgment debtor, by one deed (dated January 1, 1860, acknowledged February 1, 1860, and recorded April 13, 1860,) conveyed one tract of land to H, and by another deed (dated February 1, 1860, acknowledged February 1, 1860, and recorded February 24, 1860,) conveyed another tract to B. In proceedings to subject both tracts to the payments of judgments obtained against P, prior to either deed—HOLD:

1. The tract to B was the last aliened, and, therefore, under § 10, ch. 182 of the Code of 1873, first liable to satisfy the judgments.

2. If a deed has a date, the law intends it to have been delivered at the date; and when it is proved by witnesses, who say nothing as to the time of delivery, and is recorded, it stands recorded as a deed proved to have been delivered at its date. There is no distinction, in principle, between the presumption of delivery arising from the proof by witnesses, and the acknowledgment before a justice or notary.

Idem, 497

5. The provision of § 5, ch. 114 of the Code of 1873, that every deed, &c., "shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record," &c., does not apply to purchasers of different tracts of land from the same vendor, but refers only to "subsequent purchasers" of the same subject, as that embraced in the instrument declared to be void.

Idem, 497

DEVICES AND BEQUESTS.

1. No particular words are necessary to be used in a codicil to effect a republication of the will to which it is annexed. It is only necessary that it shall appear that the testator referred to and considered the paper as his will at the time he executed the codicil; and where this so appears, even though the codicil refers to personal property only, it may operate as a republication, as to realty, even so as to pass after acquired lands.

Corr v. Porter & als., 278

924 *2. Words used in a codicil which are sufficient to constitute a republication of the will. Idem, 278

3. The effect of a republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. Idem, 278

4. A testator made his will in 1819, whereby he devised his land to his son A forever, provided he should leave issue; if not, then it should be divided amongst his other children, or their issue. In consequence of the birth of another child, after the date of his will, he made a codicil thereto in October, 1820, which amounted to a republication of his will; died after the 1st of January, 1820, and there was nothing on the face of the will or codicil to show that the limitation over to the other children and their heirs should not take effect if A should die without issue. A died without issue living at his death or born within ten months thereafter—having first by deed, in which his wife united, conveyed said land to a grantee. In an action of ejectment brought by the other children and heirs of the testator to recover said land. HOLD: The will is governed by the laws in force at the time of the execution of the codicil, and the plaintiffs (the other children and heirs) are therefore entitled to recover the land from the grantee of A, and the fact that the wife of A united in the deed to the grantee does not convey any dower interest that she might be supposed to have therein to him.

Idem, 278

5. See Charges, No. 1, and Cockerille v. Dale's adm'r & als., 45

DOWER.

In 1853 W, before his marriage, sells and conveys a tract of land to B, and takes a deed of trust to secure the unpaid purchase money. B returns to the North during the war, and in his absence the land is sold by the trustee under the deed of trust and W purchases it for more than his debt. He is then married. After the war B returns and files a bill to set aside the sale; and the court annuls it, and decrees a sale of the land to pay to W the purchase money due him; and it is sold. HOLD: The sale to W at the trustee's sale having been decreed to be a nullity his widow is not entitled to dower in the land.

Waller v. Waller's adm'r & als., 83

EASEMENTS.

What easements on land will not be considered by a court of equity as a breach of a covenant against encumbrances.

See Equity Jurisdiction and Relief, No. 3, and

Rosenberger v. Keller's adm'r & als., 489

EJECTMENT.

1. An office judgment in an action of ejectment does not become final without the intervention of a court or jury.

Smithson v. Briggs & wife, 180

2. The defendant in the ejectment may,

upon notice to the plaintiff, appear at the next term of the court, and move the court to set aside the judgment, and allow him to plead therein. *Idem*, 180

3. In an action of ejectment, the officer returns upon the rule to plead—G. W. Smithson not being found at his usual place of abode, a true copy of the within rule was left with his daughter at his residence, who is over the age of 16 years, and purport explained to her, this 28th day of August, 1871. *HOLD*: It will be presumed that the word "residence" was used as synonymous with "his usual place of abode," and that the 925 daughter "was a member of defendant's family, and the notice was sufficient. . . Anderson, J., dissenting. *Idem*, 180

4. The same jury which tried the case on its merits was allowed, without objection from either side, to fix the value of the land, the rents and profits thereof, and the value of the improvements claimed by the defendant. It is too late after verdict to object to this action of the court.

Corr v. Porter & als., 278

5. Plaintiffs in ejectment claim under a possession taken by D in 1792 under claim of title, and a continued, uninterrupted, notorious, possession by parties claiming under D, the party first taking the possession. The defendants entered upon the land only a few years before the action was commenced, not even under color of title, and they seek to set up an outstanding title in another; and for this purpose rely upon a deed executed in 1792 by S, the original patentee of the land, containing 10,000 acres, including the land claimed by the plaintiffs, and is a part of a tract of 340,000 acres conveyed by S to his grantees, excepting in the conveyance 50,000 acres, which he had sold to D. *HOLD*: That after the long possession by D and those claiming under him, although the language of the exception may not amount to a conveyance of the land to D, as against S if he or persons claiming under him were the parties, a conveyance to D would be presumed; and so it will be as against these defendants. *Carter & als. v. Robinett & als.*, 429

EQUITY JURISDICTION AND RELIEF.

1. F was the owner of \$8,700 of the certificates of stock of the city of A, which by a decree of the United States Court in May, 1864, were confiscated and sold by the marshal, and \$2,000 of it purchased by W; and at his request the marshal made a transfer of the same on the books of the city. When the stock became due W received from the city of A four coupon bonds of \$500 each in exchange for his stock. In 1874 F sued the city for his stock and recovered it, the court holding that the decree of the United States court confiscating it was invalid. The city of A then sued W to recover the four bonds issued to him for the stock. *HOLD*: The city of A is entitled to recover the bonds. *Webb v. City Council of Alexandria*, 168

2. A bill in equity will lie, by an administrator of a principal, against the general

agent of his intestate for a discovery and an account of the transactions of the latter with his principal.

Simmons v. Simmons' adm'r., 451

3. K's administrator files a bill against R to subject land to satisfy a judgment for purchase money of land conveyed by K to R, with covenant against encumbrances. R answers claiming that there were encumbrances on the land, arising out of a previous division of a larger tract, when it was provided that the owners of other parcels of the land should have the right to use water out of a well on the lot sold to him, and also to pass along a lane through his land. This partition was made in 1833, and R had never heard of these encumbrances until since this suit was brought in 1875, and R asks his answer may be taken as a cross-bill, and his damages may be ascertained by a jury. Upon demurrer by the plaintiff—*HOLD*: The easements never having been used, and R not having suffered any injury from them, he is not entitled to relief in equity.

Rosenberger v. Keller's adm'r & als., 489

926 *4. For the jurisdiction and relief of a court of equity in the case of a railroad company, where the court has taken possession of the road,

See Railroad Companies, Nos. 1, 2, 3, 5, 6, 7, 8, 9, and

Gilbert v. Wash. City, Va. Midl. and Gr. South. R. R. Co., 586
Smith's ex'or v. Same, 617
Williamson's adm'r v. Same, 624
The Abbott Iron Co. v. Same, 624
Gilbert v. Same, 645

5. For the principles upon which a court of equity proceeds upon a bill filed for the sale of a debtor's lands,

See the opinion of Burka, J., in
Shultz & als. v. Hansbrough & als., 567
 6. See Settlements, No. 3, and
Triplett & als. v. Romine's adm'r & als., 651

EVIDENCE.

1. A check upon a bank implies that it was given in payment of a debt due by the drawer to a party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of said check; and though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication, and to establish the contrary fact.

Terry v. Ragadale, 342

2. Under the circumstances of this case—*HOLD*: The proof is sufficient to establish the payment of a debt on which judgment had been rendered and execution issued twenty-three years before the filing of a bill to enforce the payment of the judgment.

Brown, adm'r, v. Campbell & als., 402

3. Where the object of the testimony offered is to impeach a witness by proof of statements previously made inconsistent with his testimony on the trial; or to discredit him, by proof of an attempt to fabricate testimony; the foundation for such impeaching or discrediting testimony must be first laid by an examination of the witness sought to be impeached, with reference to such inconsistent statements or improper conduct, and these rules are as applicable where a plaintiff is the witness sought to be impeached as in other cases.

Davis & als. v. Franke,

413

4. A witness is asked if he knew the general character of the plaintiff for truth and veracity? and replies, that he had known him six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged. That he had never heard plaintiff's character called in question. This was proper evidence to go to the jury.

Idem,

413

5. A plaintiff, for the purpose of sustaining his character for truth and veracity, introduced a witness who had lived near him, and who testified that he had never heard anything against his veracity until this and a former suit by one of the defendants against plaintiff had been instituted. On cross-examination, defendant asked witness, "if he had not heard a number of plaintiff's neighbors testify in both suits that they were acquainted with plaintiff's character for truth and veracity; that it was bad, and they would not believe him on oath?" The answer to this question was, on motion of the plaintiff, properly excluded from the jury.

Idem,

413

6. If a deed not properly authenticated is admitted to record, a "copy of the deed from the record is not competent evidence.

Carter & als. v. Robinett & als.,

429

7. In 1792 a power of attorney authorizing the attorney to convey land, was admitted to record on the certificate of a notary public of its execution. At that time there was no statute of Virginia authorizing the admission to record of a power of attorney on such a certificate; and a copy of the power from the record is not competent evidence.

Idem,

429

8. The answer of a defendant to specific interrogatories in a bill are evidence for him; and its statements must be taken as against the plaintiff as true, unless overcome by the requisite proof.

Shultz & als. v. Hansbrough & als.,

567

9. On a trial for murder for competent evidence of statements and facts previous to the killing.

See Criminal Jurisdiction and Proceedings, No. 3, 4, and Poindexter's case,

766

10. On a trial for murder what confessions

of the accused are competent evidence against him.

See Murder, No. 3, and Albert Mitchell's case,

845

EXECUTIONS.

1. Upon an indictment for assault F is fined \$1 and the costs. He pays one dollar to the clerk before execution issued, and directs him to apply it to the fine. The costs are a part of the fine, and F being taken upon a *capias pro fine* can only be released by paying the costs as well as the one dollar.

Commonwealth v. Fields,

291

2. A judgment is obtained in 1870 on a contract entered into prior to the present Constitution of Virginia, and in the same year an execution issued thereon, placed in the hands of the deputy sheriff and levied on property of the judgment debtor, who gives a forthcoming bond; and has the property forthcoming on the day and place of sale. The debtor then claims the property as exempt under the homestead provisions of the Constitution and statute of Virginia; and the deputy sheriff releases the property to him, without requiring an indemnifying bond of the creditor, or even notifying him of the claim of homestead set up by the debtor. In a suit by the creditor against the sheriff and his sureties to recover the value of the property lost by the conduct of the deputy—HOLD:

1. The sheriff and his sureties are liable.

Sage & als. v. Dickinson & als.,

361

2. The case distinguished from

Huffman v. Leffel's adm'r, 32

Gratt. 41.

Idem,

361

3. When an officer surrenders property he has seized under execution, he does it at his peril, and the burden of establishing that it is not liable to levy is on him.

Idem,

361

3. The plaintiff in the judgment, after the sheriff's return on the execution filed his bill in equity to subject the land of his debtor to satisfy his debt, and having in 1875 exhausted this fund, he then in 1876 instituted his action against the sheriff and his sureties to recover the balance. HOLD:

1. The delay in bringing the action is not a waiver of his action against the sheriff.

Idem,

361

2. The liability of the sheriff and his sureties being fixed, it cannot be affected by any delay short of the statutory period of limitation.

Idem,

361

EXECUTORS AND ADMINISTRATORS.

1. T died in 1863, and his estate was committed to B, sheriff of P, as administrator with the will annexed. *Among the assets was a bond of F, who lived in P E county, to T for \$1,785.19, executed November 2, 1857. In 1863 B sent this bond to H a lawyer living in P E county for collection by suit or otherwise. F had in posses-

sion a considerable estate real and personal, but he was largely indebted, and H, as well as other counsel who had claims against F, apprehended that if he was sued he would convey his estate to secure preferred creditors; and therefore H did not bring suit upon the bond until 1866. Several suits were brought against F in January, 1866, and he sold and conveyed his land in payment of debts mentioned in the deed, and soon after went into bankruptcy paying nothing. **HOLD:** Neither B nor his counsel was guilty of negligence; and B's estate is not responsible for the debt.

Tanner v. Bennett's adm'r 251

2. E, administrator of A, sells the assets, and B makes purchases for upwards of \$1,000, and gives his bond to E with sureties for his purchases. B is the guardian of J, one of the distributees of A, and upon a settlement between E, and B, E receives the receipt of B as guardian of J for \$1,000 for so much of B's purchases at the sale. J dies, and R, his administrator, sues E for J's share of the estate of A. **HOLD:**

1. The duty of every fiduciary is to keep the trust fund separate from his own property or money; and to apply it in a due course of administration, or to invest it securely for the benefit of the parties entitled.

Asberry's adm'r v. Asberry's adm'r, 463

2. A party who consents or unites with a fiduciary in a misapplication of the trust funds, or in any other act contrary to the duty of the fiduciary, becomes a particeps criminis, and will be held liable accordingly. **Idem**, 463

3. E knew the guardian was using the ward's money in paying his own debt; and he knew, or must be held to know, that the guardian was thereby misapplying the funds, and committing a breach of trust. **Idem**, 463

4. Though E may have acted in good faith, without a suspicion of anything improper in the transaction, the law stamps it as fraudulent, however innocent the intention of the parties; and E is not entitled to a credit for the \$1,000, thus receipted for by B as guardian of J. **Idem**, 463

3. R as administrator of J brought an action against B, who was insolvent, and his sureties in his official bond to recover the amount due from B, and this action was pending when the decree was made in the case in equity. **HOLD:** A creditor having two different remedies, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. And the administrator of J cannot be delayed by a protracted controversy with the sureties of the guardian; he has his right of action against the party who has concurred in the breach of trust committed by the guardian, and therefore incurs the like liability. **Idem**, 463

4. H is appointed curator of the estate pending a contest over C's will; and whilst curator collects an ante-war debt well secured,

in Confederate money. C's will having been established, H qualifies as executor, but is afterwards removed; and the administrator de bonis non with the will annexed, files a bill against H, as curator and his sureties seeking to subject them to the payment of said debt; and the defendants demur to the bill. **HOLD:** The administrator de bonis non with the will annexed, may maintain the suit against the curator and his sureties, under the statute. Code of 1873, ch. 118, § 24.

Helsley & als. v. Craig's adm'r & als., 716

FRAUDULENT CONVEYANCES.

1. Where a "householder or head of a family" executes a homestead deed as a part and in furtherance of a design to hinder, delay and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct.

Rose & wife v. Sharpless and Son, 153

2. Circumstances which will vitiate a homestead deed executed and recorded by a debtor in failing circumstances, prior to the levying of attachments on his goods.

Idem, 153

GUARDIAN AND WARD.

1. S qualified as guardian of M in Frederick county. Her father lived in Hampshire county now in West Virginia, and he owned real estate in that county, which upon a bill filed by S was sold, and the proceeds paid over to him, and brought by him to Frederick county where he lived. M may sue S for a settlement of his account as guardian in Frederick.

Rinker & wife v. Streit, 663

2. The income of the estate of M, the ward, being insufficient for her support and education, her guardian S expended the principal of the proceeds of the sale of her real and personal estate upon her, and upon the settlement of his account after the termination of his guardianship, he was still in advance to his ward. **HOLD:**

1. The guardian was not authorized to use the principal of the ward's real estate for the support and education of his ward; and the court of equity settling his account could not render the expenditure valid by its decree. **Idem**, 663

2. Chapter 123, § 13, Code of 1873, which authorizes the chancery court in certain cases, to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction such application already made by the guardian; but the order of the court must be first made in order to authorize it. **Idem**, 663

3. The guardian may apply the principal of the ward's personal estate to her maintenance and education, in a proper case; and if the court would have authorized it upon application to the court, before it was done, the court may and will sanction it upon settlement of his accounts.

Idem, 663

HOMESTEADS.

1. Where a "householder or head of a family" executes a homestead deed as a part and in furtherance of a design to hinder, delay and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct.

Rose & wife v. Sharpless & Son, 153

2. Circumstances which will vitiate a homestead deed executed and recorded by a debtor in failing circumstances, prior to the levying of attachments on his goods.

Idem, 153

3. The Constitution and laws of Virginia not allowing property to be claimed as exempt for debts contracted for the purchase price of such property or any part 980 *thereof—where a large portion of goods claimed as exempt has not been paid for, and are so mingled with those that have been, as to put it out of the power of the vendors to distinguish between the two, the onus is on the person claiming the exemption, to show which has been paid for; and he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law.

Idem, 153

4. Quære: Can a "homestead" be claimed in a shifting stock of goods used in the way of trade.

Idem, 153

HUSBAND AND WIFE.

1. See Settlements, No. 1, and

Walden's assignee v. Walden & als., 89

2. A husband who has no interest in his wife's real estate, except a life estate in a part of it for their joint lives, there having been no issue of the marriage, conveys her estate to a trustee for the benefit of the wife.

HOLD: The deed of the husband conveyed no separate estate in any part of the property which did not terminate at her death; and she therefore could not dispose of it by will during her coverture.

Stroud v. Connelly & als., 217

3. The effect of a wife uniting with her husband in a deed, is not to vest in the grantee any estate, separate and distinct, from that of the husband, but simply to relinquish a contingent right, in the nature of an incumbrance, upon the land conveyed, which, if not so relinquished, would attach, and be consummate on the death of her husband.

Corr v. Porter & als., 278

4. A husband, who was a merchant, wishing to purchase a certain small lot of goods from another merchant, obtained from his wife, who had a separate estate, to secure the payment of the purchase money, an endorsement of a printed form of a negotiable note. The date, time and place of payment, amount and name of payee, were all left blank at the time of the delivery of said endorsed blank note by the wife to the husband. The husband failed to make this purchase and some time thereafter, and when the wife says

she thought the blank endorsed paper had been destroyed, he went to another city and purchased from other parties a much larger amount of goods than was contemplated at the time of the endorsement. These last parties' names were then inserted by their clerk as payees, and the note filled up as to amount, date, time, place of payment, &c. to suit the purchase as made from them—they being ignorant of the purpose for which the note was first signed by the wife and delivered to the husband. The note was protested for non-payment. On a bill filed by the payees to subject the separate estate of the wife to its payment—HOLD:

1. The wife is bound by the endorsement. The authority implied by a signature to a blank note, and the credit given, are so extensive, that the party so signing will be bound, although the holder was only authorized to use it for one purpose and has perverted it to another. But the holder cannot alter the material terms of the instrument by erasing what is written or printed as part of the same; or pervert its scope and meaning by filling blanks and stipulations repugnant to what is clearly expressed in the note before it was delivered by the endorser in blank.

Frank & Adler v. Lilienfeld & als., 377

981 *2. To invalidate the title of the holder of a negotiable instrument, endorsed in blank, acquired in due course of trade, and before maturity, it is not sufficient to show circumstances in the acquisition of the note affecting the holder with mere suspicion, or that he was guilty of gross negligence; but it is necessary to show that he was guilty of fraud. This is not proved against the holders of the note in this case.

Idem, 377

3. Instead of inserting the wife's name as payee in the note, the holders put in their own names. This is merely matter of form, does not make the wife a second endorser to the holders, or affect in any way her liability to them on said note.

Idem, 377

5. The property settled on the wife belonged to her before her marriage, and consisted of realty and personalty—the personalty being her interest in a former husband's stock of goods, debts due, &c., worth ten thousand dollars. The provisions of the deed conferring on the wife the amplest power over the property, is followed by a clause which directs that the trustee "shall sell, convey, transfer and deliver all or any portion of the property, estate or effects conveyed, and the rents, issues and profits thereof, to such person or persons as the wife may direct by a writing, signed by her and attested by two witnesses." HOLD:

1. The wife must be regarded in equity as the absolute owner, with all the powers of a feme sole over them, of the personal property and rents and profits of the realty conveyed by the deed, with power to dispose of the corpus of the realty by her sole

act in the mode prescribed by the deed, or, if that is not exclusive, by the joint deed herself and her husband.

Idem, 377

2. The separate estate of the wife is liable to the payment of the debt, but the engagement of the wife being a general one, and not a specific lien (which must be created on the realty in the mode prescribed for its absolute sale), the personal property and the rents and profits of the realty only are liable to be subjected to its payments.

Idem, 377

6. Where the object of a bill is merely to subject the separate estate of a wife, and her husband is made a formal party only, she is a competent witness in the case, and the plaintiffs are also. And an answer filed by the husband, although responsive to the bill, cannot be used as evidence for the wife and against the plaintiffs, whilst that filed by her can be so used, so far as its statement is responsive, and based on facts within her own knowledge.

Idem, 377

INDICTMENTS.

1. In such case the indictment which has been made by the grand jury of the hustings court of the city of Richmond charges the assault to have been made at the said city and within the jurisdiction of the said hustings court of the city of Richmond. **HOLD:** This is sufficient, and it is not necessary to state the place in the city where the assault was made.

Baccigalupo's case, 807

2. In a prosecution under sections 5 and 10 of the "Moffet Liquor Law," the indictment alleges that the principal was a "bar-room keeper, and a "bar-room "liquor dealer," but does not allege that he was "licensed" as such. On motion in arrest of judgment—**HOLD:** The indictment is fatally defective.

Glass' case, 827

INSANITY.

1. Under the plea of not guilty, it was competent for the prisoner to set up the defence of insanity at the time the assault was made for which he was on trial.

Baccigalupo's case, 807

2. When the defence of insanity is relied on by a prisoner, the burden of proof is on him; and it is not sufficient to raise a rational doubt on the subject; but he must satisfy the jury that he was insane at the time the act was committed for which he is prosecuted.

Idem, 807

INSURANCE.

T insured his house and a piano in the county of Franklin for \$2,200 in the Southern Mutual Insurance Company of Richmond. He paid the cash premium on the insurance, \$44, and gave his premium note for \$110. By one condition of the policy, and also in his application for the insurance, it is provided, that in case of loss or damage by fire or lightning, if any assessment on the premium note of the assured shall remain unpaid and past due at the time of such loss or damage, the policy should be void and of no effect.

One assessment of \$27.50 had been made upon T's premium note, which T had paid. A second assessment of the same amount was made, of which he received notice, but neglected to pay it until his house was consumed by fire. He then offered to pay the assessment, but the company refused to receive it. Upon the evidence—**HOLD:** The assessment was properly made by the directors of the company, and T having failed to pay it before the house was burned, the policy is void.

Southern Mutual Insurance Co. v Taylor, 743

INTEREST.

As a general rule the committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his accounts.

Crigler's committee v. Alexander's ex'or, 674

JUDGMENTS.

1. The judgment of a court of competent jurisdiction is always presumed to be right; and a party in the appellate court, alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail.

Harman v. City of Lynchburg, 37

2. Upon bill by S against G and P to subject the land of G to satisfy a judgment recovered against G, P and others, it appears and was so decided by the circuit court upon appeal from a judgment of the county court on a scire facias to revive the judgment, that no process had been served on P, and that he had not entered his appearance in the original action, and the scire facias was dismissed for a variance between the writ and the evidence. **HOLD:**

1. The judgment against P was void and a nullity, the court having no jurisdiction to render a judgment against him, he not having been served with process, or appearing in the cause.

Gray & al. v. Stuart & Palmer, 351

2. The judgment against G is a valid judgment; and is not affected by the judgment of the circuit court dismissing the scire facias for a variance between the writ and the evidence.

Idem, 351

3. Though at common law a joint judgment erroneous as to one must be reversed as to all; yet in this case the judgment against P was not an erroneous judgment; but it was a void judgment, and a nullity.

Idem, 351

4. There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed

in any court, anywhere, whenever any claim is made, or right asserted under it.

Idem, 351

5. The bill should have been dismissed at the hearing in the court below as to P, and that court having made a decree subjecting G's land, and having made no decree against P, upon appeal by G and P, the appellate court will dismiss the suit as to P, but without the costs of the appeal; but will amend and affirm it as to G.

Idem, 351

3. Under the circumstances of this case—**Held**: The proof is sufficient to establish the payment of a debt on which judgment had been rendered and execution issued twenty-three years before the filing of a bill to enforce the payment of the judgment.

Brown, adm'r, v. Campbell & als., 402

4. Where three executions have been issued upon a judgment and two of them returned by the officer, the statute of limitations is twenty years from the return day of the execution on which a return was made.

Idem, 402

JUDICIAL LOANS.

Money in court in a pending cause is in 1860 lent out under an order of the court. In 1863 M, the borrower, without notice to the parties claiming the funds, petitions the court to be permitted to repay the money; and under an order of the court authorizing it, he pays the money into court, and by a subsequent order this is approved, and his bond and deed of trust is delivered up and released. **Held**: That the money being in possession of the court, and lent out under its order, and the payment by M having been authorized by the court, it was a valid payment, though made in Confederate money when that money was at a discount of four to one of gold.

Taylor & al. v. Lancaster & als., 1

JUDICIAL TENURES OF OFFICE.

1. A judge of the county court who has been elected to fill a vacancy occasioned by the death of a former judge, is elected for a full term of six years, and not for the unexpired term of the former judge. And this is equally true of judges of the court of appeals and the circuit courts.

Meredith ex parte, 119

Harrison ex parte, 119

2. Manchester was incorporated as a city in 1874, and having more than five thousand inhabitants was entitled to have a judge of its hustings court. In March, 1874, C was elected and qualified as judge of said court.

Held: That this being the first judge of this court, under the Constitution of 1834 *of this court, under the Constitution C's term of office commenced on the 1st of January, 1875, and would continue until the 31st of December, 1880; and he was under the Constitution authorized to act as judge from the time of his qualification to the commencement of his term.

Fisher ex parte, 232

Fitzgerald ex parte, 232

3. In December, 1874, E was elected by the legislature judge of the county courts of G and B counties, and on the 12th of the same month commissioned as such; the commission stating that he was elected to fill the unexpired term of his predecessor. In December, 1879, W was elected judge of the same counties, and commissioned as such on the 20th of the same month. Without objection on the part of E, W entered, at once, upon the duties of the office, and E qualified as an attorney and practiced in both of the courts over which W presided, until the April term, 1880, when the court of appeals, having decided, that the terms of all the county judges in Virginia, whether elected to fill vacancies or not, commenced on the 1st day of January next following their appointments, and were for the full term of six years, as fixed by the Constitution, E appeared and protested that he was the lawful judge. This claim W refused to recognize, principally on the ground that E, by acquiescing in the assumption of the office by W, and becoming a practicing attorney in his court, held an office incompatible with the office of judge, and by this conduct had forfeited and abandoned his said office. On quo warranto by E against W—**Held**: E was entitled to the office, and the fact that he only yielded to the legislative and executive construction of the Constitution, until the question was settled by the supreme court was no abandonment or forfeiture of his office.

Bland and Giles county Judge case, 443

Estes v. Edmondson, sheriff, 510

LICENSES.

See Taxes and taxation, Nos. 4, 5, 6, 7, and

Webber's case, 443

LIENS.

1. J's devisees and W are tenants in common of a hotel property, and J's executor and W agree to sell the property at public auction; the deferred payments to be secured by separate bonds to each for his half of the purchase money, with a lien retained on the real property. The sale is made and W becomes the purchaser, but refuses to execute the contract. J's executor sues W for specific execution of the contract, and there is a decree in his favor for specific execution, a personal decree against W for the amount due, and for a sale of the whole property. Before the decree W sells and conveys his moiety of the property to M who pays the purchase money. Upon a bill by the judgment creditors of M to subject his moiety of the property to the payment of their debts—**Held**: W bought at the sale but J's moiety of the property, and the lien of J's executor's decree only extends to that moiety, though the whole property was sold under the decree.

Johnson's ex'or v. Nat. Exchange Bank, Richmond, 473

2. The question whether a vendor's lien reserved in a deed is surrendered is one of

intention of the vendor under the circumstances of the case.

See Vendor and Purchaser, No. 1, and
Coles v. Withers & als., 186

935 *LIMITATIONS OF ACTIONS.

1. See Sheriffs, No. 1, and
Sage v. Dickinson & als., 361

2. When the debt of a trustee for persons under disabilities is not barred by the statute of limitations.

See Trusts and Trustees, No. 4, and
Brown & als. v. Lambert's adm'r & als., 256

3. Where three executions have been issued upon a judgment and two of them returned by the officer, the statute of limitations is twenty years from the return day of the execution on which a return was made.

Brown, adm'r, v. Campbell & als., 402

4. Where on a creditor's bill, there is a decree for an account of debts the statutes of limitations as to debts ceases to run from the date of the decree.

Ewing's adm'r & als. v. Ferguson's adm'r & als., 548

5. See Seduction, No. 3, and
Clem v. Holmes, 722

LUNATICS.

1. As a general rule the committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his account.

Crigler's committee v. Alexander's ex'or, 674

2. A committee of a lunatic who qualified as such in 1838, and continued to act until his death in 1875 and did not settle his accounts, is not entitled to commissions on his receipts from 1838 to 1859; and the statute of March 3, 1867, Code of 1873, ch. 128, § 9, is not retrospective in its operation, and therefore the court has no authority to allow said commissions under that act. Idem, 674

MUNICIPAL CORPORATIONS.

See Corporations, and Equity Jurisdiction and Relief, No. 1.

MURDER.

1. B and L are jointly indicted for the murder of S. On the trial of L the jury find him guilty of murder in the second degree, and the court refuses to grant L a new trial, and enters a judgment on the verdict. Upon the evidence—HELD: That L had no part in the killing, either as acting or advising, or countenancing it, and therefore though present at the time he is not guilty of any offence.

Lee Reynold's case, 834

2. M and two others are indicted for murder in the county court of L, and on their arraignment they elect to be tried in the circuit court. A writ of venire is issued by the county court for the summoning of a

jury, returnable to the circuit court, and the 24 men selected by the county court are summoned to the circuit court. On the motion of the prisoner this venire is quashed by the circuit court, and the court directs another venire of 24 to be summoned, and names the 24 summoned on the first venire. HELD: The directing the same 24 men to be summoned is not error.

Albert Mitchell's case, 845

3. Upon the trial of a prisoner for murder, he twice makes a confession, both of which are admitted in evidence. There is very little doubt that the first confession was made without any promise or threat to induce it; and there is no doubt the last was so made. HELD: The evidence was admissible. Idem, 845

4. Upon the evidence in this case, three persons go together to rob a store. One, M, is posted some distance from the house to watch; and the other two obtain admittance into the store-house, kill the owner, and rob the store, and M shares the booty. HELD: M is principal in the first degree 936 *of the crime of murder, and may be punished with death. Idem, 845

5. Upon an indictment of M, a man of color, for murder, he is not entitled to have a mixed jury. Idem, 845

6. Upon the evidence in this case the prisoner was guilty of murder in the first degree.

Nelson Mitchell's case, 872

7. There was no doubt that the prisoner intended to kill the deceased, and that he struck the fatal blow when the deceased was endeavoring to escape from him, and the blow was in the back of the deceased; and the only questions were whether the striking the prisoner with a heavy stick to resent an insult offered to him was a sufficient provocation to justify the killing of the deceased in the manner in which it was done, and whether the prisoner did not provoke the attack upon himself that he might have an excuse for killing the deceased. And the jury having found the prisoner guilty of murder in the first degree, and the county judge who presided at the trial, and the judge of the circuit court of the county, having refused to grant a new trial, this court seeing there is evidence to warrant the verdict, will not set it aside. Idem, 872

8. To constitute a willful, deliberate and premeditated killing, constituting murder in the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into existence for the first time, at the time of such killing, or any time previously.

Wright's case, 880

NEGLIGENCE.

What is not negligence in proceedings to

recover a debt by an administrator of his counsel.

See Executor, and Administrators.

No. 1, and

Tanner v. Bennett's adm'r, 251

NEGOTIABLE INSTRUMENTS.

1. B the payee of a negotiable note of N payable at the E bank, endorsed his name on it and put it in the bank for collection. It was not paid at maturity, and B withdrew the note, and after holding it for some years, and after the E bank had ceased to exist, he transferred it to H, writing over his name the words "protest waived." H failing to obtain payment of the note from N brought his action against B to hold him responsible upon his endorsement of the note. **HOLD:**

1. When B put his name on the back of the note it was only for its collection, and he was still the owner of it. And when he transferred the note to H his endorsement must be considered as of that date.

Brown v. Hull, survivor, 23

2. The endorsement of an overdue note does not relate back to the date of the note; but as a new and independent contract only takes effect from the time it is made, and must be determined by the laws and circumstances then existing.

Idem, 23

3. The E bank having ceased to exist when B transferred the note to H, it was not at the time of the transfer a negotiable note payable at a bank, and under the statute, Code of 1873, ch. 141, § 7, B was not responsible as endorser of the note, but only as assignor or guarantor.

Idem, 23

4. As assignee of the note H was not under any obligation to make demand upon the maker, and give notice of the note to B; *but he was bound to exercise due diligence in suing the maker and obtaining judgment and execution against him, as a condition precedent to his recourse against B, unless the maker was notoriously insolvent. And B had the right to show that H had not used due diligence, and that the maker was not notoriously insolvent. And he had a right to show that at the time of his transfer of the note to H the E bank had ceased to exist.

Idem, 23

2. B as maker and R and C as endorsers make two notes each for \$1,000, which are discounted at the E & A bank, and the proceeds go to the credit of B. The notes are discounted much on the faith of a deed of trust by which C and wife conveyed to A a tract of land in trust to secure to the bank the payment of the notes, with the following covenant—And it is expressly covenanted and agreed, that upon the default of payment of either of said notes, or any part thereof, the said A shall upon the request of the president or other authorized officer of the said E & A bank, after giving thirty days' notice, &c., proceed to sell at public auction the property hereby conveyed for cash, or so

much as shall be necessary to defray the expenses, &c., and pay off and discharge any part of the sum of \$2,000 hereby secured to be paid then remaining unpaid; and for the remainder, &c. The notes were not paid at maturity; and were not protested, nor was there any notice to the endorsers. **HOLD:**

1. The deed of trust with the covenant therein, bound C to the extent of the trust subject, though there was no protest or notice to the endorsers.

Cardwell v. Allen, trustee & als., 160

2. The bank was not bound to give notice to R, so as to hold him liable, in order to hold C liable.

Idem, 160

3. In this C repeatedly applied to officers and directors of the bank for a postponement of the sale of the land under the deed of trust, promising to pay the debt, and never objected that the note had not been protested or that notice had not been given him. **HOLD:** He must be presumed to have known when he applied for delay of the sale, and made the promises to pay, that the notes had not been protested.

Idem, 160

4. A check upon a bank implies that it was given in payment of a debt due by the drawer to the party in whose favor it is drawn, or for money loaned by the latter to the former at the time of the execution of said check; and though such implication may be repelled by evidence that the check was not so given, but was in fact given for a loan by the drawer to the payee, such evidence being in conflict with the apparent purport of the transaction, ought to be very strong to repel the said implication, and to establish the contrary fact.

Terry v. Ragdale, 342

5. To invalidate the title of the holder of a negotiable instrument, endorsed in blank, acquired in due course of trade, and before maturity, it is not sufficient to show circumstances in the acquisition of the note affecting the holder with mere suspicion, or that he was guilty of gross negligence; but it is necessary to show that he was guilty of fraud. This is not proved against the holders of the note in this case.

Frank & Adler v. Lillienfeld & als., 377

6. See Husband & Wife, No. 4, and

Idem, 377

938

*NOTICE.

1. What is or is not sufficient notice of an undocketed lien, by an agent or trustee to affect his principal.

See Decree, No. 3, and

Johnson's ex'or v. Nat. Exch. Bank, Richmond, 473

2. When notice by a surety in a bond to the obligee to sue upon it will not release the surety.

See Principal and Surety, No. 5, 6,

and
Davis' adm'r, for, &c., v. Snead & als., 705

NOVATION OF DEBT.

1. A mere change of securities of equal

dignity is not a novation of a debt unless plainly so intended by the parties.

Coles v. Withers. 186

2. A railroad company gives a bond for the interest due on one of its bonds. This is not a novation of the debt.

Gilbert v. Wash. City, Va. Midl. and Great South. R. R. Co., 586

OFFICERS.

1. An attorney-at-law is not an officer. Bland and Giles County judge case. 443

2. An office is terminated proprio vigore, by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined ipso facto by the occurrence of the cause. There must be a judgment of amotion after judicial ascertainment of the fact, which may be by indictment or information, by writ of quo warranto, or by impeachment.

Idem. 443

PARTNERS AND PARTNERSHIP.

In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness.

The defendant so introduced becomes a competent witness in the cause; but this does not render the plaintiff a competent witness.

Terry v. Ragsdale, 342

PAYMENTS.

1. When payments of loan made under the order of the court will be valid.

See Judicial Loans, No. 1, and Taylor & al. v. Lancaster & als., 1

2. How payments shall be applied where several debts have been united in one.

See Vendor and Purchaser, No. 1, and Coles v. Withers & als., 186

3. How proceeds of land should be applied to the relief of several sureties.

See Principal and Surety, No. 2, and Harnsberger & als. v. Yancey & als., 527

PLEADINGS AT LAW.

1. In actions for damages for an assault.

See Actions, No. 1, and Daingerfield v. Thompson, 136

2. In action by a father for the seduction of his daughter.

See Seduction, No. 1, and Clem v. Holmes, 722

PLEADINGS IN EQUITY.

1. Parties having obtained decrees against their debtor M in a suit pending in the county court, and he having become bankrupt, may bring another suit in the circuit court against the administrator and heirs of his surety E, to subject the real estate of the surety to satisfy their debts.

Ewing's adm'r & als., v. Ferguson's adm'r & als., 548

2. Though the bill in such case only sets up their claims, and seeks payment of them, and does not purport to be a creditor's bill, it is to be so treated, and other creditors of E may come in by petition and be made parties plaintiffs in the cause, and there may be a decree for account of debts in the case.

Idem, 548

3. The bill having been dismissed on demurrer, but leave given to file an amended bill, the amended bill is not a departure from the original bill, because some of the original plaintiffs do not unite in it. Idem, 548

4. The amended bill being filed in the name of some of the original parties and of the creditors who had come in by petition, and only setting out more fully the nature of their claims and the character of the bill as a creditor's bill, is not a departure from the original bill, but is a valid amended bill.

Idem, 548

POWERS.

R by his will gives to his wife E for life certain real estate, with power of appointment by deed or will among their descendants, so that not more than one-half shall be given to any one. If she does not appoint it shall pass to his children. By a codicil he gives her permission to sell and reinvest in other lands upon the same trusts, but adds—but subject to the following qualification, that is to say—that whatever she shall by will, deed or otherwise give beneficially to any of my descendants, the same shall be not given absolutely to such descendant or descendants so as to be under his or her control, but given in trust to him or her, and in case of a female to her sole and separate use. E by her will gives the property to twenty of her grandchildren, though in very unequal proportions, directs the land shall not be sold for six years, that her executor shall hold it in the meantime, and when sold he shall divide the proceeds of sale, and invest the portion of each for him or her, and pay it to each one on his or her arrival at the age of twenty-one years. HELD:

1. That the will and codicil of R required the provision made by E under the power vested in her, for her grandchildren, should be in trust for the several beneficiaries, and for the separate use of the females; that the power vested in the executor by her will which must terminate as to each one as he or she arrived at the age of twenty-one years, did not constitute him such a trustee for the grandchildren as satisfied the will and codicil of R; and that the appointment was therefore invalid.

Morris' ex'or v. Morris & als., 51

2. It is not a case of the defective execution of the power, which a court of equity will remedy. Idem, 51

PRACTICE AT COMMON LAW.

1. When exception is taken to the admission or exclusion of evidence, or the granting or refusing of instructions, or indeed to any other ruling of the court below at the trial,

the bill should be so framed, by the insertion of proper matter as to make the error, if any, apparent; otherwise the exception will generally be unavailing.

Harman v. City of Lynchburg, 37

2. In ejectment, the same jury which tried the case on its merits was allowed, without objection from either side, to fix the value of the land, the rents and profits thereof, and the value of the improvements claimed by the defendant. It is too late after verdict to object to this action of the court.

Carr v. Porter & als., 278

3. In an action of trespass on the case for assault and battery, the defendant, 940 under the general issue, *may give in evidence matters which merely go to the quantum of damages, by way of palliating the offence.

Davis & als. v. Franke, 413

4. While it is true, that where the defendant in such action relies upon provocation as a defence, he is limited to such recent acts as will raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff; yet where the plaintiff makes the offensive acts or declarations committed or said by him long anterior to the assault, a part of the *res gestæ*, by repeating or alluding to them at the time, in the manner which indicates a repetition, renewal of, or persistence in them, they are admissible in evidence on behalf of the defendant; and this is so, even where one of the acts of the plaintiff was a libel against the defendant, for the publication of which the defendant had already recovered damages.

Idem, 413

5. In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them.

Idem, 413

6. Where the object of testimony offered is to impeach a witness by proof of statements previously made inconsistent with his testimony on the trial; or to discredit him, by proof of an attempt to fabricate testimony; the foundation for such impeaching or discrediting testimony must be first laid by an examination of the witness sought to be impeached, with reference to such inconsistent statements or improper conduct, and these rules are as applicable where a plaintiff is the witness sought to be impeached as in other cases.

Idem, 413

7. A witness is asked if he knew the general character of the plaintiff for truth and veracity? and replies, that he had known him six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged. That he had never heard plaintiff's character called in question. This was proper evidence to go to the jury.

Idem, 413

8. A plaintiff, for the purpose of sustaining his character for truth and veracity, in-

troduced a witness who had lived near him, and who testified that he had never heard anything against his veracity until this and a former suit by one of the defendants against plaintiff had been instituted. On cross-examination, defendant asked witness, "if he had not heard a number of plaintiff's neighbors testify in both suits that they were acquainted with plaintiff's character for truth and veracity; that it was bad, and they would not believe him on oath?" The answer to this question was, on motion of the plaintiff, properly excluded from the jury.

Idem, 413

9. Plaintiffs in ejectment claim under a possession taken by D in 1792 under claim of title, and a continued, uninterrupted, notorious, possession by parties claiming under D, the party first taking the possession. The defendants entered upon the land only a few years before the action was commenced, not even under color of title, and they seek to set up an outstanding title in another; and for this purpose rely upon a deed executed in 1792 by S, the original patentee of the land, containing 10,000 acres, including the land claimed by the plaintiffs, and is a part of the tract of 340,000 acres, conveyed by S to his grantees, excepting in the conveyance 50,000 acres, which he had sold to D. HELD: That after the long possession by D and those claiming under him, although the language of the exception may not amount to a conveyance of the land to D, as against S if he or persons 941 claiming *under him were the parties, a conveyance to D would be presumed; and so it will be as against these defendants.

Carter & als. v. Robinett & als., 429

10. An office is terminated *proprio vigore*, by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined *ipso facto* by the occurrence of the cause. There must be a judgment of motion after judicial ascertainment of the fact, which may be by indictment or information, by writ of *quo warranto*, or by impeachment.

Bland and Giles County Judge case, 443

11. The writ of *quo warranto* is not abolished in Virginia, and the circuit courts have jurisdiction of the same.

Idem, 443

12. W having waived the filing of an information in the court below, cannot be heard to complain of any irregularity on this ground in the appellate court.

Idem, 443

13. A motion for a continuance, is one addressed to the sound discretion of the trying court, under all the circumstances of the case, and its action will not be reversed by the appellate court unless it appears plainly erroneous.

Idem, 443

14. A creditor having two remedies may pursue both at the same time; but he can have but one satisfaction.

Asberry's adm'r v. Asberry's adm'r, 463

15. See Seduction, Nos. 1, 5, 3, and Clem v. Holmes, 722

PRACTICE IN CHANCERY.

1. The answer of the defendant in which no reference is made to a commissioner's report, will not be regarded as an exception to said report; and where there are no errors on the face of the report, and no exceptions taken thereto in the court below, they cannot be taken for the first time in the appellate court.

Simmons v. Simmons' adm'r. 451

2. With the answer of a defendant a bond of the plaintiff's decedent is filed. The plaintiff filed no replication, but pleaded non est factum to the bond filed with the answer. On the evidence being heard, the court below decided that the bond was not the deed of the plaintiff. **HOLD:** While it was irregular and improper to have allowed a plea to have been filed to an answer, and the proper course was, for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit, putting in issue the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet, as the plea, which was sworn to, can be now treated as an affidavit, as the parties took issue on it, and testimony, and the appellant has not been prejudiced by the irregular proceedings and trial on said plea as such, the decree will not now be reversed for such irregularities, substantial justice having been done between the parties. *Idem.* 451

3. Without evidence of any preceding executory agreements between the parties, or any evidence of the time of the delivery of the deeds, except what may be inferred from their dates, P, a judgment debtor, by one deed (dated January 1, 1860, acknowledged February 1, 1860, and recorded April 13, 1860,) conveyed one tract of land to H, and by another deed (dated February 1, 1860, acknowledged February 1, 1860, and recorded February 24, 1860,) conveyed another tract to B. In proceedings to subject both tracts to the payments of judgments obtained against P, prior to either deed—**HOLD:** The tract to B was the last aliened, and 942 therefore, under *§ 10, ch. 182 of the Code of 1873, first liable to satisfy the judgments.

Harman & als. v. Oberdorfer & als. 497

4. Where several lots of land are sold on the same day, on the same terms, to several parties, all of whom are immediately put in possession under the same agreement as to the deeds conveying the lots, and the trust deeds to secure the purchase money—although the deeds conveying them are really delivered and recorded at different times—they will all be regarded as "alienations," within the meaning of the statute (ch. 182, § 10, Code 1873), as of the same day (day of sale); and in subjecting them to the payment of a judgment docketed against a vendor at the time of the sale, each lot must bear its proportion, according to their relative values on the day of sale, and subjected in accordance with the principles of *Horton v. Bond*, 28 Gratt., 815. *Idem.* 497

5. Parties having obtained decrees against their debtor M in a suit pending in the county court, and he having become bankrupt, may bring another suit in the circuit court against the administrator and heirs of his surety E, to subject the real estate of the surety to satisfy their debts.

Ewing's adm'r & als. v. Ferguson's adm'r & als. 548

6. Though the bill in such case only sets up their claims, and seeks payment of them, and does not purport to be a creditor's bill, it is to be so treated, and other creditors of E may come in by petition and be made parties plaintiffs in the cause, and there may be a decree for account of debts in the case. *Idem.* 548

7. The bill having been dismissed on demurrer, but leave given to file an amended bill, the amended bill is not a departure from the original bill, because some of the original plaintiffs do not unite in it. *Idem.* 548

8. The amended bill being filed in the name of some of the original parties and of the creditors who had come in by petition, and only setting out more fully the nature of their claims and the character of the bill as a creditor's bill, is not a departure from the original bill, but is a valid amended bill. *Idem.* 548

9. One of the debts set up by one of the petitioning creditors was evidenced by a negotiable note and to this debt the statute of limitations was pleaded. **HOLD:** The statute of limitations ceased to run against all debts of the debtor from the date of the decree for an account; and the note not having been barred at that date, the statute does not apply to it. *Idem.* 548

10. The heirs of E, being infants, though their guardian was a party and answered, they were entitled to be defended by a guardian ad litem, and although one was appointed for them, and there was a paper purporting to be an answer found among the papers of the cause, yet as it did not appear that it had been filed, it was error to decree the sale of the infant's land, without an answer filed by guardian ad litem. *Idem.* 548

11. The real estate of E had been purchased by him from M, the principal debtor in the claims set up against E's estate, and there were some grounds for supposing that at the time of the sale and conveyance to E, M had other unencumbered land which he afterwards sold. It was error to decree the sale of E's land to pay the debts of M, until a full enquiry was had whether there was not real estate held by M at the time of his sale to E which was primarily liable to pay these debts for which E was liable as M's surety. *Idem.* 548

12. By deed bearing date the 15th of October, 1863, Mrs. G, in consideration of \$10,000, for which S executes his bond 943 to G, conveys *a tract of land to S reserving in the deed a vendor's lien. G marries H, and H obtains from S a new

bond for the principal and interest, and in October, 1868, recovers a judgment against S for the amount. S, who owned a number of tracts of land, after the judgment, conveys the lands to different purchasers; and among them by deed dated 22d of May, 1877, S conveyed to R the land purchased of G; and R in this deed bound himself to pay the debt of S to G. By deed dated May 3, 1878, S conveyed all his lands including the land bought of G to L in trust to secure a number of his creditors stating their debts as about a certain sum. In August, 1878, H files his bill to subject the lands owned by S at the date of his judgment or afterwards acquired to satisfy his judgment. **HOLD:** The land conveyed by G to S, and by him conveyed to R is to be first sold to satisfy the judgment of H.

Shultz & als. v. Hansbrough & als., 567

13. The commissioner who was directed to take an account of the debts of S and their priorities, and of the lands of S and to whom and when aliened, after stating certain judgments, and debts secured by specific liens, reports that the debts secured by the deed to L were not presented before him, and he does not report them. **HOLD:** The report should be recommitted to the commissioner to take an account of said debts; and it was error to make a decree for the sale of the lands of S before this account was taken. *Idem*, 567

14. For the principles upon which a court of equity proceeds upon a bill filed for the sale of a debtor's lands, for the payment of his debts.

See the opinion of Burks, J.

Idem, 567

15. The answer of a defendant to specific interrogatories in a bill, are evidenced for him; and its statements must be taken as against the plaintiff as true unless overcome by the requisite proof. *Idem*, 567

16. See Railroad Companies, *passim*.

17. On a bill by a creditor, secured by a deed of trust, to subject real estate to the satisfaction of his debt, the party in possession claims to be a purchaser for value without any knowledge of the deed. The lien being enforced, the party in possession may be allowed for his permanent improvements upon the land, but he must account for the rents and profits as an offset to his claim.

Wood's ex'or & als. v. Krebbs, 685

18. The deed of trust provides for a sale for cash; but the court as supposed by consent, makes a decree for a sale on credit. The vendor of the purchaser in possession, objects to the decree on a credit, and asks that the land shall be sold for cash. **HOLD:** The court should correct the decree and direct a sale for cash. *Idem*, 685

19. Under the statute, Code of 1873, ch. 172, § 36, when there has been an interlocutory decree in a chancery cause, a deposition taken thereafter cannot be read as to any matter thereby adjudicated, unless it be as

the foundation for a motion or petition to rehear the cause.

Richardson v. Duple & als., 730

20. In such case if no interlocutory decree has been rendered, or even though one has been rendered, a deposition taken and returned before a final hearing, as to any matter not adjudicated, may be read. But the right is not an absolute right. The statute does not say the deposition shall be, but it may be read. *Idem*, 730

21. In this case the cause having been referred to a commissioner, and ample opportunity offered both parties to introduce their witnesses, and the commissioner had made his report and the cause was ready for a hearing, depositions afterwards taken by one of the parties as to a controverted matter in the report, was under the circumstances, properly disregarded by the court in deciding the cause.

Idem, 730

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings, and Murder.

PRESUMPTIONS.

See Ejectment, No. 5, and

Carter & als. v. Robinett & als., 429

PRINCIPAL AND AGENT.

1. A bill in equity will lie, by an administrator of a principal, against the general agent of his intestate for a discovery and an account of the transactions of the latter with his principal.

Simmons v. Simmons' adm'r, 451

2. What is not sufficient notice to a trustee or agent of an undocketed decree to affect his principal in a deed to secure a debt.

See Decrees, No. 3, and

Johnson's ex'or v. Nat. Exch. Bank, Richmond, 473

PRINCIPAL AND SURETY.

1. A principal for whom another, at his request, undertakes as surety, although such principal's name does not appear in the obligation given by the surety, is as much bound to indemnify such surety, for what he pays on the obligation, as if his name appeared on it as principal; and the surety in such case is entitled by subrogation to enforce for his exoneration or indemnity all the rights, remedies and securities of the creditor against the principal debtor. And this rule is broad enough to include every instance where one pays a debt for which another is primarily answerable, and that should in equity and good conscience have been discharged by him.

Harnsberger & als. v. Yancey & als., 57

2. A decree was rendered against Y, a principal debtor, and M, his surety, on one bond; T, a principal, and W, his surety, on another; and said T, principal, and H, his surety on another bond—all given for deferred payments for purchases of land, part

by Y and part by T. An appeal was taken by both principals and sureties from said decree, but the supersedeas bonds were only executed by T, one of the principals, and H, one of his sureties. The condition of the bond, as prescribed by the judge awarding the supersedeas, was to pay all "costs and damages according to law, and also any deficiency in the funds arising from the land sales decreed in meeting and discharging the sums decreed against the parties, respectively, in case the decree complained of be affirmed, or the appeal or supersedeas dismissed." The condition inserted in the bond by the clerk, was to "pay the judgment," in addition to that prescribed by the judge. On a suit on the appeal bond—**Held:**

1. The stipulations in the bond to "pay the judgment," and "also the deficiency" on the resale of the lands, should be regarded as alternative provisions, intended to accomplish but one and the same object, namely, the satisfaction of the decree and the payment of costs and damages according to law. *Idem*, 527

2. The proceeds of these bonds when collected are applicable to the satisfaction of the decree appealed from, "as reduced by the resales of the lands, apportioned amongst all of the parties against whom the decree was rendered, and H, a surety for T, a principal, now bankrupt, who joined in the appeal bond, is not only entitled to his proportion of the fund arising from the judgment on the appeal bond, to be credited on the decree against him as such surety, but he and his co-obligors in the bond, who have satisfied the penalty, are entitled to indemnity from Y, one of the principals, for the portion credited to him as derived from the said bond and are also entitled to contribution from W, a co-security on the original contract to T, for the amount paid by them on said appeal bond. *Idem*, 527

3. If there are two parties bound as principal and surety for a debt, and a third party afterwards, at the request of the principal, bind himself as surety for the debt, the two sureties, in the absence of any agreement to the contrary, become co-securities of the same principal, and this relation may be established by implication from circumstances, as well as by express agreement. But where there is a judgment against a principal and his surety, and a third party, at the instance of the principal, and for his sole benefit, and without the assent of the surety, enters as surety for the principal in an obligation, the effect of which is to suspend the execution of the judgment, and thus prejudice the rights of the first surety, the equity of the latter (first surety) is superior, and the second would not be entitled to contribution from the first: and, according to some authorities, the first would be entitled to indemnity from the second. This is not the case with Y and W in this case. *Idem*, 527

4. See Practice in Chancery, No. 11, and
Ewing's adm'r & als. v. Ferguson's adm'r & als., 548

5. A person appointed by a court of equity in a pending cause, a receiver to collect the purchase money of lands sold by him as commissioner under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner, is not a creditor in the sense of the statute, Code of 1873, ch. 143, §§ 4, 5, to whom a surety on the bond may give the notice to bring suit upon it.

Davis' adm'r for, &c., v. Sneed & al., 705

6. If the receiver was such a creditor, he could only have authority to sue after giving the security required of him in the decree appointing him receiver; and in the absence of clear and satisfactory proof that he had given the security required, the notice to him is not sufficient to release the surety. *Idem*, 705

PRIORITIES OF DEBTS.

Debt of a trustee for persons under disabilities, is a fiduciary debt entitled to rank as such in the administration of his estate. See Trusts and Trustees, No. 4, and

Brown & als. v. Lambert's adm'r & als., 256

PROBATE OF WILLS.

1. It is a settled rule of law in Virginia, that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue devisavit vel non within the time and in the mode prescribed by the statute.

Norvell & als. v. Lessueur & al., 222

946 *2. A case in which a will good as a will of personalty, but not good as a will of realty though admitted to probate generally—**Held:** Upon the action of the same court, between the same parties, on the same day, treating the probate as of only a will of personalty, and this acted on for forty years, that the order admitting the will to probate, will be considered as only a probate of a will of personalty. *Idem*, 222

PROCESS IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings, Nos. 1, 2, and
Poindexter's case, 766
Baccigalupo's case, 807

PROMISSORY NOTE.

See Negotiable Instruments.

QUO WARRANTO.

The writ of quo warranto is not abolished in Virginia, and the circuit court has jurisdiction in the case.

Bland and Giles County Judge case, 443

RAILROAD COMPANIES.

1. A court of equity having in charge the mortgaged property of a railroad company,

is authorized to do all acts that may be necessary—within its corporate power—to preserve the property and give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any acts, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts.

Gilbert v. Wash. City, Va. Midl.
and Gr. South. R. R. Co., 586

2. In such a case the court may authorize the receiver to take a lease of another railroad, where it is manifestly for the interest of the creditors and the company. And so on like conditions the court may authorize its receiver to contribute out of the accrued revenues in his hands, to the building of another railroad. Idem, 586

3. The road in the hands of the court, is the property of a company, constituted by the consolidation of three railroad companies, all of which had before the consolidation issued their bonds and executed mortgages on their property to secure them. The court may direct the property of the consolidated company to be sold as a whole; and afterwards fix the amount to be paid to the several holders of the bonds and mortgages, on the respective roads. Idem, 586

4. One of the railroad companies not having been able to pay the interest on their bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of said interest. HELD:

1. This was not a novation of the debt for the interest; and these bonds are secured by the mortgage. Idem, 586

2. The coupons for interest bore interest from the time they were payable. Idem, 586

5. In the case of a claim secured by a mortgage although the remedy by an action at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be effected by any lapse
947 of time short *of the period sufficient to raise the presumption of payment.

Smith's ex'x v. Same, 617

6. A trust deed by a railroad company provides that upon a sale of the trust property by the trustees out of the proceeds of sale, after satisfying the costs and expenses of sale and of this trust, the trustee shall pay to the holders of the bonds secured thereby the amount so held by them. If the trustee has performed services in executing the bonds, &c., for which he is entitled to compensation, he is entitled to be paid for these services in preference to the bondholders secured by the deed. Idem, 617

7. Where a railroad has been taken pos-

session of by a court of equity, and a receiver to manage the road has been appointed, if at the time the receiver was appointed the railroad company was indebted for services rendered or materials furnished them, these creditors are entitled to be paid out of the net revenues of the road in preference to the mortgage bondholders; and if said net revenues have been applied to pay interest to these bondholders, or to the repair improvement, or the extending of the road, upon a sale of the road, the proceeds of the sale of the road to the extent of the said net revenues are to be applied to the payment of these creditors.

Williamson's adm'r v. Same, 624
Abbott Iron Co. v. Same, 624

8. For the principles which will guide a court of equity which has taken possession of a railroad and appointed a receiver, in adjusting and enforcing the rights of all the creditors and parties interested, of and in the railroad company.

See the opinion of Staples, J., and the cases of Fosdick v. Schall and Hale v. Frost, 9 Otto 235, 389. Idem, 624

9. At the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff; and there are funds derived from income and balances due from employees, in the hands of or due to the company. HELD: The execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts, in preference to the trust creditors.

Gilbert v. Same, 645

10 If these funds or balances have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment. Idem, 645

SEDUCTION.

1. In an action by a father for the seduction of his daughter, a count which avers she is under twenty-one years of age, and unmarried, and was so at the time of the seduction, and the plaintiff then was and still is entitled to her attentions and services. HELD: This is a sufficient averment of the relation of master and servant, between the father and daughter. Clem v. Holmes, 722

2. In an action by a father for the seduction of his daughter, evidence offered by the father of the pecuniary condition of the defendant is competent. Idem, 722

3. The statute, Code of 1873, ch. 145, § 1, which in an action for seduction dispenses with any allegation or proof of the loss of service of the female, by reason of the defendant's wrongful act, does not alter the rule as to the commencement of an action on the case by the father; and when the daughter lived away from her father's house at the time of the seduction, but returned and was confined there and nursed, the
948 statute of limitation will *only being to run from that time.

Idem, 722

SEPARATE ESTATES.

1. See Settlements, Nos. 1, 2, and
Walden's assignee & als. *v.* Walden
& als., 88
Ropp *v.* Minor & als., 97
2. A separate estate may be made to a feme sole, which upon marriage will be good against the marital rights of the husband, although at the time it is made no particular marriage is contemplated.
Haymond, trustee, *v.* Jones & wife,
&c., 316
3. No particular form of words is necessary to create a separate estate; any words, showing clearly an intention to do so, will suffice.
Idem, 317
4. A testator gave his property to his wife for life, and at her death to be divided equally among his five children, two of whom were daughters. He then directs whatever portion came to the daughters to be "put into the hands of trustees of their own choosing, requiring them to give ample security for the faithful performance of the trust committed to them," and afterwards directs: "Should any of my children die without an heir of their body, it is my desire that whatever may be then left, of what they have received from my estate, revert to the same, with such restrictions in regard to my daughters that may be entitled to a portion, as herein-before provided." One of the daughters married, and during the pendency of a friendly suit for partition of the testator's estate, but before any portion was actually assigned to her, united with her husband, who was insolvent, in a deed conveying whatever interest she may be entitled to under the will of her father, to a trustee, to secure certain debts of her husband named in the deed. HELD:

1. The executor of the testator would have no power under the will to pay the daughter's legacy to any one except a trustee chosen and qualified as the will directed, and if the daughter had the right to convey it at all, she could only do so with the concurrence of her trustee, and therefore the deed of trust is a nullity.
Christian, J., dissenting. Idem, 317

2. Quære: Would she have the power to convey it, even with the concurrence of her trustee, duly chosen and qualified?
Idem, 317

5. The property settled on the wife belonged to her before her marriage, and consisted of realty and personality—the personality being her interest in a former husband's stock of goods, debts due, &c., worth ten thousand dollars. The provisions of the deed conferring on the wife the amplest power over the property, is followed by a clause which directs that the trustee "shall sell, convey, transfer and deliver all or any portion of the property, estate or effects conveyed, and the rents, issues and profits thereof, to such person or persons as the wife may direct by a writing, signed by her and attested by two witnesses. HELD:

1. The wife must be regarded in equity as the absolute owner, with all the powers of a feme sole over them, of the personal property and rents and profits of the realty conveyed by the deed, with power to dispose of the corpus of the realty by her sole act in the mode prescribed by the deed, or, if that is not exclusive, by the joint deed of herself and her husband.

Frank & Adler *v.* Lillienfeld &
als., 377
949

*2. The separate estate of the wife is liable to the payment of the debt, but the engagement of the wife being a general one, and not a specific lien (which must be created on the realty in the mode prescribed for its absolute sale), the personal property and the rents and profits of the realty only are liable to be subjected to its payments.

Idem, 377

6. See Husband and Wife, No. 2, and
Stroud *v.* Connelly & als., 217

SETTLEMENTS.

1. There being a contest among the heirs and distributees of B over a paper offered for probate as his will, they enter into an agreement for the adjustment of their respective interests in his estate, and by deed bearing date the 26th of September, 1866, they convey the whole property, real and personal, to T in trust, setting out the interest which each was to take; and among them was W and his wife A, who was a daughter of B, W and A taking a certain part of the real estate and all the personality. By deed dated the 27th of September, 1866, reciting what had been agreed upon and the recitals in the previous deed, and a promise by W to B that he would settle on A her share of the estate to the separate use of A, B and A convey the property to T for the separate use of A. HELD: The deeds must be construed together; and A's equity is a valuable consideration for the settlement; and there being no fraud in the transaction, the settlement is valid against creditors of W, whose debts were contracted before the death of B.

Walden's assignee & als. *v.* Walden
& als., 88

2. Under the will of R, and a deed from M, T, trustee for L, wife of M, holds a farm called Greenway, in trust "as soon as convenient and practicable after having received the said legacy or proceeds of said devise, to loan out the same at interest, on good and sufficient security, by bond and mortgage on unencumbered real estate, and to apply the interest or income, which shall or may arise, accrue or be derived therefrom, to the payment and discharge of all the expenses and charges necessary and required for the proper maintenance, support, and comfort of my said daughter L; or the said trustee may, if she shall in her discretion deem it proper, pay over the income or interest aforesaid to my said daughter L, semi-annually, in money, on her sole and separate receipt, independent of any interference, hindrance or

control of her husband; and the said interest and income shall not be liable or taken for her husband's debts or contracts, nor be applied to the payment thereof or any part thereof." And the executors of R have the power of sale. L and M give their bond to S for \$2,000, and a deed of trust to secure it to Janney. Upon bill by S to enforce the trust—HxLD:

1. L had no power to dispose of, charge or encumber the corpus of the estate derived under the will of her father, and under the deed for her benefit, nor to anticipate the profits, income or interest which might arise or be derived from said estate, so far as they might be required for her comfortable support; and the lien of the deed of trust to Janney, trustee, extends, and can be enforced, only on any excess of profits beyond that necessary for her support, derived from "Greenway," if 950 any. Nor can "the subsequent discovery of L, per se, give any greater force or effect to her prior engagements than existed during the coverture.

Ropp v. Minor & als., 97

2. Under the will, the whole estate of the testator was equitably converted into money; but whether "Greenway" is treated as equitably converted into money, or as realty, the estate of L and the rights of the plaintiff to enforce his lien thereon remain the same.

Idem, 97

3. If by a fair construction of the whole instrument creating a separate estate in a feme covert, the *jus disponendi*, and incidental power to encumber and charge the estate, to an extent involving alienation, be inconsistent with the plan and scheme of settlement, and the exercise of these powers would defeat the plain intent pervading the instrument, they must be considered as much forbidden as if expressly denied. Bank of Greensboro' v. Chambers, 30 Gratt. 202. Idem, 97

3. M, a widow, having property settled upon her by her former husband, purchases land, and borrows from R, money to pay for it in part. Being about to marry again she enters into a marriage contract with her intended husband T, by which she conveys all her property real and personal to a trustee, in trust for the separate use of herself and T, and the children of T by a former marriage; the money she borrowed to pay for the land still being due and unpaid. HxLD: The land is liable to pay the debt due to R as against the children.

Triplett & als. v. Romine's adm'r & als., 651

4. R files his bill against T and his wife M, to subject the land to the payment of his debt. They answer, an account is ordered and taken fixing the amount of R's debt, to some items of which T excepts. After the death of M and eight years after the suit was brought, the children of T file their petition in the cause setting out their claim under the deed, and asking to be made parties in

the cause. R's administrator answers the petition, and the court decrees against them. HxLD: They should have been made parties; but as their case was fully stated and investigated upon their petition and the answer of R's administrator, and after the delay they would not be allowed to disturb the report of the commissioner, the appellate court will not reverse the decree; they may be made parties, if they desire it, when the cause goes back. Idem, 651

SHERIFFS.

1. A judgment is obtained in 1870 on a contract entered into prior to the present Constitution of Virginia, and in the same year an execution issued thereon, placed in the hands of the deputy sheriff and levied on property of the judgment debtor, who gives a forthcoming bond; and has the property forthcoming on the day and place of sale. The debtor then claims the property as exempt under the homestead provision of the Constitution and statute of Virginia; and the deputy sheriff releases the property to him, without requiring an indemnifying bond of the creditor, or even notifying him of the claim of homestead set up by the debtor. In a suit by the creditor against the sheriff and his sureties to recover 951 the value of the property lost by the conduct of the deputy—HxLD:

1. The sheriff and his sureties are liable. Sage & als. v. Dickinson & als., 361

2. The case distinguished from Huffman v. Leffel's adm'r, 32 Gratt. 41. Idem, 361

3. When an officer surrenders property he has seized under execution, he does it at his peril, and the burden of establishing that it is not liable to levy is on him.

Idem, 361

4. The plaintiff in the judgment, after the sheriff's return on the execution filed his bill in equity to subject the land of his debtor to satisfy his debt, and having in 1875 exhausted this fund, he then in 1876 instituted his action against the sheriff and his sureties to recover the balance. HxLD:

1. The delay in bringing the action is not a waiver of his action against the sheriff. Idem, 361

2. The liability of the sheriff and his sureties being fixed, it cannot be affected by any delay short of the statutory period of limitation. Idem, 361

STATUTES.

1. The Constitution, Art. 6, § 2, as to the jurisdiction of the court of appeals, construed in

Harman v. City of Lynchburg, 37

2. The act of March 28, 1879, in relation to the State debt: HxLD: Constitutional.

Williamson v. Massey, auditor, 237

3. The act, Code of 1873, ch. 126, § 25, in relation to the priority of debts, in the case of a debt due by a trustee, construed in

Brown & als. v. Lambert's adm'r & als., 236

4. The act, Code of 1873, ch. 114, § 5, providing what deeds shall be void as to creditors and purchasers, construed in

Harman & als. v. Oberdorfer & als., 497

5. The act, Code of 1873, ch. 128, § 9, in relation to commissions of fiduciaries, is not retrospective in its operation.

Crigler's committee v. Alexander's ex'or, 674

6. The act, Code of 1873, ch. 118, § 24, in relation to curators, construed in

Helaley & als. v. Craig's adm'r & als., 716

7. The act, Code of 1873, ch. 145, § 1, in relation to seduction, construed in

Clem v. Holmes, 722

8. The act, Code of 1873, ch. 172, § 26, in relation to depositions taken after an interlocutory decree, construed in

Richardson v. Duble & als., 730

TAXES AND TAXATION.

1. The act of March 28, 1879, in relation to the settlement of the State debt, which provides that all obligations created under this act shall be forever exempt from all taxation, direct or indirect, by the State, is not in violation of Art. 10, § 1, of the Constitution of Virginia.

Williamson v. Massey, auditor, 237

2. The overdue coupons upon bonds issued under said act of March 28, 1879, are receivable for all taxes levied by the State, including the capitation tax; and the auditor is bound to receive them, when offered in payment of taxes returned delinquent to his office.

Idem, 237

3. The act of March 9, 1880, entitled "An act to provide for the election of one commissioner of the revenue for the county 952 of Giles," is only prospective in its operation, and does not affect the authority of the commissioner of the revenue district to which that act relates, to act as commissioner of the revenue for that district during the time for which he was elected.

Peters v. The Auditor, 368

4. If the auditor of public accounts declines to deliver to the commissioner copies of the land and property books for his district, this court will compel him by mandamus.

Idem, 368

5. The Singer manufacturing company, a foreign corporation, has a place of business in Richmond, where it sells its machines, made out of the State, and has paid a tax to the State of \$322. The company is a resident merchant in the sense of the revenue laws of Virginia, and may appoint an agent to conduct its business. But this does not authorize the agent to take its machines to another county and there sell and deliver them to the purchasers, without paying in that county the tax prescribed by the statute.

Webber's case, 898

6. Whilst the statute, section 35 of the rev-

enue law of 1877, allows a resident merchant or manufacturer, who has paid a tax on his business of \$100, to sell his goods by sample, card, &c., in any other county, without paying an additional tax, he is not authorized to take his goods or wares to another county and there sell them, without paying the tax prescribed by the said revenue laws.

Idem, 898

7. The fact that the Singer manufacturing company is making its machines under a patent of which it is the assignee, does not entitle the company to bring her machines into the State, and sell them here without complying with the requirements of the State revenue laws.

Idem, 898

8. There is nothing in these provisions of the State revenue laws in conflict with the Constitution of the United States.

Idem, 898

TRESPASSES.

1. In an action of trespass on the case, the declaration charged the defendant with an assault in various forms, one of which was, by a wounding from a pistol shot, so as to cause the amputation of the leg of the plaintiff; and also set out an ordinance of the city in which the wound was inflicted, prohibiting the discharge of firearms therein; also alleging the continued sickness, disorder and suffering in consequence of said wound; the expense, medical attendance and other costs, consequent on said wound, which, plaintiff claimed, amounted to a large sum, and for which he claimed damages amounting to \$10,000. On demurrer—HELD: The declaration alleges a case of trespass at common law, and under our statute (C. V., 1873, ch. 145, § 6) trespass on the case will lie, wherever trespass will, and is sufficient.

Daingerfield v. Thompson, 136

2. Whilst the mere presence of a person at the commission of a trespass will not make him liable for its consequences, yet every one present encouraging or inciting a trespass by words, gestures, looks or signs, or who, in any way, or by any means, countenances, or approves the same, is, in law, assumed to be an aider and abettor, and is liable as a principal to the extent of the injury done. But the burden is on the plaintiff to show that the party charged was present, aiding, encouraging, or inciting the trespass.

Idem, 136

3. T was a keeper of a restaurant in Alexandria city, which has an ordinance prohibiting the discharging of firearms in its streets. He had shut his front door for the night, but his light was burning, when D, H, and S came there and demanded admittance about midnight. S went around 953 *at a side door, went in, and told T that D wanted to come in. D and H were at the front door. D said to H, "fire a salute," or something of the sort. H fired, and the ball went through the door into the leg of T, wounding him so severely as to cause amputation of the leg, and seriously to impair his health. In a suit brought by T against D and H, which was, at the instance

of D, tried separately against him first, and a verdict rendered against him for \$8,000 damages and the costs, on a motion to set aside the verdict as being contrary to the law and evidence, and because the damages were excessive, it was refused by the circuit court, and on a writ of error affirmed by this court. *Idem*, 136

4. Insisting on being admitted into the house of another at a late hour of the night after it is closed, and after being refused by the owner, is a trespass. *Idem*, 136

5. The wilful firing of a pistol in the streets of a city, whether done maliciously or not, is of itself an unlawful act, and the consequences must be visited on those who commit it, or instigate it. *Idem*, 136

6. In estimating the damages, the jury should take into consideration "the bodily injury sustained by the plaintiff, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent, the expenses incidental to attempts to effect a cure, or to lessen the amount of injury, and the pecuniary loss sustained by the plaintiff through inability to attend to his business." *Idem*, 136

TRUSTS AND TRUSTEES.

1. See Powers, No. 1, and
Morris' ex'or v. Morris & al., 51

2. B as maker and R and C as endorsers make two notes each for \$1,000, which are discounted at the E & A bank, and the proceeds go to the credit of B. The notes are discounted much on the faith of a deed of trust by which C and wife conveyed to A a tract of land in trust to secure to the bank the payment of the notes, with the following covenant—And it is expressly covenanted and agreed, that upon the default of payment of either of said notes, or any part thereof, the said A shall upon the request of the president or other authorized officer of the said E & A bank, after giving thirty days' notice, &c., proceed to sell at public auction the property hereby conveyed for cash, or so much as shall be necessary to defray the expenses, &c., and pay off and discharge any part of the sum of \$2,000 hereby secured to be paid them remaining unpaid; and for the remainder, &c. The notes were not paid at maturity; and were not protested, nor was there any notice to the endorsers. *Held*:

1. The deed of trust with the covenant therein, bound C to the extent of the trust subject, though there was no protest or notice to the endorsers.

Cardwell v. Allan, trustee, & al., 160

2. The bank was not bound to give notice to R, so as to hold him liable, in order to hold C liable. *Idem*, 160

3. In this case C repeatedly applied to officers and directors of the bank for a postponement of the sale of the land under the deed of trust, promising to pay the debt, and never objected that the note had not been protested or that notice had not been given

him. *Held*: He must be presumed to have known when he applied for delay of the sale, and made the promises to pay, that the notes had not been protested.

Idem, 160

954 *4. On the 15th of January, 1828, E, by deed, recorded the same day, in consideration of "love and affection," conveyed to B, trustee, all of his property, including therein several slaves, in trust, for the use of himself and wife for their lives, and at the death of both of them, for their surviving children; and in case of the death of any of the children before E and his wife, for the children of the deceased children, in such portions as his children would have taken had they survived him and his wife. B, the trustee, died in 1832, and the property was without any regularly appointed trustee until 1862, when E, the grantor, instituted proceedings and had himself appointed trustee by the court. E died in 1872 and his wife in 1874. No child survived both, and the appellants—the grandchildren—were entitled to the trust estate. From the date of the deed to the death of E, the latter continued in possession of the trust property, using it as his own; and between 1832 and 1862, sold several of the slaves, received the proceeds, appropriated them to his own use, and never accounted for them to any one. In a creditors' suit brought for a settlement of E's estate, the grandchildren claimed the proceeds of the slaves sold by E, and that the debt was a fiduciary one, and as such entitled to priority. *Held*:

1. E was a trustee de facto at the time of the sale, and although the property in the slaves had been destroyed by their emancipation before the rights of the claimants vested; yet, as E was a trustee at the time, and the sale was a breach of trust, he, or his estate, are liable to the cestuis que trust for the proceeds. Where a trustee acts within the line of his duty, he will be responsible for no unavoidable loss; but where he commits a breach of trust, he must account for the property in all events.

Brown & al. v. Lambert's adm'r & al., 256

2. Where one assumes to act in relation to trust property without just authority, however bona fide may be his conduct, he will be held responsible for the capital and income, to the same extent as if he had been de jure trustee. *Idem*, 256

3. The debt is entitled to priority as a fiduciary one, in the distribution of the assets of the decedent. *Idem*, 256

4. The term "trustee," as used in the Code, ch. 126, § 25, must be understood in the restricted sense of an express trustee, as distinguished from trustee in a general sense, by construction or implication of law; and E, by qualifying as trustee in 1862, became such express trustee, and liable as such for the amount which he owed whilst acting as trustee de facto, and should have paid to himself.

Idem, 256

5. The claim is not barred by the statute of limitations. *Idem*, 256

5. A trust deed by a railroad company provides that upon the sale of the trust property by the trustee out of the proceeds of sale after satisfying the costs and expenses of sale and of this trust, the trustee shall pay to the holders of the bonds secured thereby the amount so held by them. If the trustee has performed services in executing the bonds, &c., for which he is entitled to compensation, he is entitled to be paid for \$55 these services in preference *to the bondholders secured by the deed.

Smith's ex'x v. Wash. City, Va.
Midl. & Gr. South. R. R.
Co.,

617

6. In the case of a claim secured by a mortgage although the remedy by an action at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment.

Idem, 617

7. A decree for sale of trust property must conform in its terms of sale to the deed, unless all the parties in interest consent to a change of the terms.

Wood's ex'or & als. v. Krebs,

685

VENDOR AND PURCHASER.

1. In 1852 C sold to M a tract of land for \$3,564, for which she took his bond, and reserved a lien on the face of the deed given M, which was duly recorded. Between the sale in 1852 and December, 1855, there were other transactions between C and M, by which the latter became indebted to the former (inclusive of the purchase money for the land) \$10,630.50 and for which he executed his bond, with two personal sureties, and the bond for \$3,564 was surrendered. M died in 1856, leaving his whole property to his wife L, who was a sister of C. L, the widow, soon married W, and in 1863 W and wife conveyed the land purchased of C, with other lands, to H, made him a deed and put him in possession. On the 19th of October, 1866, the balance due on the \$10,630.50 bond was \$4,123, for which W, who was then the representative, and had married the widow of M, gave his bond, got possession of the \$10,630.50 bond, and confessed a judgment for the \$4,123 in favor of C, which he, W, alleges was in lieu of the bond which he got possession of. W soon went into bankruptcy, and but a small portion of the judgment was paid. C denies the statement of W about his possession of the bond, and there is nothing in the record certainly to show affirmatively that she ever intended to release the lien reserved in the deed to M. H denies all knowledge of the reserved lien at the time of the purchase, and until a long time thereafter. There was nothing done by C to induce H to believe that she had waived her lien, or to influence his conduct in any way. On a bill filed by C against H and W and wife, in 1871, to enforce the lien for the purchase money then

due on the land sold by C to M and afterwards by W and wife to H. *HOLD*:

1. The question of whether a lien reserved is surrendered is one of intention, on the part of the vendor, under the circumstances of each case; and there being nothing in this case to show such intention, the lien is not surrendered, and must be recognized as still existing. The lien was a security not for the bond but for the debt, and therefore the cancellation or surrender of the bond cannot extinguish the debt and the lien given for its payment, without a manifest intention to do so by the vendor, and the burden is on the purchaser to show such intention.

Coles v. Withers & als.,

186

2. A mere change of securities of equal dignity is not a novation of a debt, unless plainly so intended by the parties.

Idem, 186

3. As to the payments made on the bond for \$10,630.50, H insisted that they should be first applied to extinguish the purchase money bond of \$3,564, and that was therefore extinguished. *HOLD*: H not being one of the original parties to the bond, has no right to insist on how the payments shall be appropriated, that being a right existing only between those parties; and whilst as a rule, where there are two debts, one secured and the other not, the courts will apply the payments to the unsecured debt, yet, as no general rule, applicable to every case, can be adopted without the greatest hardship; if neither party has made the application, the court will exercise a sound discretion, and make the application according to what it deems right and proper in each case; and in this case, the payments should be applied pro rata to all of the debts due to C.

Idem, 186

4. Although an action at law on a note given for the purchase money of land may be barred by the statute of limitations, the right of the vendor to resort to the land for payment is not affected by any lapse of time short of that sufficient to raise a presumption of payment.

Hanna v. Wilson, 3 Gratt. 232.

Idem, 186

5. Quære: M being dead, was C a competent witness to any fact with reference to the debt of \$3,564, or the lien reserved to secure it? *Idem*, 186

2. See Liens, No. 1, and

Johnson's ex'or v. Nat. Exchange
Bank, Richmond,

473

3. The provision of § 5, ch. 114 of the Code of 1873, that every deed, &c., "shall be void as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record," &c., does not apply to purchasers of different tracts of land from the same vendor, but refers only to "subsequent purchasers" of the same subject, as that em-

braced in the instrument declared to be void.

Harman & als. v. Oberdorfer & als., 497

WILLS.

1. It is a settled rule of law in Virginia, that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue devisavit vel non within the time and in the mode prescribed by the statute.

Norvell & als. v. Leasueur & als., 222

2. A case in which a will good as a will of personalty, but not good as a will of realty though admitted to probate, generally: **HOLD:** Upon the action of the same court, between the same parties, on the same day, treating the probate as of only a will of personalty, and this acted on for forty years, that the order admitting the will to probate, will be considered as only a probate of a will of personalty. *Idem*, 222

3. No particular words are necessary to be used in a codicil to effect a republication of the will to which it is annexed. It is only necessary that it shall appear that the testator referred to and considered the paper as his will at the time he executed the codicil; and where this so appears, even though the codicil refers to personal property only, it may operate as a republication, as to realty, even so as to pass after acquired lands.

Carr v. Porter & als., 278

4. Words used in a codicil which are sufficient to constitute a republication of the will. *Idem*, 278

957 5. *The effect of a republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time.

Idem, 278

6. A testator made his will in 1819, whereby he devised his land to his son A forever, provided he should leave issue; if not, then it should be divided amongst his other children, or their issue. In consequence of the birth of another child, after the date of his will, he made a codicil thereto in October, 1820, which

amounted to a republication of his will; died after the 1st of January, 1820, and there was nothing on the face of the will or codicil to show that the limitation over to the other children and their heirs should not take effect if A should die without issue. A died without issue living at his death or born within ten months thereafter—having first by deed, in which his wife united, conveyed said land to a grantee. In an action of ejectment brought by the other children and heirs of the testator to recover said land. **HOLD:** The will is governed by the laws in force at the time of the execution of the codicil, and the plaintiffs (the other children and heirs) are therefore entitled to recover the land from the grantee of A, and the fact that the wife of A united in the deed to the grantee does not convey any dower interest that she might be supposed to have therein to him.

Idem, 278

WITNESSES.

1. In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness. The defendant so introduced becomes a competent witness in the cause; but this does not render the plaintiff a competent witness.

Terry v. Ragdale, 342

2. A witness who was not a party to the contract or transaction, which is the subject of investigation, is not disqualified on account of interest only; although one of the original parties to such contract or transaction be dead, insane, or incompetent to testify by reason of infamy, or any other legal cause, and for that reason the other party is rendered incompetent to testify.

Simmons v. Simmons' adm'r, 451

3. Objection to the competency of a witness cannot be taken for the first time in the appellate court. *Idem*, 451

4. When a wife is a competent witness in a case in which her husband is a nominal party.

See Husband and Wife, No. 6, and Frank & Adler v. Lillienfeld & als., 377

